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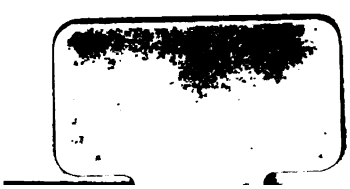

CASES

DECIDED IN

THE COURT OF SESSION.

1828-1829.

CASES

DECIDED IN

THE COURT OF SESSION,

FROM

NOV. 13. 1828. TO JULY 11. 1829.

REPORTED BY

PATRICK SHAW AND ALEXANDER DUNLOP,
ESQUIRES, ADVOCATES.

VOL. VII.

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1829.

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JUDGES

OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

FIRST DIVISION.

Lord President HOPE.
Lord CRAIGIE.
Lord BALGRAY.
Lord GILLIES.

PERMANENT LORDS ORDINARY.

Lord MEADOWBANK.
Lord ELDIN was succeeded by Lord NEWTON.
Lord COREHOUSE.

SECOND DIVISION.

Lord Justice-Clerk BOYLE.
Lord GLENLEE.
Lord PITMILLY.
Lord ALLOWAY was succeeded by Lord CRINGLETIE.

PERMANENT LORDS ORDINARY.

Lord CRINGLETIE was succeeded by Lord FULLERT
Lord MACKENZIE.
Lord MEDWYN.

LORD ORDINARY ON THE BILLS.

Lord NEWTON was succeeded by Lord FULLERTO and thereafter by Lord MONCREIFF.

Sir JAMES W. MONCREIFF, Baronet, Dean of Facul promoted to the Bench, was succeeded by FRAN JEFFREY, Esq.
Sir WILLIAM RAE, Baronet, Lord Advocate.
JOHN HOPE, Esquire, Solicitor-General.

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Allan, R.	Swan, H. and Others,
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Allison or Miller, M.	Allison, W.
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Amory's Trustee,	Grindlay, J.
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Lawrie, J.	Cormack, D.	109	221
Lead, J.	Brisbane's Trustees,	40	65
Lead, J. and J.		41	69
Leckie, W. and Others,	M'Kenzie's Trustees,	402	774
Leith Bank,	Scot, A.	24	40
Little, G.	Elliot, R.	426	800
Little, G. and Others,	Murray, A.	152	316
	Cheyne and Mackersy, (for Fife Bank,)	56	110

Defenders.	*Pursuers.*
Little, J.	Carruthers, F. and Others,
Littledale, I. and T.	M'Neill, J.
Livingston, W.	Dunn, A. and J.
Louden or Liddell, Margaret	Boaz, J. (Liddell's Trustee,)
Low, J.	Thomson, W.
Lumsden,	Stewart,
Lyon, J.	Monro, C. and Gunn, Rev. A.
Macandrew, J.	M'Gregor, D. and Fraser, D.
	M'Intosh, L.
M'Andrew, W.	Pollock and Dickson,
M'Alister, A. and Trustees,	Nicholson, J.
M'Cree, Mrs. Jean, and Others,	Lothian, D.
Macdonald, D.	Mackintosh, J.
M'Donald, Rev. J. and Others,	Robertson, A.
Macdonald, Lord	Macdonald, Hon. A. and Others
Macdonald's Trustees,	Campbell or Macdonald, Mrs. I
M'Douall, A.	Matheson, K.
M'Gachen, A.	Fergusson, Mrs.
M'Gauchie, M.	Barbour, J.
M'Ghie, J.	Hamilton, J.
M'Gregor, R. and Co.	Stuarts and Fletcher,
M'Ilwham, T. and Others,	Dick, A. and Others,
M'Inturner, C.	Earl of Dunmore,
M'Intyre, W.	Harvie, J. and Curator,
Mackechnie's Trustees,	Ferguson's Trustee,
M'Kenzie, A.	Finlayson or Muir, Mrs. E.
Mackenzie, M.	Macdonell, J.
	Ashburton, Lady, and Sutherland, G.
Mackenzie, Mrs. H. & Mackenzie, J. H.	Glassford, J.
Mackenzie's Trustees & Others,	Mackenzie, A.
Mackintosh, D.	Smith, A. (Stirling Bank Trustee,)
M'Kissock, H.	Wallace, W.
M'Lachlan, A. and Others, (M'Lachlan's Trustees,)	Thomson, Miss Margaret,
M'Lachlan's Trustees,	Thomson Miss Margaret,
M'Laren, D.	Irvine, G. and Shepherd, Mrs. M
M'Leod, D.	Rose, H.
M'Leod, J. N.	M'Leod, Captain
M'Nair, R. and Brunton, R.	Mein, A.
M'Neill, M.	Galbraith, D. G.
	Jollie, Mrs. and Husband,
Macqueen, Marjory, and Tutor ad Litem,	Mackintosh, C.
M'Rae, D.	Pringle, A.
Magistrates of Dingwall and Others,	Mackenzie, Mrs. H. and Munro, J. H.
	Mackenzie, Hon. Mrs. & Others,
Magistrates of Dunfermline and Others,	Buchanan, J. and Paterson W.
Magistrates of Edinburgh,	Commissioners of the Harbour of Leith,

Defenders.	*Pursuers.*	No.	Page.
Magistrates of Edinburgh and Others,	Trinity-House of Leith and Others,	187	374
Magistrates of Montrose,	Paterson, Rev. Dr. J.	289	573
Magistrates of Paisley,	Chalmers, W. and Others,	370	718
Malcolm, Sir M. & Carstairs, R.	Magistrates of Earlsferry,	384	755
Malcolm, Miss	Taylor, J.	266	547
Mar, J. F. M. Erskine, Earl of	Erskine, Hon. H. D. and Others,	457	844
Masson,	Masson,	397	771
Mather, W.	Clark, A.	444	825
Mather, W. and Others,	Pollock, J.	343	675
Matheson, W.	Ward, J. R. and Others, (Portable Gas Co.)	206	409
Maule, W.	Maule, Hon. W.	324	639
Maule, Hon. W. R.	Maule, W.	260	527
Maxwell, J. H. and Others,	Bell, J.	93	198
Meffan, W. and Others,	Sands, J. S.	132	290
Megget, W.	Middleton, M. and G.	45	76
Mein, A. (Wilson's Trustee,)	Mitchell, J. and J.	456	841
Menzies, R. & Son, and Wilson, J.	Pollock, J.	285	568
Merry, J.	Cowie, A. and Others,	17	23
Miller and Kerr,	Scott and Gifford,	33	56
Miller, H.	Miller, W.	306	617
Miller, J.	Gammell's Trustees,	238	461
Minto, Earl of	Eliott, Sir W. F.	459	845
Mitchell, J.	Robinson, E.	451	835
Mitchell's Trustee,	Smith, G.	398	771
Monteith or M'Target, Mrs. E.	M'Target, W.	292	591
More, W. and Others,	Miller, P. and Others,	388	762
Morison's Trustee,	Inglis, J. and Co.	244	469
Morrison or Lamont, Mrs. M. and Others,	Herries, R. and Others,	355	695
Morrison, M.	Orr, A.	218	434
Morrison's Trustees,	Nisbet's Trustees,	147	307
Morton, J.	Learmonth, W. C.	126	276
		252	492
Mowbray, J.	Cook, J.	407	778
Mudie, J.	Ferrier, C. (Lyell's Trustee,)	170	349
Muir's Creditors,	Muir,	471	886
Munro, Rev. T. and Others,	Shepperd, A. (Fraser's Trustee,)	346	680
Murdoch, T. and Others, Buchanan's Trustees,)	Smith, A. (Stirling Bank Trustee,)	341	670
		406	777
Murray, C.	M'Donald, Captain J.	146	306
Murray, Hon. C. A.	Campbell, A.	474	890
Murray, P.	Lawson, J. and F.	193	380
Murray, W.	M'Nair, J.	232	451
Napier, J. and Others,	Scott, Mrs.	166	338
National Bank,	Calder and Sons,	454	840
Neilson, R. and A.	Dougal, J.	148	312
Nicoll, Dr. F.	Strachan, A.	13	20
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Nisbet, A. and Others, (Carwin's Trustees,)	Morrison, Mrs.	432	810
Niven, Mrs. and Others,	Robertson, Miss, and Others,	216	421

Defenders.	*Pursuers.*
Officer, W.	Baird, J.
Ogilvy's Trustees,	Bank of Scotland & Hamilton, J.
Overend, Gurney, and Co.	Hunter, W.
Paisley, Magistrates of	Chalmers, W. and Others,
Pattie, R.	Wilson, R.
Pattison's Trustee,	Paterson, R.
Paul, H.	Hamilton, Agnes
Paul, W. (Morison's Trustee,)	Inglis, J. and Co.
Pedie, J.	Finlayson, J.
Perth Bank,	Fisher, J. and Hepburn, H.
Pettigrew, M.	Ramsay, W.
Phillips or Hogg, Mrs. and Others,	Carruthers, J. and Others,
Pollock, J.	Baillie, Mrs. and Rogers, J.
Pott and M'Millan,	Anderson, Child, and Child,
Potter, J. and Reid, T.	Roberts, J.
Prentice, T. and J.	Weir or Hart, Agnes
Preston and Rutherford,	Ramsay, W.
Principal and Professors of King James's College, Edinburgh,	Magistrates of Edinburgh,
Purves, J.	Thomson, A.
Purves, W. and Mandatory,	Burn, H. and Mandatory,
Queensberry Executors,	M'Michael, R. and W.
Queensberry, Executors of Duke of	Marquis of Queensberry and Trustee,
Rankin, Mrs. Helen	Macdonell, Captain J.
Reddie, A.	Wilson, R.
Reddie, R. and A.	
Reed, J. and Others,	Tannoch, J.
Reid, G.	Dudgeon, P.
Reid, J. (for Trustees of Statute Labour, Glasgow,)	Aitken, R. and Others,
Reid, R.	Holmes or Shiells, Mrs. M. and Husband,
Robertson, A.	Robertson, A.
	Scott, J.
Robertson or Harper, Mrs. C. and Husband,	Laing, J.
Robertson, J.	Scouller, J. and Brownlee, J.
Rose, P.	M'Lennan, J.
Ross's Creditors,	Ross,
Ross, G.	Glass, J.
Ross, R.	Baird, W.
Ross's Trustee,	Faylayson, J.
Ross's Trustees,	Carnegie, Sir J.
Rothes, Countess of, and Lady E. Leslie.	Earl of Rothes, and Curator,
Russell, C. (Ross's Trustee,)	Finlayson, J.
Samuel, J. (Pattison's Trustee,)	Paterson, R.
Sandeman, P.	Hull and Leith Shipping Co.
Sanderson, R. and Others,	Paterson, J.

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Saunders, G. (Amory's Trustee,)	Grindlay, J.	253	498
Scales's Representatives & Kirkwood, J.	Ramsay, J. (Glass's Trustee,)	382	749
Scot, A.	Ker, J. and Johnston, H. (for Leith Bank,)	221	438
	Ker, J. and Others, (for Leith Bank,)	478	893
Scot, A. and Small, T.	Johnston, H. (for Leith Bank,)	115	234
Scott, D.	Buchan, Mrs.	134	296
Scott, J.	Gillies, C. and Others,	453	832
Scott, J. and Others,	Smith, Elizabeth and Mary	240	464
Selby, Lieut.	Pentland, G.	256	502
Seymour, F.	Smith, A.	470	886
Sharp, G.	Alexander, J. H.	59	117
Shepperd, A.	Lockhart or Thomson, Mrs.	1	1
Shillinglaw, Isabella	Thomson, J. (Fraser's Trustee,)	412	788
Shirreff, J.	M'Intosh, W.	271	558
Simpson, A. and King, A.	Stein's Assignees,	28	47
Sinclair, J.	Sharpe, J. P.	482	901
Skene, J.	Sinclair, D.	168	342
Skinner, A.	Spalding, R.	68	142
Small, A.	Mann and Co. and Hall, H.	431	806
Smillie, M. and Others,	Muckarsie, T.	408	779
Smith, A. and Others,	Solicitors of Edinburgh,	63	134
Smith, Colonel, and Others,	Stubbs, T. Brothers, and Co.	417	790
Smith, D.	Burnside, James, Janet, and Mary	378	735
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Sommerville, W. and A.	Bank of Scotland,	160	327
Southern Districts Market Co.	Rennie, W.	264	545
Sproat, J.	Ross, A. (Charles's Trustee,)	379	738
Steel, Isobel	Leslie, J.	149	312
Steel, W.	Bertram, J.	219	434
Stoddart, Dr. J.	Henderson, J.	141	303
Stonehaven Harbour Commissioners,	Strachan, J.	2	4
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Stevenson, R. and Others,	Schuurmans, G. and Sons,	259	526
Stewart, A.	White, Mary, and Others,	273	555
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	Stewart, Misses M. and J. and Ballendene, J.	73	145
	Russell, J. and Co.	140	302
	Skirving, J.	164	320
Stewart, Miss, and Others,	Stewart, Misses	222	440
Stirton, W.	Malcolm, N.	367	715
Strathmore, Earl of	Hagart, P. C.	229	448
Sutherland, D.	M'Gougan, J.	297	601
Sutherland, J. and Others,	Dunlop, J.	155	320
Swanson, W.	Sinclair, Col. and Others,	100	214
Syme & Stewart, (for Perth Bank,)	Clyne, D.	387	762
Syme's Trustees,	Fisher, J. and Hepburn, H.	55	97
	Bell, J.	477	893

Defenders.	*Pursuers.*
Tait, C.	Queensberry, Executors of Duke of
Taylor, A.	M'Kenzie, M.
Taylor, J. T. sen.	Taylor, J. T. jun.
Taylor, P.	Mitchell, A.
Thomson, A.	Seymour, F.
———	Mitchell, J. jun.
Thomson, J.	Henderson, W.
———	Campbell's Trustees,
———	Paterson, A.
———	Campbell, Trustees of A.
Thomson, W.	Thomson, C.
———	Allan, J.
Thomson, W. and Others,	Spence, J. (Megget's Trustee,)
Tod, G.	Munro, Mrs. Christian
Tod, Mrs. and Husband,	Lothian, J. H.
Towers, Miss M.	Mein, A. (Neilson's Trustee,)
Traill, W. and Others,	Gifford, A. and Others,
Trotter, Sir C. and Others,	Ker, J. B. and Others,
Trustees for Courts of Justice in Scotland,	Budge, D.
Turnbull, D.	Douglas, W.
———	Hamilton, J.
Turner, D. and Others,	Pearce, J. M. and Others,
Twaddle, Jean	Fleming, Dr. B.
Tweedie's Trustee,	Schuurmans, G. and Sons, and Mandatories,
Urquhart or Grant, Margaret	Borthwick, P. (Grant's Trustee,)
Valance, J.	Neilson, W.
Waddell, A.	Wayne, R.
Walker, A. and West, R.	Butchard, R.
Walker, J.	Kid, Captain J.
Walker, P.	Cheyne, J. A. and Mackersy, L.
Walker's Trustees,	Thomas, R.
Warden, R.	Paton, W.
Watson, R.	Adam, R.
Watt, Agnes	Cowan, J.
Watt, J. and Others,	Stark, A.
Weir's Assignee,	Goodall, J. (Morison's Trustee,)
Watt, T. and Others,	Alison, J. and Others,
Weir, C.	Bryson, J.
Welsh, W. A.	Forbes, D. G. and Trustee,
Wemyss and Walker and Bill-Chamber Clerk,	Brown, W.
Wemyss, Captain	Erskine, Trustees of Sir W.
West of Scotland Insurance Co.	Johnston, J.
White, T. and Others,	Glasgow and Carlisle Road Trustees,
Whyte,	Whyte,
Wight, A.	Jameson, J.
———	Ewing, W.

Defenders.	*Pursuers.*	No.	Page.
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William's Creditors, J.	Williams, J.	101	214
Wilson, A.	Beveridge, W.	129	279
Wilson and Maclellan,	Sinclair, Duncan	202	401
Wilson, J.	Woodward, R. and Others,	282	566
Wilson, J. and Magistrates of Hamilton,	Scott, H.	283	566
Wilson, J. and Others,	Lord Melville,	473	889.
Wilson, R.	Keltie, A.	90	208
	Fullerton, A.	173	353
	Kennedy, D. D.	201	397
	Mitchell, J. and J.	456	841
Wilson's Trustee,	Porteous, T. and Mitchell, A.	16	22
Wilson, W. (Aitken's Trustee,)	Gib, J.	344	677
Winning, T.	Scott, A.	249	481
Wotherspoon, J.			
Young, A.	Thomson, R.	20	32
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ERRATA.

P. 46. Second line from foot, after *preventing* delete *and*.

P. 316. Heading of No. 151. third line, for *has projected* read *had projected*.

P. 344. No. 169. For the line of heading, for *dominant* read *servient*; and eigh
servient read *dominant*.

P. 774. Heading of No. 402. first line, for *securities were held* read *executors wer*

CASES

DECIDED IN

THE COURT OF SESSION.

WINTER 1828-29.

MRS. LOCKHART OR THOMSON, Advocator.—*Skene—Carlyle.*
G. SHARP, Respondent.—*Sol.-Gen. Hope—Wilson.*

No

Arrestment—Competition—Husband and Wife.—Held,—1.—That an arrestment on the dependence of a summons before the Commissary Court, concluding for more than £40, is competent;—and,—2.—That a wife who has obtained a judicial separation from her husband, and a decree of aliment, is entitled to compete with his creditors, and to be preferred under a prior arrestment, executed when he was solvent.

EBENEZER THOMSON, barrackmaster at Leith Fort, married the Nov. 13.
advocator Mrs. Lockhart in 1811. His salary and emoluments were 1st Di
about £260. In 1817 he was incarcerated for debt, and afterwards Lord M
raised a process of cessio, but did not obtain decree. He then entered ban
into an arrangement with his creditors, by which he assigned to them D.
a portion of his salary in payment of his debts, which did not exceed
£500. In November 1820 his wife left his house on the ground of
maltreatment, and on the 8th of March 1821 she raised a summons be-
fore the Commissaries of Edinburgh of separation a mensa et toro, con-
cluding for aliment to herself and her children. On the dependence of
this action, and on the same day, she executed an arrestment in the hands
of the executors of a Mr. Hutchison; and the summons was executed
against her husband on the following day. The respondent Sharp, being
a creditor of Thomson, raised a summons against him, in virtue of which
he also arrested in the hands of Hutchison's executors on the 8th of June
1821, and obtained decree on the 24th of October.

After considerable procedure before the Commissaries, they decerned
in the separation a mensa et toro, awarded £65 per annum of aliment to
his wife, the advocator, and £20 to each of his sons.

He died in 1823; and, in the mean while, several other creditors having
arrested, a multiplepoinding was raised by Hutchison's executors before
the Sheriff of Edinburgh, in which the advocator lodged a claim, and a
competition took place between her and the other creditors, but which
ultimately came to depend between her and the respondent Sharp. The

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Sheriff having preferred him, she brought an advocation, in which the Lord Ordinary advocated the cause, and preferred Sharp, but found no expenses due. Both parties then reclaimed—the advocator on the merits, and Sharp as to expenses.

Against the validity of the arrestment Sharp objected, That by the 20th article of the Instructions of the Commissaries, 22d January 1666, it is declared that they 'shall give forth no precepts in matters above '£40 till the decree be extracted;' and as the sum of aliment concluded for by the advocator exceeded £40, and her arrestment had been executed on the dependence, it was inept.

To this she answered, That the instruction had reference, not to precepts of arrestment on a dependence, but to arrestments in execution, and that the meaning was, that the Commissaries were not to allow execution under their decrees till they had been extracted. In support of this proposition, she produced a certificate of search by the clerk of the Commissary Court from 1780 to 1828, accompanied with the subjoined letter in regard to the practice.*

The Court having repelled the objection,

Skene, for the Advocator, stated, that the point on the merits was, whether the arrestment which she had executed (the validity of which had now been sustained) was effectual in a competition with her husband's creditors? If it was so, then, as her arrestment was prior in date to that of the respondent, she was entitled to be preferred. The criterion seems to be, whether her husband was solvent or not at the date of the arrestment, and therefore the matter resolves into a question of fact. Accordingly the case of M'Gregor rested upon that distinction.

Lord President.—But in the present case the husband was insolvent.

Skene.—I am going to explain the facts, and to show that, even on the statement of the other party, there was no insolvency. It is true that

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* 'I herewith send you the certificate of search relative to the articles mentioned in your 'letter of the 2d instant.

'The article you refer to in the instructions to the Commissaries, and ratified by an act of 'Charles II. in 1666, does not apply to precepts of *arrestment* on depending actions, but to 'short precepts for execution, issued on decreets after sentence, such as practised in the She-'riff Courts. On looking at the prices to be taken, as in the Instructions 1563, you will find 'there a fee for 'the precept *executorial upon the sentence*, ij. s.' Again, in the next article but 'one, 'for a precept to arreist in causes depending before thame (i. e. the Commissaries,) ij. s.' 'In the Injunctions 1610, you will observe that the Commissaries are enjoined 'that na precept 'be given furth without the decrete be first extracted.' It is to this that the article in the In-'structions 1666 applies, being 'a precept executorial upon the sentence.' In further evidence 'of this, you will see in the Injunctions by the Archbishops anent the prices of writs, &c. to the 'inferior Commissaries, clerks, and fiscals, that there are fees for 'precepts upon matteris within "xx. lib. *upon decretis*, the writing and seill, x. s.'—'precepts upon matteris of xl. lib. and "above xx. lib. *upon decretis*, seill and writing, xx. s.' Which establish that it is these pre-'cepts *on decreets* which the Commissaries are forbid 'to give furth in matteris above £40 "Scots, *untill* the *decreet* be first extracted,' and not precepts of arrestment in causes depend-'ing before them. I am, &c. George Carphin.'

'N. B. You will find a copy of the Instructions 1563 and 1610, in Balfour's Practicks.'

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he was in difficulties—that he attempted to get a cessio, but did not succeed, and that he entered into an arrangement with his creditors for payment of his debts. But there is no legal insolvency; and it is admitted that a few years appropriation of his income would have been sufficient to have paid his debts.

Lord President.—If he had lived another year, he would have paid them all except £7.

Skene.—Certainly; and besides, as he held an office producing a salary more than sufficient to have insured his life, so as to pay off his debts, this shows that the *value* of his funds exceeded the amount of his debts; and therefore neither in law nor in fact was he insolvent. Such being the case, the advocator is entitled to compete with his creditors, and to be preferred in virtue of her prior diligence.

Sol.-Gen. Hope for the Respondent.—It is true that, in one point of view, the case may turn on matter of fact; but the grounds on which the judgment in the Sheriff Court rested are conclusive in favour of the respondent. We have pointedly alleged that the debt of the respondent was contracted before the advocator left her husband's house, and that it consisted of furnishings on her behalf. Although these facts are not contradicted, yet she pretends that she is entitled, in virtue of a subsequent decree of aliment, to compete with onerous creditors. But aliment is only due deductis debitis; and therefore it is of no importance whether her husband was solvent or not at the date of her arrestment. Now, contrast this case with those of M'Gregor and M'Donald. In the former, the wife was infeft in a special subject long before the debts were contracted; so that it might fairly be contended that the creditors could not rely upon that fund. Again, in that of M'Donald, the wife had lived separate from her husband for many years, and got a decree of forthcoming even before the debts were contracted—a circumstance on which the late Lord Meadowbank mainly rested. But here the debts were contracted while the advocator was residing in the house of her husband, and no part of his funds was allotted to her previous to the competition. If it were necessary to go into the question of insolvency, it is manifest from the admitted facts that he was unable to pay his debts, and therefore truly stood in that situation. The case, however, turns upon the other point.

Skene in reply.—It is of no importance that the debt was contracted while the advocator was residing with her husband, or, as is alleged, on her behalf; because it was not a debt of hers, but of her husband. It is true that, in the cases of M'Gregor and M'Donald, the appropriation of part of the funds was founded upon as a specialty in favour of the wife; but the decision proceeded on the general point. Besides, in the case of M'Gregor there was no judicial separation, whereas here there is; so that the advocator became a creditor of her husband for her aliment.

Lord Balgray.—There is a material distinction between a judicial and a voluntary separation. When there is a judicial separation, the wife is entitled to

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a share of her husband's effects as her peculium. It is quite irrelevant to say that this debt was contracted for her behoof, because it did not become her debt, but that of her husband. Standing, therefore, in the situation of a creditor, this lady was entitled to arrest; and on the supposition that her husband was then solvent, she is entitled to compete with his other creditors, just as if he had granted to her an assignation. But I should wish to have the fact as to the solvency cleared up by a remit to an accountant.

LORD PRESIDENT.—There may be an insolvency in point of law, and still no insolvency in fact. A person may have no tangible funds, so as to take up his bill, and may be exposed to diligence; but still he may have sufficient funds to pay all his debts. Now, in this case, it is clear from the amount of the husband's income, as contrasted with his debts, that the former was more than sufficient to have insured payment of the debts; and therefore I see no necessity for a remit to an accountant.

LORD GILLIES.—I am clearly of the same opinion, and that there is no difficulty in the case. The advocator's decree establishes the fact that she is an onerous creditor, and as such she is entitled to compete with the other creditors, provided her husband was solvent at the date of her arrestment; so that the question just comes to be—Which was the prior diligence? In regard to the allegation of insolvency, the husband stood very much in the same situation as an heir of entail. He had a life interest sufficient to pay all his debts, and therefore it cannot be said that he was insolvent.

LORD CRAIGIE was understood to concur with the other Judges.

LORD PRESIDENT.—In the cases of M'Gregor and M'Donald, the appropriation of a particular fund to the wife was founded on as a specialty in support of a claim under a voluntary separation. But here the separation was judicial, so that such specialty is not necessary.

THE COURT, accordingly, 'altered the interlocutor of the Lord Ordinary 'complained of, advocated the cause, sustained the claim for the said Mrs. 'Hannah Thomson, and preferred her primo loco on the funds in medio 'for payment of the sums, principal, interest, and expenses due to her on 'the claim and interest produced for her, and decerned in the preference, 'and for payment accordingly; and found expenses due.'

Advocator's Authorities.—2. Bell, 73; 3. Ersk. 6. 8; 4. Stair, 35. 2; 1. Ersk. 5. 29; Thomson, July 13. 1666, (675); Richardson, March 3. 1772, (678); Brodie, June 14. 1710, (816); Pindar, May 27. 1824, (ante, Vol. III. No. 69); 1. Bell, 548. 555; 1. Ersk. 6. 31; Greenhill, Feb. 7. 1822, (ante, Vol. I. No. 336); Buchanan's Creditors, Feb. 14. 1822, (ante, Vol. I. No. 364); M'Gregor's Trustees, Jan. 22. 1820, (F. C.); M'Donald, Jan. 15. 1811, (F. C.)

Respondent's Authorities.—2. Bell, 387; Robb, March 8. 1794, (3900); Lee, Dec. 1. 1795, (3889.)

D. BRASHE,—W. FERGUSON, W. S.—Agents.

No. 2.

J. STRACHAN, Pursuer.—*D. of F. Moncreiff—Jeffrey—Cockburn—Marshall.*

DR. J. STODDART, Defender.—*Sol.-Gen. Hope—Murray—Cuninghame.*

Reparation—Malice.—In an action of damages for apprehension for examination alleged to have been on a grossly illegal and irregular warrant, against the Judge who granted it, it is not necessary to aver malice and want of probable cause.

No. 2.
Nov. 13. 1828.
2D DIVISION.
JURY COURT.
Ld. Mackenzie.
T.

THE pursuer Strachan having been taken into custody on a warrant granted by the defender Dr. Stoddart, a Justice of Peace in the island of Arran, to apprehend him for examination as in meditatione fugæ, and having been carried several miles to be brought before the defender, who, however, immediately discharged him, thereafter raised an action of damages against the party on whose application the warrant was granted, and also against Dr. Stoddart, on the ground of the alleged illegality and irregularity of the warrant in several particulars, to which it is unnecessary to advert. After the cause had been remitted to the Jury Court, and a condescendence there given in, that Court remitted it back, to have the question determined, 'whether the pursuer, in the question between 'him and Dr. Stoddart, the Justice of Peace, is bound to aver in his 'condescendence malice, and without probable cause.' The Lord Ordinary reported this question to the Court on Cases.

Argued for the Defender.—In granting the warrant in question, the defender was undoubtedly acting in a matter in which he had jurisdiction, and within his powers. In such circumstances, a Judge is protected from claims of damage arising from error or irregularity, unless it can be proved that he acted maliciously, and without probable cause; and although, in several cases, Justices have been subjected in damages for acts done in their magisterial capacity, without any averment of malice, that was only where they exceeded their jurisdiction, or transgressed the special statute under which they may have acted, which last was the case in Milhollan v. Dalrymple. But, besides, there is a material difference between the case of a warrant for incarceration and a warrant for examination merely, there being necessarily a much greater latitude allowed in regard to the latter than the former.

For the Pursuer.—If a party be deprived of his personal liberty on an illegal and irregular warrant, it is of no consequence whether the Magistrate be in bonâ fide or not; he is liable for the consequences of his illegal act, and there is no distinction between the illegality founded on excess of jurisdiction, or that arising fron any other cause. Neither is there any room for distinguishing between the case where a man is deprived of his personal liberty on a warrant for examination, and that where he is deprived of it on a warrant for incarceration. The injury is the same in kind, and he is equally entitled to reparation. The cases are numerous in which damages have been awarded against Magistrates without any allegation of malice; and that of Milhollan is completely in point, the warrant there not having been one for incarceration, but for examination as in the present case.

The Court unanimously found,' that in this case it is not necessary for 'the pursuer to aver malice or the want of a probable cause, but that 'it will be sufficient to aver such irregularity or illegality in the procedure, as will warrant a decree of damages against a Justice of Peace;' and remitted the case back to the Jury Court, but found no expenses due.

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Nov. 13. 1828.

LORD PITMILLY.—We have a good deal of matter in the papers not properly before us. The case is remitted to decide a single and short point of law, and we should decide nothing else. The only question to be determined is, whether the pursuer is bound to aver in his condescendence malice, and without probable cause? In other respects, we have nothing to do with the relevancy of the condescendence, which remains for consideration in the Jury Court. There are two grounds on which it is said to be necessary to aver malice and want of probable cause: 1. That the action is against a Magistrate; and, 2. That the warrant is for examination, not incarceration. I have no doubts on either ground; but, as the case has been remitted from the Jury Court, I think it right to state the principle of distinction in those cases where malice must be libelled, and where it is unnecessary. There is a great class of cases where malice forms the groundwork or gist of the action. In all cases of this class, malice is either presumed by law, or it must be proved. In those where it is implied by law, it is not necessary to aver it, as in ordinary actions of libel against private individuals; while, in those where it must be proved, as in the case of a master giving the character of a servant, where the presumption is the other way, malice must be averred. In general, where malice is the groundwork of the action it must be averred, except where it is presumed by law. But malice is not the groundwork of this action. It proceeds on the allegation that the party was taken into custody, and on a warrant grossly illegal and irregular, and it must be taken for granted at present that it was so. It is clear in such a case that malice is not the groundwork. It is no matter whether it was from error or malice; if grossly illegal and irregular, the party is entitled to claim damages alike from the private party and the Judge. It is no answer to a man who has been taken into custody on a grossly illegal warrant, to say that it was done from error. There cannot be a doubt of this, as it is settled by all previous decisions; and as malice is not the groundwork of the action, it is unnecessary to put the question in issue. It is said that the warrant was for examination only, and a distinction is attempted to be founded on the dictum of Lord Chancellor Eldon in the case of Arbuckle. But his Lordship's observation is quite misunderstood; for it related to a question under the act 1701, whether bail should be taken on commitments for examination merely. If a person be deprived of personal liberty, and dragged before a Judge, I think it is of no consequence whether this be done for examination or incarceration. Therefore I do not think that it is necessary for this party, who says that the warrant was grossly illegal and irregular, to aver malice. But I should be very sorry to say that every slip in the granting of a warrant would subject a Magistrate in damages. I think that the illegality and irregularity must be gross before this can be done, and that the Judge is not at all in the same situation as the private party. And so, in the case of Arbuckle, the Court had great difficulty as to the Judge, and it was the same in the case of Porter, where the Judge was only subjected because the illegality had been gross; and in a case not mentioned in the papers, Jameson v. Napier, I see that the action was not insisted in against the Magistrate. The remaining point is, If the party must aver want of probable cause? This is an English expression. It is not, however, a technical one; and the meaning is plain, and we cannot object to it, as we find it in the 43d Geo. III. for the protection of Justices, which undoubtedly extends to Scotland. The same plea also has been in previous cases advanced with us, though the same term was not used, as in Napier v. Jameson, and also in Henderson v. Scott, though not mentioned in the papers. I am, however, a little at

a loss to see the ground of its application here. If it had been applied to the private party that he had made application for the warrant without probable cause, I could have understood it; but I cannot see how it can be applied to Dr. Stoddart. On the whole, I do not think it necessary that the pursuer should aver malice, or the want of probable cause. I would, however, add a little to the interlocutor to prevent its being supposed that we mean to sanction the doctrine that any culpa levissima would warrant damages against a Judge. No. 2. Nov. 13. 1828.

Lord Alloway.—I concur in every word; only I would doubt the propriety of the proposed addition to the interlocutor, as the point is not before us, though I entertain the same opinion in regard to it.

Lord Justice-Clerk.—I had formed a deliberate opinion; but it has been so ably and accurately expressed by Lord Pitmilly, that I shall add nothing to his Lordship's observations, in which I entirely concur.

Lord Glenlee.—I am of the same opinion.

Pursuer's Authorities.—Bell, Nov. 22. 1743, (13951); Phillips, June 23. 1748, (13953); Ramsay v. Coulter, Dec. 19. 1799, (App. Wrongous Imprisonment, 1); Laing, Dec. 20. 1789, (8555); Milhollan, Dec. 21. 1826, (ante, Vol. V. No. 105.)

Defender's Authorities.—4. Stair, 1. 5; Dicta of Lord Ch. Eldon in Arbuckle v. Taylor and Sons; 3. Dow, 160; Anderson, Nov. 26. 1814, (F. C.)

J. Forman, W.S.—R. Rutherford, W.S.—Agents.

W. Lumsdaine and Commissioner, Pursuers.—*Sol.-Gen. Hope—H. J. Robertson.*

Gen. Balfour, Defender.—*D. of F. Moncreiff—Alison.* No. 3.

Proof—Writs, Production of—Agent and Client.—Circumstances in which the Court refused, hoc statu, in the course of the preparation of a cause, to compel production of writings said to be confidential between agent and client; and Observed, that the rule of the law of England, which protects from disclosure all communications by a client to an agent in his professional capacity, whether with reference to a suit or not, except only where the agent has been employed, to contract with third parties, ought to be followed in Scotland.

In the year 1752, John Lumsdaine of Lumsdaine executed a bond of tailzie, whereby he obliged himself to resign his lands of Lumsdaine and Blanerne, under the fetters of an entail, in favour of his eldest and second sons in their order, and the heirs-male and female of their bodies respectively—whom failing, to the third, fourth, and fifth sons of Robert Balfour Ramsay of Balbirnie—whom failing, to the other sons to be procreated of the body of Robert Balfour Ramsay—whom all failing, to John Lumsdaine, third son of Lumsdaine of Innergelly, and the heirs whatsoever of his body. No infeftment was taken on this entail; and on the testator's death, that of his eldest son (who had made up no titles) without issue, his second son John succeeded, and in 1776 made up titles as heir to his father in fee-simple. This John died without issue in 1802; but, during his possession, he had sold a part of the lands in question, and had burdened the remainder to the extent of £6000. On his death, John Balfour of Balbirnie, (the defender's father,) who was not one of the heirs called under the entail, expede a service to him as Nov. 13. 1828. 2d Division. Ld. Mackenzie. F.

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heir of line in general cum beneficio inventarii, and thereafter made up titles in fee-simple to the estates of Lumsdaine and Blanerne. These titles were, however, reduced in 1811, in an action at the instance of the late Major Lumsdaine, the heir under the bond of tailzie entitled to succeed, failing the younger brothers of John Balfour, who was first called in the entail. Thereafter the present pursuer, (who, in consequence of the reduction of these titles, succeeded, on the death of the younger brothers of John Balfour and of Major Lumsdaine, to the lands of Lumsdaine and Blanerne,) raised an action against General Balfour, concluding that he, as representing John Lumsdaine (second) should be obliged to hold count and reckoning for the prices of these parts of the entailed lands which had been sold by him, and also to relieve the pursuer of the £6000 of heritable debts contracted by him.

In defence General Balfour pleaded, That his father had entered heir to John Lumsdaine cum beneficio, and that the debts paid exceeded the amount of the effects; and as to the rents of the entailed estates, from the time of John Balfour's taking them up, till the succession opened to the pursuer, he stated in a condescendence that they had been paid to the younger brothers of John Balfour, who were the parties entitled, during that period, to have possessed the estates in virtue of the entail. In answer to this, the pursuer averred, That the payment of the rents by John Balfour to these younger brothers was to purchase their acquiescence to his continuing to possess the estates on the fee-simple titles till prescription had run in favour of these titles, and that an agreement had been entered into between the brothers to that effect. In this state of the process, the Lord Ordinary granted a diligence for the recovery of all documents relative to this alleged agreement, under which there was obtained from the repositories of the late Mr. Duncan, agent of John Balfour, a draft of an obligation which bore that John Balfour had never intended to disappoint his younger brothers of their succession to the estates of Lumsdaine and Blanerne according to the destination of the bond of tailzie; and it therefore went on to oblige him to employ the rents in payment of the debts of John Lumsdaine (second,) and thereafter to convey the lands to his younger brothers and their heirs respectively in the order prescribed in the entail—whom failing, to his own second son. Having obtained this, the pursuer further demanded from the haver, who was in possession of Mr. Duncan's papers, 'excerpts of such parts of letters from Mr. 'Balfour to Mr. Duncan as contain instructions relative to the framing 'of the said draft, or the extending the obligation in terms of it, or rela-'tive to the subsequent actings upon it, and of such parts of letters from 'Mr. Duncan to Mr. Balfour, or his youngest brother, as relate to the 'execution of such instructions.' To this demand it was objected, that the letters called for were confidential communications between agent and client. The Commissioner reported the matter to the Lord Ordinary, who remitted to him 'with instructions to repel the objections in so far 'as respects letters or parts of letters containing instructions by Mr.

'Balfour to Mr. Duncan, relative to framing the draft in question, or 'extending the obligations in terms of it, or to subsequent actings upon 'it, and of such letters or parts of letters by Mr. Duncan to Mr. Bal- 'four, or his younger brothers, as related to the execution of the said 'instructions.' No. Nov. 13

General Balfour reclaimed.

Dean of Faculty for Defender.—All communications between agent and client, at whatever distance of time they have been made, and whether with reference to a process in contemplation or dependence or not, are confidential,—the circumstance of the existence of a process not affecting in the least the principal on which the agent cannot be compelled to produce such communications in evidence against his client:—by the law of England, which has been reduced on this point to a more complete system than that of Scotland, the general rule is, that *all* communications made by a client to the attorney 'in his professional character, and with refer- 'ence to professional business,' whether that be a suit or not, are confidential, under one exception only, in the case of an agent having contracted with third parties in virtue of powers committed to him by his constituent; and in the law of Scotland, though not so explicitly decided, the same rule has in substance been followed, and was the distinction taken in the case of Campbell of Ederline.

Solicitor-General for the Pursuer.—The decisions of the Courts in Scotland have drawn a distinction as to communications made with reference to a cause either raised or about to be raised, and those without reference to any suit, and have allowed the production of the latter class of communications; but besides, the transaction here sought to be expiscated is of the nature of a legal fraud, as to which an exception will apply, and it also falls under the exception admitted by General Balfour.

The Court recalled the interlocutor of the Lord Ordinary in hoc statu, and remitted to his Lordship to proceed with the preparation of the cause as he should deem meet.

Lord Glenlee.—I have some doubts of the propriety of granting this diligence hoc statu. At present we are only in that stage of the case where the party is seeking to recover writings on which he is to found, and not in modum probationis of an averment, the relevancy of which has been fixed. The statement as to this transaction does not appear in the summons, but only arises as an objection to the claims of credit by General Balfour in the accounting; and there has yet been no discussion of its relevancy. If that allegation be the ground for recovering the writings sought for, the relevancy should first be settled. I do not say but that the havers may be obliged to produce them in proof of relevant facts; but I certainly would not allow it hoc statu.

Lord Justice-Clerk.—We had occasion to consider this subject lately in the cases of Fisher and Mackintosh, and the Court were clear that it was a very delicate matter to allow the production of such documents; and we must therefore see the specific averments in proof of which it is asked, before deciding whether it can be compelled.

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Lord Alloway.—I cannot distinguish this case from that of Mackintosh and Macqueen; and looking at the authorities of the law of England, where this branch of law is more matured than with us, founded not on any peculiarities of that law, but on principles which apply equally in our own law, I think that we cannot adhere to this interlocutor.

Lord Pitmilly.—I concur; but I would not even add the qualification of 'hoc statu,' as I think the general rule applies here, to preclude entirely the productions of the writings called for; and it appears to me that the rule of law which is clearly established in England, should be followed with us.

Pursuers' Authorities.—M'Leod, Dec. 21. 1744, (16754); Graham and Brown, May 26. 1810, (F. C.); Campbell, Jan. 21. 1823, (ante, Vol. II. No. 132); Davidson, May 13. 1824, (ante, Vol. III. No. 8.)

Defender's Authorities.—1. Phillips, (4th edit.) 100-1, 140-1-2; Cormack v. Heathcote, April 26. 1820, (2. Brod. and Bing. 4); 4. Stair, 43. 9; 4. Ersk. 2. 25; M'Kenzie's Obs. Stat. 1621; Burnet, p. 435, c. 17; 2. Hume, 313; Wamphray, Dec. 21. 1675, (347); E. of Northesk, July 15. 1680, (353); Scott, July 8. 1737, (358); Lindsay, July 12. 1743, (16746); Lady Bath's Executors, Nov. 12. 1811, (F. C.): Duke of Hamilton, May 25. 1819, (F. C.); Fisher, Dec. 22. 1827, (ante, Vol. VI. No. 110); Mackintosh, May 13. 1828, (ante, Vol. VI. No. 270.)

A. Stevenson, W. S.—J. Yule, W. S.—Agents.

No. 4.

Rutherford and Finlayson, and A. Rutherford, Advocators.—*Jeffrey—More.*

W. Finlayson, Respondent.—*Christison.*

Partnership.—One of the two partners of a company not entitled in his own name, or that of the company, to pursue a summary process against the other for removing him from a house vested in the person of the party pursuing, but for behoof of the company, into possession of which he had been put as a partner and manager of the company.

Nov. 13. 1828.
2d Division.
Lord Medwyn.
B.

In the year 1818, the advocator Rutherford and the respondent Finlayson, along with two other parties named Russell and Inglis, entered into a copartnership as thread-manufacturers in Dunfermline. By the contract it was declared that Finlayson and Inglis should have the sole management; and the former was immediately put in possession of a dwelling-house belonging to the concern, and adjoining the manufactory, the titles to which were taken in favour of Rutherford ex facie absolute, but qualified by a separate writing declaring that he held it for behoof of the company. In the course of a few years, Rutherford acquired right to the shares of Inglis and Russell; and some disputes having arisen between him and Finlayson, the remaining partner, the latter withdrew himself from the active management. This Rutherford alleged he had done without cause, while Finlayson imputed the blame to Rutherford, and stated his willingness to resume his duty. But however that might be, Rutherford, in 1827, presented a summary application to the Sheriff of Fife, in name of the company, (to which he afterwards sisted himself individually,) to have Finlayson removed from the dwelling-house adjoining the manufactory, which he still continued to occupy. The Sheriff having assoilzied Finlayson, an advocation was brought by Rutherford in his own name and that of the company.

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'liverance on the application for the sequestration of the estates of the 'said Hughes and Williams, or at all events within sixty days prior to 'the date thereof, in security or towards payment of a prior debt due to 'him by the said Hughes and Williams, the value of the said iron and 'harness became a part of the estate of the said Hughes and Williams; 'and accordingly the said James Jaffray is liable in payment to the com-'plainer of the same, as trustee foresaid.'

In defence, Jaffray denied that he had received the articles within sixty days of the bankruptcy, or subsequent to the first deliverance; and alleged that he had got them in the course of the month of July. The Sheriff having allowed a proof to Horne of his allegations, found them proved, and decerned in terms of the libel.

Jaffray having advocated, and objected that the action was incompetent in so far as it concluded for repetition, on the ground of the transaction having taken place within sixty days of the bankruptcy, the Lord Ordinary remitted 'the cause to the Sheriff, with instructions to allow 'to the pursuer a proof that the articles pursued for were delivered to 'the advocator subsequent to the 5th day of October 1822, being the 'date of the first deliverance on the petition for sequestration of the 'estates of Hughes and Williams, and to the defender a conjunct proba-'tion;' but found no expenses due.

Both parties having reclaimed,

Jeffrey, for the Advocator, contended, That as the only evidence which had been adduced related to the allegation of having entered into the transaction within sixty days of the bankruptcy, and as the Lord Ordinary had given effect to the plea of incompetency, he ought to have assoilzied the advocator, in respect that there was no evidence in support of the averment that the articles had been delivered subsequent to the first deliverance.

Neaves, for the Respondent, not instructed.

LORD BALGRAY.—The case depends on the fact, whether the articles were delivered before or after the first deliverance.

LORD GILLIES.—The allegation in the summons is alternative, either that the delivery was after the first deliverance, or at least within sixty days previously. There is therefore no specific averment of the delivery having been after the first deliverance.

LORD PRESIDENT.—The last of these averments may be relevant, but it would require a reduction.

LORD GILLIES.—We should remit with instructions to allow a condescendence of the averment that the delivery was after the first interlocutor in the sequestration.

LORD CRAIGIE thought that it would be more expedient not to remit the case; but the other Judges concurred in the proposition of Lord Gillies.

THE COURT, therefore, 'varied the interlocuter of the Lord Ordinary com-'plained of, so far that the Sheriff, before allowing a proof, shall require 'from the respondent a condescendence of the facts he avers and offers to

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In 1816 Mr. Gray granted a personal bond for £1500 to the pursue Mr. Graham, who, in 1821, raised a summons of adjudication, in whicl he concluded for adjudication of 'such parts and portions of the lands 'and others after expressed, belonging to and enjoyed by the saic 'Charles Gray, whether in fee-simple or fee-tail, or at least such righ 'and title as stands vested in his person, or in the person of any confi 'dential friend or trustee, in trust for his use and behoof; and also the 'lease of certain fishings after mentioned granted to him by the Ho 'nourable William Maule of Panmure;' or otherwise, 'all and whole these 'parts and portions of the lands and estate of Carse, formerly belonging 'to him as heir of entail, but which were lately sold by public roup, and 'purchased by him, or by some confidential friend or trustee, in trust for 'his benefit and behoof, under the authority of the statute of the 42d 'year of his late Majesty's reign, cap.116;' as also the above lease. 'And, 'lastly, the defender Charles Gray's liferent, and whatever more extensive 'and valuable other right and title to, and interest in the several lands 'and others after specified, stands vested in his person, or in the person of 'any other confidential friend or trustee, in trust for his use and behoof, 'in so far as it is not inconsistent with the conditions of a deed of entail 'executed by the late Captain Charles Gray of Carse on the 23d day of 'May 1765, under which the said Charles Gray now holds and enjoys 'the said lands and estate of Carse, with the exception therefrom only of 'those parts and portions thereof herein before specified, which were sold 'for redemption of the land-tax of the said whole estate; viz. All and 'whole the lands of Carse, with the manor-places, houses, biggings,' &c. Decree was pronounced in terms of the libel; and, after a charge against superiors, Mr. Graham obtained a Crown charter of adjudication, by which there was conveyed to him, in so far as related to the entailed estate, 'usum vitalem redditum dicti Caroli Gray, et quodcunque aliud 'jus vel interesse, magis extensivum vel pretiosum, vestitum stans in ejus 'persona, vel in persona alicujus amici pro ejus usu et beneficio, quantum 'non repugnan. conditionibus talliæ instrumenti facti per nuperum Capi- 'tanum Carolum Gray de Carse, &c. viz. Totarum et integrarum terarum 'de Carse, cum manerei loco, domibus, ædificiis, hortis, pomariis, mo- 'lendinis, multuris,' &c., and precept of sasine was granted for giving infeftment 'totarum et integrarum præfat. terrarum, decimarum, molen- 'dinorum, aliorumque, cum pertinen., tam pro principali quam in war- 'rantizatione supra disposit., jacen. ut præfertur; sed sub reversione pro- 'ut de jure, secundum formam et tenorem antedict. cartæ nostræ quam 'de nobis inde habet.' Sasine was accordingly taken 'prædict. terrarum, 'decimarum, molendinorum, aliorumque, cum pertinen., tam pro princi- 'pali quam in warrantizatione supra specificat., jacen. ut præfertur; sed 'sub reversione prout de jure, secundum formam et tenorem dict. cartæ, 'per traditionem terræ et lapidis fundi dict. terrarum aliorumque,' &c.

In 1823 the estate of Carse was sequestrated, and claims having been lodged, both by Mr. Wilson, the heritable annuitant, and by the repre-

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cation and charter and sasine were precisely in the same terms as those which in numerous other instances had been led against entailed estates; and,

2. That, at all events, the adjudication was per se a sufficient title to insist in the action, without reference to the charter and sasine.

The Lord Ordinary found:—'That the dispositive clause of the 'pursuer's charter of adjudication, (which is precisely conform to 'the decree of adjudication on which it proceeds,) in so far as it re- 'spects the entailed estate of Carse, does not convey the lands them- 'selves, but 'usum vitalem redditum dicti Caroli Gray, et quod- "cunque aliud jus vel interesse, magis extensivum vel pretiosum, "vestitum stans in ejus persona, vel in persona alicujus amici fiduciarii, "ut fidei commissarii, in fiducia pro ejus usu et beneficio, quantum non "repugnan. conditionibus, talliæ,' &c.: That the conveyance of Mr. 'Gray's liferent was inept, he being no liferenter, but fiar of the lands, 'though a limited fiar, and that the addition of the indefinite more ex- 'tensive and valuable right which he might happen to be vested with, 'either in his own person, or in that of a trustee for his behoof, is not 'such as could constitute a proper feudal title in the pursuer, or to 'warrant his infeftment in the lands: That the precept which authorizes, 'in general terms, 'sasinam totarum et integrarum præfat. terrarum, "decimarum,' &c. 'secundum formam et tenorem antedict. cartæ nostræ,' 'although a sufficient warrant for infeftment in the other lands and sub- 'jects directly conveyed, was not such, in regard to the entailed estate, 'as to which all that is granted is a right of liferent which did not exist, 'or some more extensive right, the nature of which is left altogether un- 'defined: Therefore sustains the objection to the pursuer's title, that 'he has no valid infeftment nor feudal estate in the tailzied lands, as- 'soilzies the defender, and decerns; but finds no expenses due.' Mr. Graham reclaimed, and the Court ordered Cases; and on these coming to be advised,

Baird, for the Pursuer, after stating the nature of the action, contended that the adjudication was an effectual attachment of the liferent interest, and that an heir of entail had a right of fee sub modo:—

Lord President.—We are all agreed that there may be an adjudication of the liferent. It will found a good title in an action of mails and duties, and may entitle the party to get a charter in liferent, but not to obtain a feudal right to the lands.

Baird.—The practice is different, of which there are numerous instances; and your Lordships' view cannot be reconciled with the interlocutor. It finds that the adjudication of the liferent of an heir of entail is inept—a point of the utmost importance in reference to the practice which has been followed in attaching the estates of heirs of entail; but besides, there is a general clause in this adjudication attaching all right, title, and interest which Mr. Gray had in the estate; and consequently we are entitled, in virtue of it, to insist in this action.

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THE COURT accordingly 'altered the Lord Ordinary's interlocutor, so far as 'it assoilzied the defender from the present action; but adhered to the 'said interlocutor complained of, to the effect of its dismissing the present 'action, without prejudice to the pursuer's bringing a new action upon the 'decree of adjudication founded on by him, or other titles, as accords.'

Pursuer's Authority.—2h Jur. Styles, 255.
Defender's Authorities.—2. Stair, 6, 7; 3. Ersk. 1. 16, and 2. 9. 41; Hamilton, Feb. 23. 1819; Macqueen, Jan. 23. 1824, (ante, Vol. II. No. 607.)

J. BROWN,—A. PEARSON, W. S.—Agents.

No. 8.

A. STARK, Pursuer.—*Monteith.*
J. WATT and Others, Defenders.—*Jameson.*

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2D DIVISION.
Ld. Mackenzie.
F.

THIS was a question as to certain expenses which the Lord Ordinary, in the course of the preparation of the cause, had awarded against the pursuer. The Court adhered.

T. GRAHAME, W.S.—J. WILSON, W. S.—Agents.

No. 9.

D. GILCHRIST.—*Skene.*
HOUSTON'S TRUSTEES.—*Sol.-Gen. Hope.*
G. DEMPSTER.—*Gordon—Robertson.*

Commonty—Personal Exception.—No objection to a party claiming a share in the division of a commonty in respect of several separate estates that he had originally maintained that he had an absolute right of property in the whole of it, in virtue of his titles to a certain piece of land.

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F.

THIS was a process of division of commonty depending almost entirely on the proof of possession. The only specialty arose from Dempster of Skibo, who was proprietor of several distinct properties bordering on the commonty, having at first maintained that, in virtue of his titles to one of these, he had an exclusive right of property to the whole ground alleged to be common, and having, on proving unsuccessful in this plea, claimed a share of the commonty as belonging to his other properties. An objection on this ground, however, was overruled, and the Commissioner pronounced an interlocutor on the proof as to the interests of the respective proprietors, to which the Lord Ordinary and the Court adhered.

INGLIS and WEIR, W.S.—A. STORIE, W.S.—Agents.

No. 10.

J. BARBOUR, Advocator.—*Thomson.*
M M'GAUCHIE, Respondent.—*A. M'Neill.*

Res Noviter Veniens—Process.—1.—A circumstance once known to a party, but which has escaped his recollection, not res noviter.—2.—A. S. 11th July 1828 cannot apply to judgment pronounced before it came into operation.—3.—Question remitted as to whether, under A. S. 12th November 1825, a statement of fact omitted in the Inferior Court record could be brought forward in reasons of advocation in this Court.

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F.

IN an advocation at the instance of Barbour of an action for payment of certain bills, raised by him before the Sheriff of Dumfries against the respondent M'Gauchie, in which a record had been made up in the Inferior Court, and decree of absolvitor pronounced, he craved to be permitted to add to his reasons of advocation, while the record was yet

No. 12.

D. CASSELS, Pursuer.—*Sol.-Gen. Hope—Russell.*
BANK of SCOTLAND and Others, Defenders.—*Cockburn—Walker.*

Cessio.—A party having discounted a bill drawn on another, and thereafter taken payment from the debtor, refused the benefit of the cessio.

Nov. 15. 1828.
1ST DIVISION.
D.

CASSELS having brought a process of cessio, various objections were stated by the Bank of Scotland, but particularly that, on the 10th of May 1826, he brought a bill to their agent at Stirling, drawn by his father, a distiller at Kepp, for £72. 12s., upon James Robertson, spirit-dealer in Irvine, indorsed by his father, for which he received the money, less the discount; that the bill having been transmitted to the agent at Ayr, he applied to Robertson for acceptance, who refused it on the ground that he was entitled to certain deductions, and was only bound to pay the money at Irvine; that the pursuer, within a few days thereafter, obtained from Robertson the money, and did not account for it to the Bank; that at this time both he and his father were on the eve of bankruptcy; and therefore that this was such a fraud as ought to deprive him of the benefit of the cessio.

In answer to this it was stated, That his father had been in the practice of discounting his drafts with the agent of the Bank at Stirling, and when they were not accepted of, he was allowed to settle with the debtors; that this practice was followed on this occasion, and the proceeds were applied, not to the use of the pursuer, but to that of his father.

The Court, however, considering that the pursuer, after having got the money from the Bank, ought, on receiving it from Robertson, to have delivered it to the Bank, found that he was not entitled to the benefit of the cessio in hoc statu, and disregarded a plea that he had been several months in prison.

CAMPBELL and BURNSIDE, W. S.—H. DAVIDSON, W. S.—Agents.

No. 13.

A. STRACHAN, Advocator.—*Skene—Currie.*
DR. F. NICOLL, Respondent.—*Sol.-Gen. Hope—Grant.*

Nov. 15. 1828.
2D DIVISION.
Ld. Mackenzie.
F.

Landlord and Tenant.—Interlocutor of consent ordaining a tenant, who was bound by his lease, the greater part of which was yet to run, to follow a six-shift course of cultivation, but who had adopted a four-shift course, to find security to bring the farm into the six-shift course as soon as it could reasonably be done, and to adhere thereafter to the same course,—the caution as to this last matter to subsist for six years after the farm had been brought into the course of rotation prescribed by the lease.

J. BURNESS, S. S. C.—D. M'LEAN, W. S.—Agents.

No. 15. Nov. 15. 1828.

'to, by which a cause assumed different aspects in consequence of the 'production of writings till then withheld.'

His Lordship thereafter advised the cause as it stood, and remitted simpliciter.

The advocator then reclaimed, and stated that the production of the document in question, which was in the handwriting of the proprietor, but had been in possession of the advocator's agent all along, became necessary to refute an inference drawn from certain letters of the proprietor, produced by the advocator before closing the record, with a view to a totally different point; and he pleaded that it was not the intention of the Act of Sederunt to preclude the Judge from ordering production of documents in modum probationis, which might be necessary in order to form a judgment on the case.

The Court, holding that the case could not be satisfactorily decided without the document in question, unanimously recalled the Lord Ordinary's interlocutor, and ordered production of it, and of all other letters that had passed between the parties with reference to the bills which were the subject of the action.

A. Hamilton, W. S.—J. Mowbray, W. S.—Agents.

No. 16.

T. Porteous and A. Mitchell, Petitioners.—*Rutherfurd.*
W. Wilson, (Aitken's Trustee,) Respondent.—*Shaw.*

Bankrupt—Sequestration.—Payment of a dividend under a sequestration, at the expiration of twelve months from the date of the sequestration, interdicted at the instance of two creditors claiming after the lapse of the ten months, till it should be seen whether certain additional funds would be realized, so as to pay them a dividend equal to that of the other creditors.

Nov. 18. 1828. 1st Division. D.

On the 29th of May 1827, the estates of James Aitken were sequestrated under the Bankrupt Act, and thereafter the respondent Wilson was appointed trustee. On the 5th of April 1828, the period for publishing the first scheme of division arrived, and it was alleged by the respondent that it was then regularly framed and advertised. The petitioners, on the 13th and 15th of May, transmitted affidavits to the respondent, claiming to be ranked on the estate; but they were not accompanied with the grounds of debt. The respondent having intimated that he could not receive them, these parties presented a petition to the Court, alleging that the scheme of division had not been made out of the date which it bore, and praying the Court to 'prohibit the said William Wil-'son from proceeding with the payment of the said dividend,' and to find that he was bound to appropriate a part of the fund to their debts.

The Court granted interdict, and ordered the petition to be served on the respondent. In the mean while he had received two bills, which, if paid, would afford a dividend to the petitioners equal to that allotted to the other creditors; and he therefore lodged answers stating this fact, but moving the Court that in respect the claims were not lodged till after the ten months, and as the period fixed for payment of the first dividend

No. 17.
Nov. 18. 1828.

'joint interest, and that their petition and answers in their present form 'are irregular, and intended as an evasion of the Act of Sederunt order- 'ing consignation, and in respect also that consignation has not been 'made in terms of the Act of Sederunt.

A bill of suspension having been presented, Lord Craigie refused it, and found expenses due, 'in respect the usage asserted by the respond- 'ent with regard to houses and yards possessed by colliers, situated as 'the suspenders were, is not denied, nor that the suspenders desisted from 'working, in order thereby to compel an increase of their wages.'

A second bill having been offered, Lord Corehouse refused it, and found the suspenders liable in expenses; but 'remitted to the Sheriff 'with instructions to repone the suspenders against the interlocutor com- 'plained of, upon payment of the expenses under both bills as modified 'by the auditor, and on consignation of expenses in the Sheriff Court, in 'terms of the Act of Sederunt.'

Against this judgment the suspenders reclaimed.

LORD PRESIDENT.—The suspenders have been reponed by Lord Corehouse's interlocutor; therefore there can be no question on that point.

Skene for the Suspenders.—True; but we have been found liable in expenses, and are only to be reponed on payment of those incurred in this Court, and on consignation of those in the Sheriff Court. The question therefore is, whether the suspenders can only be reponed upon these conditions? If the proceedings of the opposite party have not been regular, they cannot in justice be subject to these conditions. Now, observe how the facts stand. It is said that all the colliers struck work, and that warning was given to them to remove from the houses. When the period is about to expire, five different petitions are presented to the Sheriff, who issues a deliverance on each petition, ordering a copy to be served on each of the defenders. By the Act of Sederunt this ought to have been a full copy, whereas it was merely stated that the complaint was against the particular individual on whom the copy was served, 'and others,' so that it was impossible to discover whether there was more than one petition or not. The same procurator was employed by them all; and as their defence was identically the same, and he naturally supposed there was only one petition, (seeing that all the copies were expressed in the same terms,) he lodged a single defence for them all. In that paper it is not denied that the names of the suspenders were inserted. Supposing, therefore, that it was irregular to insert the names of the other parties, it was at all events a proper defence for the suspenders. The Sheriff, however, rejected it in toto. A petition was then lodged in name of the suspenders, praying to be reponed, and the defence received; but this also was rejected, because it is said they did not consign in terms of the Act of Sederunt. But if the service copies were irregular, the defences ought to have been received, and at all events they were available so far as the suspenders were concerned; and therefore the question of expenses should at least be reserved.

No. 17. Nov. 18. 1828.

LORD GILLIES.—I think there was rather sharp practice on the part of the charger; but the consignation was quite irregular.

LORD PRESIDENT.—We should remit to repone, on consignation of the expenses in the Sheriff Court.

Jameson.—That is just what the Lord Ordinary has done.

Skene.—But he has found us liable in expenses here.

LORD PRESIDENT.—You were in fault; but perhaps you should not be liable in full expenses.

THE COURT accordingly 'remitted to the Lord Ordinary to alter his interlocutor, in so far as it finds the suspenders liable in the expenses of the first bill of suspension, and to find no such expenses due; but, quoad ultra, adhere to the interlocutor complained of.'

J. CULLEN, W. S.—W. WADDELL, W. S.—Agents.

No. 18.

COMMISSIONERS of the HARBOUR of LEITH, Suspenders.—*Cockburn—Skene—Marshall.*

MAGISTRATES of EDINBURGH, Chargers.—*D. of F. Moncreiff—Sol.-Gen. Hope—L'Amy.*

Harbour—Jurisdiction—Admiralty.—Held,—1.—(In passing a bill of suspension,) That the Commissioners of the Leith harbour and docks are not compellable to aid the Magistrates of Edinburgh in levying harbour-dues;—and,—2.—That a question as to whether they might be compelled to keep the drawbridge of the harbour and the gates of the docks shut, was not maritime; and therefore a bill of suspension of an interdict by the Judge Admiral passed.

Nov. 18. 1828. 1ST DIVISION. Bill-Chamber. Lord Balgray.

BY the statutes 28th Geo. III. c. 58, 38th Geo. III. c. 19, and 39th Geo. III. c. 44, the Magistrates of Edinburgh were empowered to levy, in the most summary form, certain shore-dues on vessels entering or departing from the harbour of Leith. By a table published on the 20th of May 1763, they announced that dues under the name of pilotage, birthage, and flaggage, should be exacted, and these were increased by a subsequent table published on the 20th of August 1788, in which the mode of exaction and payment was pointed out. In virtue of these tables, it was alleged by the Magistrates that they had been in the practice of preventing vessels from sailing until the dues were paid, and that they annually obtained a precept from the Court of Admiralty for enforcing payment by arrestment.

By the first section of the 7th Geo. IV. c. 105, it is enacted, that the Magistrates 'shall continue by themselves, or by their officers, servants, and other persons to be appointed by them, to levy, collect, and receive all shore and harbour dues, and other dues which they are entitled to levy, collect, and receive in the said port and harbour of Leith; and also to levy, collect, and receive all dock-duties, and other duties which they are entitled to levy, collect, and receive in the said port, harbour, and docks, in virtue of the said recited acts, or any of them.'

By the second section, certain Commissioners were appointed 'for superintending, managing, and directing all matters in regard to the

No. 18. Nov. 18. 1828.

interdict to the Judge Admiral,* praying 'for letters of suspension 'and interdict in the premises, prohibiting, interdicting, and dis- 'charging the Commissioners for the superintendence of the docks 'and harbour of Leith under the act 7th Geo. IV. c. 105, Captain 'Patrick Dall, superintendent of said docks and harbour, and James 'Wilson, harbour-master, and all other harbour and dock officers, 'bridgemen, or others acting under them or by their orders, or in any 'way employed at the harbour or docks at Leith, permitting or allowing, 'in any way, any ship, sloop, brig, or other vessel or boat of any descrip- 'tion whatever now in the harbour or docks, or which may at any time 'enter the harbour or docks, from departing from or leaving said har- 'bour or any part thereof, and said docks, without previously having 'paid the harbour, dock, and shore dues, comprehending in particular 'birthage, flaggage, and pilotage dues, conform to use and wont, and 'more particularly as contained in the tables of 1763 and 1788 herewith 'produced, or as specified in said mentioned statutes; or without having 'and exhibiting a receipt from the collector thereof of the same having 'been paid, or other proof of the payment thereof; and for that pur- 'pose to interdict, prohibit, and discharge the said Commissioners, or 'any of them, or the said persons employed by them, from opening or 'permitting to be opened any dock-gate or drawbridge, or other barrier 'connected with and belonging to said harbour and docks, for the pur- 'pose of permitting or furthering any such ship, vessel, or boat leaving 'said harbour and docks before payment of such dues, and a receipt from 'the collector thereof, or other proof of payment exhibited to that effect; 'and further prohibiting, interdicting, and discharging all owners, mas- 'ters, captains, and managers of any ship, vessel, or boat frequenting 'said harbour and docks, from allowing, or aiding, or assisting any such 'ship, vessel, or boat to leave said harbour and docks without the fore- 'said dues being previously paid, conform to use and wont, and to the 'said tables and acts of Parliament, or without a receipt from the col- 'lector of said dues for the amount of the same due on such vessel, ship, 'or boat, or other proof of the payment of the same exhibited to the 'officers appointed by the Commissioners in charge of the harbour and 'docks, and empowered to allow vessels to depart from the same; or to 'do otherwise in the premises, as to your Lordship may seem meet.'

In defence, the Commissioners stated that they were not bound to interfere at all in the matter; that if the Magistrates had right to the dues, they ought to try the question with a party resisting payment; that the Commissioners could not be called on to exercise the office of functionaries for the Magistrates in levying their revenue; and that if they were to interfere, they might expose themselves to claims of damages, more especially as the exaction of the dues appeared to be illegal.

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* No objection was stated to the competency of such a mode of proceeding.

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to exact the dues by detention of vessels, there are unquestionably no powers in the statute conferred on us to resort to such a mode of proceeding. On the contrary, we are expressly prohibited from interfering; and yet the Judge Admiral has in fact ordered us to interfere, by granting interdict in terms of the prayer in the bill of the Magistrates.

Dean of Faculty for the Chargers.—The right to the dues is vested in the Magistrates; power is given to them to levy them; and they have been in possession since 1763. Prior to the late statute, they had the means in their own hands of enforcing this right; but thereafter the superintendence of the harbour was transferred to the Commissioners. For some time these Commissioners gave their aid to the Magistrates, by keeping the gates and bridges shut; but they more lately rescinded their orders to that effect, so that they have attempted to invert the state of possession. This, therefore, is a possessory question; and we are entitled to have an interdict, to the effect of prohibiting the Commissioners from opening the gates or bridges, and so permitting vessels to sail. The Custom-house might no doubt lend their assistance; but they have declined to interfere, and we cannot compel them.

Lord President to *Skene.*—Speak to the point as to the rescinding of your resolution, and also to this, Whether, as the harbour is the property of the Magistrates, and the duties are theirs, you, as Commissioners for superintending the harbour, are not in the situation of their servants, just as in the case of a tollman appointed to attend at a turnpike gate?

Skene in reply.—On looking at the act, an answer will be seen to the case put by your Lordship. In that case there can be no doubt of the legality of the exaction of the tolls—that the tollman is the proper person to levy them,—and that he may enforce his demand by shutting the gate. But in this case (assuming that the exaction of the duties is lawful) we are not only not bound to collect or levy them, but are expressly prohibited from doing so. This belongs to the Magistrates alone, and they may do so by means of their own functionaries. But we are not their toll-gatherers; and on what ground can we be compelled to do that which we are actually prohibited from doing? There is, therefore, no similarity between the case of a tollman and the present one. As to the rescinding of the resolution, it can make no change on the question; and when we saw disputes arising, we were entitled to say that we would not interfere.

Lord Balgray.—There must be some remedy in this case, and, in order to discover it, we must attend to the general principles of law. The Magistrates, as proprietors of the harbour, are entitled by the common law to prevent any vessel from sailing until the dues are paid. This, I apprehend, is undoubted. By the Act of Parliament, the superintendence of the harbour is given to the Commissioners; and therefore, unless they lend their aid, the right of detention, and consequently payment of the duties, may be evaded. Accordingly we see that

No. 18. Nov. 18. 1828.

tend the harbour, so as to keep it in repair, yet it may be very doubtful whether they have any right to interfere with the shutting or opening of the gates and bridges at all. This, I conceive, belongs to the Magistrates, or at least that they are entitled to avail themselves of the power of doing so, to the effect of levying payment of the dues. As this, however, is a view of the case which has not been argued, I should wish to consider more attentively the Act of Parliament. At present I do not see any thing to prevent them from appointing a person to enforce payment of the duties in the above manner.

Solicitor-General.—We nominated harbour-masters, but the Commissioners resisted them.

Lord President.—Your prayer is not for an interdict against their being prohibited from interfering with your officers in the execution of their duty, but that they shall not be permitted to open the gates and bridges.

Cockburn.—Their bill and prayer proceed on the assumption that the power of opening and shutting them is vested in the Commissioners, and the interdict is asked upon that footing.

Lord Gillies.—Although I am quite clear that we cannot compel the Commissioners to interfere in one way or another, yet I think the Magistrates may enforce payment in the manner which your Lordship has suggested.

The Court accordingly (after taking time to consider whether this was to be regarded as a maritime or mercantile case) recalled the interdict, and passed the bill.

J. Pein, S. S.C.—MacRitchies, Bayley, and Henderson, W. S.—Agents.

No. 19.

W. Wallace and Others, Pursuers.—*Ivory.*
W. Horn, Defender.—*Jameson—A. M'Neill.*

Nov. 18. 1828. 2d Division. Lord Medwyn. T.

This was a question of expenses. The Lord Ordinary, while he dismissed an action at the instance of Wallace &c. v. Horn, found no expenses due. The Court adhered.

A. Forsyth,—C. Fisher,—Agents.

No. 20.

R. Thomson, Advocator.—*Forsyth.*
A. Young, Respondent.—*D. of F. Moncreiff—Cuninghame.*

Reference to Oath—Landlord and Tenant.—Circumstances in which a landlord not entitled in a process of sequestration to refer to the oath of a party alleged to be his tenant, whether a lease for a term of years, at a higher rent than he had accepted for ten years from the person in possession of the farm, had been constituted by missives defective as to the term of entry and period of endurance; and Observed, that it was incompetent for one of two parties to refer to the oath of the other whether they had been engaged in a contrivance to defraud the revenue.

Nov. 18. 1828. 2d Division. Ld. Cringletie. B.

The advocator Thomson, proprietor of a farm called Queyholm in the county of Lanark, presented, in 1824, a petition to the Sheriff, setting forth that the respondent Alexander Young was his tenant in the farm, (which was possessed by William Young, Alexander's brother,) at the

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not constitute a tack, and that it was incompetent to prove by oath a lease for a term of years, which could only be constituted by written instruments. 2. That Thomson could not be allowed to attempt to prove by oath statements contradicted by the receipts under his own hand; and, 3. That in particular it was impossible to admit a reference to the oath of one of two parties an alleged criminal contrivance between them to defraud the revenue.

The Sheriff refused the reference, in respect that 'the interlocutor finding that the missives founded on do not constitute a tack has been acquiesced in by the pursuer, and in respect that, in tacks of longer endurance than one year, writing is indispensable'; and that, in such cases, proof by the oath of party is incompetent.'

Thomson brought an advocation; but the Lord Ordinary, for the reasons given by the Sheriff, found the reference incompetent, and remitted simpliciter. The Court unanimously adhered.

LORD ORDINARY.—On full consideration of the whole circumstances of this singular case, the Lord Ordinary does not think that if the facts offered to be proved by the respondent's oath were all admitted, they would support the libel against Alexander Young. For, let it be supposed that on the missives he entered into possession, and that his rent was £146, notwithstanding the advocator's receipts for £95, which he must allow were fraudulent, to impose on the revenue officers, still the possession was for two years only. At the end of that period, the missives were both placed in the advocator's possession. Let it be admitted that this was for the sake of custody and preservation. Does Alexander Young continue in possession? No. William Young got into possession, which he retained for ten years, paying rent, as the tenant, to the advocator, and getting receipts from him, not as a subtenant of Alexander, but as tenant, and, without dispute, never paying £146 of rent, or near to it. No other legal conclusion, then, can follow, than that the lease (if there ever was one for £146 of rent) to Alexander Young was abandoned; and after allowing him to go out of possession, without challenge, for no less than ten years, and the farm to be occupied by another paying rent to the advocator, it appears to the Lord Ordinary that it would be the height of injustice to raise up these old defective missives as a lease against Alexander Young.

LORD GLENLEE.—I am not for altering this interlocutor. This is a mere process of sequestration of the stock and cropping which belongs to William Young, the person in possession of the farm, without any conclusion for payment; and all we could possibly do, even if we thought Alexander Young a proper party, would be to grant the sequestration. Then William says he is not a subtenant, and admits that he is a principal and only tenant; but the landlord turns round and leaves him, and proposes, for the sake of raising up a higher rent, to refer to the oath of another person, who is a third party as to him. I think the reference cannot be allowed.

LORD ALLOWAY.—This is a most singular case. But, before we can move a step, the advocator must make out that Alexander Young entered into a lease with him for £146. As his own receipts, however, show that Alexander has been long out of possession, it would be very singular if we could allow this re-

ference to his oath. But I have great difficulty on another point. The party here is called upon to acknowledge himself guilty of a contrivance to defraud the revenue. Now, we can never allow this man to be called upon to acknowledge this on oath. But even the reference, if competent, is not sufficient, as the whole issue is, whether this man continued to be the principal tenant after he gave up possession; and the facts offered to be proved would not establish that.

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LORD JUSTICE-CLERK.—I am clearly of the same opinion. Considering the nature of the process, I hold it to be incompetent altogether. But besides, as to the other matter, however attempted to be disguised, we see the true nature of the transaction offered to be established by the respondent's oath; and we cannot allow it to be proved by the oath of one of two parties that they entered into a contrivance to defraud the revenue.

LORD PITMILLY.—I agree.

J. GRAINGER, W. S.—W. WADDELL, W. S.—Agents.

*** THIS was a Teind day, and the Court announced that in future they would, immediately after the Teind business was finished, proceed to sit in their respective Divisions, as in the Court of Session, and hear and decide summary Cases.

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It may also be mentioned, that the Court have repeatedly complained of papers being boxed to them, marked '*corrected copy*,' after other copies had been previously boxed, without stating in what the correction consisted, whereby great and unnecessary trouble is occasioned to their Lordships; and that, in reclaiming against Bill-Chamber interlocutors pronounced during vacation, the agents do not attend to the circumstance that the note ought to be addressed to the Division to which the Lord Ordinary belongs.

J. BUCHANAN and W. PATERSON, Pursuers.—*D. of F. Moncreiff—Wilson.*

MAGISTRATES of DUNFERMLINE and Others, Defenders.—*Rutherfurd—Neaves.*

No. 21.

Triennial Prescription.—An entry in a state of affairs of a sequestrated estate, made up by an accountant, under the authority of the creditors, bearing that a debt was due by the estate, and an allocation having been made on the creditors accordingly; and there being no entry or allegation of payment—*Held* sufficient to elide the plea of triennial prescription, although the entry was within three years from the last article in the account.

THE estates of Robert Hutton, tenant of the coal belonging to the town of Dunfermline, after having been managed under a private trust, were sequestrated on the 1st of July 1807, and John Wilson appointed interim factor; on which occasion the creditors 'recommended to the 'factor to carry on the Dunfermline Colliery, in the same manner as it 'had been done under the voluntary trust, till a trustee is chosen under 'the statute.' He was afterwards elected trustee, and was directed by

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1st DIVISION. Lord Meadowbank. D.

No. 21. Nov. 20. 1828.

the creditors 'to proceed in the management as heretofore,' and in particular to get the machinery put into a proper state. A person of the name of Geddes was employed to act as overseer and manager of the colliery, which was carried on by the creditors for some time.

Between May and December 1810, the pursuers Buchanan and Paterson furnished several quantities of wood, by the order of Geddes, to the extent of £64: 5: 2, for the use of the colliery, but which was reduced to £58: 2: 10 by coals being delivered to them. Wilson resigned in January 1811; and Parker having been elected trustee, the colliery was soon afterwards sold by public roup. At a meeting held by the creditors on the 2d of March 1811, they resolved, 'that in order to ascertain the 'claim of advances made, and engagements come under by the trustee, 'commissioners, and principal creditors, for carrying on the colliery, it 'will be advisable to lay the state of the trustee's intromissions, with the 'whole claims upon the estate, before an accountant in Edinburgh, in 'order to allocate and proportion these amongst the concerned; and that 'William Wotherspoon, accountant in Edinburgh, should be named to 'investigate and examine the whole remaining claims upon the estate, 'and to allocate the same upon the different creditors.'

A report was accordingly framed by Wotherspoon, in which there was an entry of the debt due to the pursuers under the head of expenditure or loss, and under another branch it was, with other debts, allocated upon the creditors respectively. This report brought the state of affairs down to the 31st of December 1812. Thereafter Parker resigned; and Wotherspoon, having been elected trustee, brought an action against several of the creditors who had been ranked on the estate, concluding for their respective shares of the loss. The summons was dated in 1813, and afterwards fell asleep, but none of the present defenders were parties to it. Wilson, the former trustee, also brought an action for payment of a share of the loss due to him, in which the defenders were called as parties. After a remit had been made to Mr. Ferrier, accountant, and after considerable litigation, judgment was pronounced, on the 17th of May 1822, in favour of Wilson. (See ante, Vol. I. No. 474.)

In April 1823, the pursuers Buchanan and Paterson brought an action against the whole of the creditors who had been ranked on the estate, concluding for payment of their debt of £58: 2: 10, with interest from the 10th of January 1811.

In defence, the triennial prescription was pleaded. On the other hand, it was alleged that it was elided by the entry in the above report.

The Lord Ordinary, 'in respect it is stated in the record that the report founded on is dated in 1812, sustained the defence of prescription, 'assoilzied the defenders, and found expenses due.'

The pursuers reclaimed; and the Dean of Faculty, having risen to support the reclaiming note, was at first stopped by the Court, when

Lord Balgray observed that prescription could not be pleaded with effect in this case. The creditors formed a corporation, in which

each was the employer. The trustee was their functionary, and, No. 21.
the entry in the account made up under the authority of the creditors, Nov. 20. 1828.
without any counter entry of payment, was a sufficient writ of party to elide the prescription, just as in the case of the magistrates of a burgh.

Dean of Faculty.—The point was expressly decided in the case of Leslie against the Magistrates of Brechin, 15th November 1808, and also in the course of the litigation with Wilson.

Lord Balgray.—I wish to hear what the defenders have to say in support of the interlocutor.

Rutherfurd for the Defenders.—It is quite true that the case of Leslie has established a rule that prescription, when pleaded by a corporation, may be elided by an entry of the debt in their books, and no counter entry of payment. But the question here is, whether the same rule can apply to this case, which is not that of a corporation? The account, on the face of it, is prescribed, and we plead prescription. The interlocutor sustains the relevancy of this plea; and the question therefore comes to be, whether it is elided? This can only be done by the writ or oath of party. There is no oath; but it is said that they have writ. This writ consists of the report, not of the trustee, but of Wotherspoon, his private agent, employed to make up a vidimus of the affairs of the estate. It is true that the debt is there mentioned as being due; but that report is erroneous, was so found by Mr. Ferrier in the process with Wilson, and was not acted upon. It is not the writ either of the creditors or of their trustee. Besides, even supposing it were to be regarded as such, still, as the debt was contracted in December 1810, and the report is dated in December 1812, it falls within the currency of the three years. But as the triennial prescription is rested on the presumption of payment, it is impossible to hold this document as eliding that presumption.

Lord President.—It is a mistake to say that Wotherspoon was merely a private agent of the trustee; he acted on a remit by the creditors.

Dean of Faculty.—The case stands thus:—Prescription is pleaded, but payment is not alleged; and there is sufficient evidence of the constitution of the debt. There is then Wotherspoon's report, made on the employment of the creditors, in which the debt is entered as due. This is followed by an action at the instance of Wotherspoon as trustee, founded upon that report, and concluding against the creditors for their respective shares. As we, therefore, have that which must be regarded as the writ of the creditors, they must show payment; but this they have not even alleged.

Rutherfurd.—The action alluded to has been abandoned, and the parties called in this one were not included in it.

Lord Craigie.—There is sufficient evidence of the subsistence of the debt; and as there is none of payment, the interlocutor must be altered.

The other Judges concurred.

The Court accordingly altered the interlocutor, and decerned in terms of the libel.

D. Wilson, W. S.—A. Pearson, W. S.—Agents.

No. 22.

J. CARRUTHERS and Others, Pursuers.—*Thomson.*
H. JOHNSTON, Defender.—*Anderson.*

Process—Reduction—Title to Pursue.—1.—An individual being called as defender in a reduction under the designation of H. J. banker in Leith, allowed to give in a reclaiming note as H. J. manager, and for behoof of the Leith Bank.—2.—Circumstances in which decree of certification contra non producta recalled, and diligence granted, without payment of previous expenses.

Nov. 20. 1828.
2D DIVISION.
Lord Newton.
F.

CARRUTHERS and others having raised an action of reduction against 'James Ker of Blackshiells, Esquire, Henry Johnston, banker in Leith,' and the other individual partners of the Leith Banking Company, and also against 'the said James Ker and Henry Johnston, managers of 'the said company,' calling for production of certain bills and letters, the defenders produced the whole documents called for, with the exception of two,—viz. a bill for £162: 13: 7, and a letter to one of the pursuers themselves, both of which, in their inventory of productions, they stated to be in the possession of the pursuers. Three terms were severally assigned for satisfying the production, but the pursuers never intimated that they were not to produce these two documents; and after the expiry of the third term, when the defenders craved a diligence for their recovery, this was opposed by the pursuers, on the ground that the application was too late, and they therefore craved decree of certification contra non producta.

The Lord Ordinary having pronounced decree of certification, a reclaiming note was presented in name of Henry Johnston, one of 'the 'managers, and for behoof of the Leith Bank.'

On this note coming to be advised,

Thomson, for the Pursuers, objected that the note was incompetent, as being presented by Johnston in his character of manager of the Leith Bank, while that body had not qualified themselves to sue by their manager, in terms of the 7th Geo. IV.; and he was proceeding to state in what respect they had failed to comply with the provisions of that statute, when he was stopped by the Court, who held that, however that might be, Johnston, being called as a defender, was entitled to give in a reclaiming note, and that the alteration of his designation from 'banker 'in Leith' to 'manager of the Leith Bank,' did not render the note incompetent. On the merits he then stated, that though the defenders were in possession of the bill in question, it had come into their hands since the decree of certification had been pronounced, (it being admitted, however, to have been previously in the hands of a person holding it for their behoof); and he contended that the defenders should have asked a diligence in proper time, and that they could not be reponed without at least payment of previous expenses.

The Court unanimously recalled the Lord Ordinary's interlocutor, and remitted to grant a diligence, reserving the question of expenses on both sides.

W. DALRYMPLE, S. S. C.—J. BISSET, S. S. C.—Agents.

TRUSTEES of LEITH WALK, Advocators.—*Sol.-Gen. Hope—Rattray.* No. 23.
DR. HOME and Others, Respondents.—*Cuninghame.*

Road—Leith Walk.—Held,—1.—That a party having a property immediately adjacent to Leith Walk is entitled to form crossings over the foot-path;—and,—2.—That he is not compelliable to do so in a more expensive form than that of others originally made by the trustees across other parts of the foot-path.

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1ST DIVISION.
Lord Meadowbank.
H.

DR. HOME of Whitfield is proprietor of a piece of ground extending about 300 feet in front along the east side of Leith Walk, by which alone he has access to his property. The trustees, several years ago, formed a foot-path of flag pavement upon that side of the walk, with occasional crossings, so as to give access to adjacent properties; and Dr. Home being lately desirous to have crossings to his property, and those originally formed having been made with dressed whinstone or causeway, he applied to the trustees for permission to make two crossings of that description. In answer, the trustees wrote, that they had 'now resolved not to allow 'any crossings to be made on that side of the walk laid with flag pave-'ment, unless such crossings are made of Craigleith ashlar stone twelve 'inches deep, six inches thick, and from twelve to eighteen inches long, 'with a crib-stone at each side. Dr. Home has therefore permission, upon 'these terms, to make the two crossings he alludes to at his own expense.' This he declined to do, and obtained access for carriages to his property by laying a quantity of earth in the water-channel, and driving them across the foot-path. The trustees thereupon presented a petition to the Sheriff of Edinburgh, praying for an interdict against Dr. Home and his tenants 'from crossing with carts the flag pavement of Leith Walk, unless 'a proper crossing shall be previously made by them, and at their ex-'pense, of Craigleith ashlar stones twelve inches deep, six inches thick, 'and from twelve to eighteen inches long, with a crib-stone at each side; 'and thereafter to declare the interdict perpetual.'

In defence, he stated that he was perfectly willing to make crossings similar to those already formed, and that if the trustees wished to have them of a different description, they were bound to make them at their own expense.

The Sheriff-substitute pronounced this interlocutor:—'Finds that the 'Act of Parliament founded on by the pursuers, and in particular the 'Act of Parliament 3d Geo. IV. c. 45, § 3, giving to the pursuers 'power to lay the foot-path on Leith Walk with flags, do not give to the 'pursuers a right to prohibit access to carts and carriages across the foot-'path to adjoining properties, except upon the condition of the proprie-'tors constructing the crossing in the special manner prescribed by the 'pursuers, and that the crossing of dressed whinstone offered by the de-'fenders is as much as can be required of them, reserving to the pur-'suers to make a sufficient crossing of a different description, upon their 'paying from their own funds the difference between a crossing of 'dressed whinstones, and a sufficient crossing of a different kind pre-

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'ferred by them; and therefore, in hoc statu, dismisses the conclusion 'for interdict, and for repairing the damage alleged to have been done to 'the flags; but appoints the defenders, within four days, to remove the 'rubbish put down by them in the water-run, with certification that 'otherwise warrant will be granted for removing it at their expense; and, 'to that effect, supersedes further consideration of this case; reserving 'to the defenders to construct and employ moveable steps of wood or 'stone for passing from the causeway to the foot-path, until a proper 'crossing shall be constructed: Finds the pursuers liable in three fourth 'parts of the expenses incurred by the defenders.'

The trustees having appealed to the Sheriff-depute, he, after visiting the premises, adhered, in so far as regarded the crossing at the upper part of the walk; and thereafter, 'with regard to the first crossing men-'tioned in the petition, or the crossing at the under end of the property 'in question, allows the defender to lift seven feet and a half of this 'crossing from the south to the north side, and also to lift the flag pave-'ment and crib-stone, and to lay them in as sufficient and substantial a 'manner as the other parts thereof; the above operations to be done at 'the sight and to the satisfaction of Mr. John Thin, overseer of the 'Middle District: Finds the defenders liable in the expenses of Mr. 'Thin's superintending the said operations.'

The trustees having brought an advocation, the Lord Ordinary remitted simpliciter; and the Court, being unanimously of opinion that the interlocutors of the Sheriff were right, adhered.

D. Turnbull, W.S.—R. Rutherford, W.S.—Agents.

No. 24.

A. Scot, Suspender.—*Skene—Marshall.*
H. Johnston (for the Leith Bank,) Charger.—*Jameson—Anderson.*

Nov. 21. 1828. 1st Division. Bill-Chamber. Lord Newton. D.

This was a bill of suspension of a charge for a debt, presented after a bill of suspension of a threatened charge, on the same grounds as those now pleaded, had been refused by the Court. The Lord Ordinary refused it as incompetent, and the Court adhered.

T. Small, W.S.—J. Bisset, S.S.C.—Agents.

No. 25.

W. Ramsay, Suspender.—*J. W. Dickson.*
Preston and Rutherford, Chargers.—*Graham Bell.*

Arrestment.—Circumstances under which an arrestment was held not a relevant reason of suspension of a charge for payment of the sum arrested, and the party using it called to the Bar to state whether he had authorized it.

Nov. 21. 1828. 1st Division. Bill-Chamber. Lord Newton. S.

After a bill of suspension by Ramsay of a charge by Preston and Rutherford for payment of a sum of money had been refused by the Court on the 16th of February last, he presented another bill, alleging that an arrestment at the instance of one Small had been executed against him on the dependence of an action against Preston and Rutherford.

To this it was answered, That the arrestment had been used on the dependence of an action of damages for £1000, at the instance of Small, a poor obscure person, who disclaimed it; and as the summons had never been executed, and the arrestment was dated so far back as the 1st of March, it had lost its effect by undue delay. The Lord Ordinary refused the bill, and issued this note:—'The Lord Ordinary would have refused the bill when presented, had it not been for the arrestment. He thinks it highly probable that the action, on the dependence of which the arrestment bears to be laid, was never meant to be insisted in; but at all events, as the summons has not been executed, and four months have elapsed since the date of the arrestment, he conceives this such undue delay as to render this diligence ineffectual.'

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Ramsay having reclaimed,

Lord Balgray observed, that although it was competent to arrest on a dependence, yet it was the duty of the Court to see that it was not made use of for an improper purpose, and therefore proposed that both Small and the agent for the suspender should be examined at the bar. Small accordingly appeared, and stated, that having been informed that the chargers had been throwing out imputations against his moral character, he had given verbal authority to raise the action and execute the arrestment, but did not mean to insist further. The Court therefore found it unnecessary to examine the agent; but, for the reasons assigned by the Lord Ordinary, they adhered to his interlocutor.

Chargers' Authority.—2. Bell, p. 73.

R. Cairns, S. S. C.—Low and Rutherford, W. S.—Agents.

J. Donaldson, Appellant.—*Jeffrey—Monteith.*

D. Chapman, Respondent.—*D. of F. Moncreiff—Sol.-Gen. Hope.*

No. 26.

Jurisdiction—Circuit Court—Water Bailie of Glasgow.—The judgments of the Water Bailie of Glasgow are not subject to review by appeal to the Circuit Court of Justiciary under the 20th Geo. II. c. 43.

By the 20th Geo. II. c. 43, which first created the appellate jurisdiction exercised by the Circuit Courts of Justiciary in civil matters, it is enacted, 'That it shall and may be lawful to and for any party or parties conceiving himself or herself aggrieved by any interlocutor, decree, sentence, or judgment of the Sheriff or Steward Court of any county, shire, or stewartry, or of the Courts of any royal burgh, or burgh of regality or baronry, or of the Court of any baron or other heritor having such jurisdiction as is not abrogated or taken away by the said act &c., to complain and seek relief against the same by appeal to the next Circuit Court of Justiciary,' &c. In the burgh of Glasgow there has long existed an Admiralty Court, held by one of the Bailies called the Water Bailie, who is annually elected along with the other Magistrates. This jurisdiction was conferred and confirmed by certain royal

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charters, particularly two granted in the years 1636 and 1638. The first of these grants, among other privileges, 'libertatem, usum, et possessionem 'quam dict. burgus noster de Glasgow et Magistratus ejusdem habuerunt 'eligendi unum ballivum qui aquæ præsit, lie Water Bailie, infra dict. 'fluvium de Clyde, ubi mare fluit et refluit, et infra integras bondas 'ejusdem subtus pontem de Glasgow ad lie Clochstane, et corrigendi 'omnes injurias et enormitates super dicto fluvio commiss. infra bondas 'ejusdem.' The charter of 1638, again, erecting the burgh of new, contains these clauses:—'Ac cum libertate dicti fluvii de Clyde, ex utroque 'latere, a ponte de Glasgow ad lie Clochstane, nec non cum libertate et 'immunitate navium stationum lie of the roadis of Inchgreen Newark 'port of the Rig, vel alicujus alterius navium stationis infra dict. 'fluvium infra pontem de Glasgow et lie Clochstane prædict., pro oner-'ando et exonerando mercimonia et bona ad dict. burgum, burgen., et 'inhabitantes spectan.' &c. And, 'Præterea, nos, cum consensu prædict., 'creavimus, fecimus, et constituimus propositum et ballivos dicti burgi 'nostri, eorumque successores, justiciarios pacis infra dict. burgum nostrum '&c., et infra dict. portus de Inchgreen Newarke et port of the Rig; ac 'etiam cum potestate dict. Magistratibus dicti burgi de Glasgow eligendi 'annuatim ballivum qui aquæ præsit, ad corrigendum injurias et enor-'mitates super dict. fluvio committendas infra bondas supra specificat.'

In virtue of these charters, the Water Bailie exercises a jurisdiction which is now held, in conformity with long usage, to extend to civil as well as criminal maritime causes. In 1826, the respondent Chapman, tacksman under the Magistrates of Glasgow of the river and harbour dues leviable at the Broomielaw, (the harbour of Glasgow,) raised an action before the Water Bailie against the appellant Donaldson for payment of a sum of £8. 15s., as the amount of dues alleged to be leviable upon certain quantities of slates which had been imported by him at the Broomielaw. After considerable procedure, the Water Bailie pronounced a judgment, decerning for payment of the dues claimed, and Donaldson thereupon presented an appeal to the Circuit Court of Justiciary held at Glasgow in April last. To the competency of the appeal, however, it was objected, that the Circuit Court had no jurisdiction, under the 20th Geo. II., to review judgments of the Water Bailie; and Lord Alloway, before whom the appeal came to be heard, with concurrence of the Lord Justice-Clerk, who was likewise on the Circuit, certified the cause to this Court on Cases, with a view to have the question of jurisdiction authoritatively determined.

Pleaded for the appellant:—

The jurisdiction of the Water Bailie is, in fact, a jurisdiction vested in the Magistrates, though exercised by one of their number specially but annually elected for this purpose, as clearly appears from the terms of the charters; for that of 1636, while it empowers the Magistrates to elect a Water Bailie 'qui aquæ præsit,' grants to them, and not to the Water Bailie, according to the grammatical construction of the sentence, the

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power 'corrigendi omnes enormitates et injurias supra dict. fluvio com- miss.;' and the charter of 1688 in like manner empowers them to elect a Bailie 'ad corrigendum enormitates' &c., and at the same time makes the Magistrates Justices of the Peace over the river, thus extending their jurisdiction over the whole space within which the powers of the Water Bailie are to extend. It is therefore the Magistrates who in reality exercise this jurisdiction through the intervention of one of their number, and the Water Bailie Court consequently must be considered as one of the Burgh Courts; and accordingly its judgments must be subject to review by the Circuit Court, just as those of the Dean of Guild Court would be, the statute expressly using the plural 'Courts of any burgh' &c.; while the singular 'Court' is used in reference to counties and stewartries, in order to provide for the case of there being more than one Court in the burgh.

For the respondents:—

The statute 20th Geo. II. created a new jurisdiction; and unless the Water Bailie Court of Glasgow can be brought within its express words, the jurisdiction as to it cannot be sustained. Now the jurisdiction exercised by the Water Bailie is of a peculiar nature, not incident to the ordinary powers of Magistrates of burghs; and the privilege granted to the Magistrates of Glasgow is not a power to exercise themselves an Admiralty jurisdiction, but to appoint an Admiral whose jurisdiction is separate and distinct from that of the Magistrates, and never can be understood to come within the description in the statute of 'Courts of any royal burgh,' which can only have reference to the ordinary and usual Courts existing in all royal burghs; nor can the Legislature be presumed to have given the Judges on the Circuit power to review the decisions of a Court exercising a jurisdiction so peculiar, and of a maritime nature, without having expressly and specially included it. Besides, the plural 'Courts' does not imply that more than one Court may exist in a royal burgh, whose judgment may be brought by appeal before the Circuit Court; but it is used in the plural as having reference not only to the case of royal burghs, but of burghs of barony and regality, and so required the use of the word in the plural; and at any rate there is no authority for holding that the Judges on the Circuit could receive appeals from the Dean of Guild Court, or any but the proper Burgh Court, in which the Magistrates themselves are Judges. And further, the circumstance that part of the space over which the jurisdiction of the Water Bailie extends is beyond not only the limits of the burgh, but even of the Glasgow Circuit, (the lower part of the Clyde within the Clochstane bordering the county of Argyle which is in the Inverary Circuit,) is of itself conclusive that the decisions of this Court were not intended to be subjected to the review of the Judges on the Circuit.

Lord Justice-Clerk. When this case came before Lord Alloway at the Circuit Court of Glasgow, I agreed in the propriety of reporting it, as I considered this point of competency to be one of some importance and difficulty. In

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determining, we must look to the Act of Parliament; and the question being as to the construction of an Act of Parliament, would be an answer to any thing like usage, if there were such; for, to sustain the jurisdiction of the Circuit Court in cases from the Water Bailie, they must be brought within the letter of the act. The words are,—'That it shall and may be lawful to and for any party or parties conceiving himself or herself aggrieved by any interlocutor &c. of the Sheriff or Stewart's Court of any county, shire, or stewartry, or of the Courts of any royal burgh'—if it had stopped here, the point might have been argued that, by the word 'Courts' in the plural, more than one Court in a royal burgh was intended; but it goes on—'or burgh of regality or barony,' thus including the Courts of such towns, as well as those of royal burghs; and therefore 'Courts' is naturally used in the plural; so that I see no reason to think that the statute intends any thing more than the Court of any royal burgh, the Court of any burgh of regality, and the Court of any burgh of barony. Then, does this imply that every sort of Court existing in a royal burgh, whose judgments are reviewable by the Court of Session, (as, for instance, the Court of Incorporated Trades of Dundee, from which we had a question lately,) are all reviewable by the Circuit Court? It is said the practice has been to review judgments of the Dean of Guild, but I cannot ascertain that any such practice ever existed. The Clerk of Justiciary has certainly some recollection of a judgment of the Dean of Guild of Cupar being reviewed in a Circuit Court, and I have discovered that three cases have occurred at Glasgow of appealing from the judgment of the Water Bailie; but the question of jurisdiction does not appear to have been raised in any of them. We are now, therefore, in the same situation as we were in regard to the review of judgments pronounced by Justices of the Peace, when that question was first stirred, after a very long practice of entertaining such cases. This is certainly a most extraordinary power of appointing a Water Bailie, having an extensive jurisdiction over persons not subject to the jurisdiction of the Magistrates. Therefore the question comes to be, whether, by the construction of the statute, we can hold it to be a proper Court of the burgh of Glasgow, such as the Dean of Guild Court? It is a most anomalous jurisdiction, and of an Admiralty nature; and there is no trace in the statute that the Court of Justiciary on the Circuit has any jurisdiction in such questions, and I do not think it was in the contemplation of the Legislature that they should be subject to any such review.

Lord Glenlee.—In so far as I have formed an opinion, I concur with your Lordship. It occurred to me, that we had first to consider whether the statute should have an extensive or restrictive construction; and as this is a new statute conferring a new jurisdiction, I think the construction must be restrictive, and that, to entitle the Circuit Court to exercise the jurisdiction of reviewing judgments of any Court, it must be expressly given, as, unless it be plainly within the words conferring the jurisdiction, it cannot be sustained. Now, as to the use of the word 'Courts' in the plural, I rather think that it is explained by the addition of burghs of regality and barony. But even supposing more Courts were meant than the proper Burgh Court, so as to include the Dean of Guild Court, still I would not think that it included this Court, as I conceive it must mean Courts the jurisdiction of which was entirely exercised within the proper territory of the burgh; and I cannot say that I am satisfied with the argument that the whole extent of the territory over which the Water Bailie has jurisdiction is made part of the burgh to that effect. It is said that the Magistrates are made Justices of the Peace

in certain ports. Over and above, however, is the power of naming a Bailie who shall exercise jurisdiction within the whole river, whether within burgh or not. But I do not think that makes it a proper Burgh Court, and I conceive the jurisdiction of the Circuit Court is confined to those which are to exercise their jurisdiction within the burgh alone. No. 26. Nov. 21. 18

LORD PITMILLY.—I have formed the same opinion. The question is, Whether this Court is, under the statute, one of the Courts of the Royal Burgh of Glasgow? I do not think the statute could have in view any such peculiar Court, and I think it only meant Courts common to all burghs; and if this was to have been included, it would have been specially mentioned. It is of importance also to consider that the Water Bailie has jurisdiction beyond the territories of Glasgow, and even beyond the Circuit of Glasgow, and within that which meets at Inverary. I therefore conceive that the appeal is not competent.

LORD ALLOWAY.—I also concur. This is a statutory question, and the Circuit Court has no power except in virtue of the statute. Now there is nothing in it as to maritime jurisdiction, and it would have been very extraordinary if, at the time when it was doubted whether the Court of Session could entertain Admiralty causes, the statute should have given to a committee of the Court of Session (in which capacity the Judges at Circuit sit on appeals) what was doubted if the Court itself could exercise. Then the question comes to be, Is this an Admiralty jurisdiction? And as it is so, I think the Circuit Court cannot review its judgments; for although the burgh has power to appoint the Admiral, it does not alter the nature of the jurisdiction, or make it a Burgh Court, any more than the Court of the Conservator at Campvere, because appointed by royal burghs. It is impossible to hold it to be a Burgh Court; so that even if we entertained cases from the Dean of Guild Court, I would hold that we could not do so here. And, independently of this, the great extent beyond the bounds of the Circuit, is of considerable weight; and, on the whole, I think it clear that we cannot sustain the jurisdiction.

THE COURT accordingly sustained the objection to the competency of the appeal, and dismissed the same, with expenses.

CAMPBELL and MACDOWALL, S. S. C.—T. GRAHAME, W. S.—Agents.

KIRK-SESSION of MONIMAIL, Suspenders.—*D. of F. Moncreiff—M'Neill.* No. 27.
A. ESPLINE, Charger.—*Sol.-Gen. Hope—Neaves.*

Mortification—Schoolmaster.—A sum being mortified for the purpose of teaching the youth of a parish, and reading at ordinary times in the kirk, and the interest being directed to be given to the schoolmaster and reader, (who generally precented,) and the latter office having been subsequently discontinued by authority or sanction of the church—Held, although the same person had always, since the date of the mortification (200 years ago,) been schoolmaster and precentor, that the schoolmaster of the parish was entitled to the interest of the mortified fund, notwithstanding his refusal to precent.

IN the year 1632, the then Lord Melville, principal heritor and patron of the parish of Monimail, by contract with the minister and elders, mortified a sum of 1000 merks, the purpose of which appeared from the following minute of the kirk-session, the only evidence now extant of the terms of the contract:—'Upon the twentie-first day of November Jvvji Nov. 21. 182 2D DIVISIO Ld. Cringlet F.

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'threttie and twa yeeris, the session being convenit,—forasmeikill as ane 'nobill and potent Lord, Robert Lord Melvill, out of his L. loive that 'he bears to the paroche of Monimail, and care in special that there be 'in all tymes heirefter ane schoole within the said paroche for teaching 'of the youthe, and speciallie the poor ones, and reading at ordinar tymes 'in the kirk, has presentlie given and reallie deleverit and mortifiet to 'the said usis all and haill the soume of one thousand merkis money of 'this realme, to be laid out upon lande or uther sufficient securitie for 'yeirlie annual rent, to be bestowit and given to the reader and school-'master presentit be his L. and his successoris, as at more length is con-'tenit in the contract past betwixt his L. on the one pairt, and the mini-'ster and elderis of the said kirk on the uther pairt. The minister and 'elderis, willing that the said contract for thaire pairtes be fulfillit in all 'poynts, and that the said soume sould not lye ydill, but sould be im-'ployit to the use that is appoyntit for, conforme to the contract fore-'said; James Arnot of Ferny hes borrowit and ressavit,' &c. By a previous minute of session in the year 1617, it appeared that the reader was then employed to precent, as well as to perform the duties incident to his office as reader. This minute was in these terms:—'The reader 'sall reade the scriptures before noon and after, betwixt the secound and 'third bell, and proclame the bandis of marriage, and tak up the psalm 'before and after sermone, conform to the order of the kirk.' From the date of this mortification, the person who was elected schoolmaster had always been also appointed precentor and session-clerk; but in the records of session the yearly sum arising from the mortified fund was stated as paid to the 'schoolmaster,' while a separate allowance was set down distinctly as paid to the 'precentor;' and, in the several bonds on which this sum was lent out, it was always described as being 'for behoof of 'the schoolmaster.'

In 1818, the charger Espline was elected schoolmaster of the parish; and he was thereafter appointed by the kirk-session precentor and session-clerk. In 1820, however, having been dismissed from the office of session-clerk, he refused longer to officiate as precentor. The kirk-session having, on this, resolved not to pay him the interest of the mortified fund, amounting to £3: 6: 8 yearly, Espline raised an action before the Sheriff of Fife, concluding for payment of this yearly sum, as belonging to him in his character of schoolmaster of the parish; and he contended, that the object of the mortification being for the support of a school, and maintaining a reader to read the Scriptures at the ordinary terms in the kirk, and the church having now discontinued the office of reader, he, as schoolmaster, was entitled to the whole proceeds of the mortified fund, although not required to read in church, and was not obliged to precent, which was not a duty incident to the office of reader. The reader, it was true, frequently precented in churches, but the office was totally distinct from that of precentor and precenting, and formed no part of its duties; and at any rate Lord Melville had mortified the sum, not to secure precenting,

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'and I oblige myself to retire your acceptances, or put you in cash eig
'days previous to their falling due, so that you may retire them yourse
'It is of course understood that I am to pay cellar rent, insuran
'against fire, and likewise to sustain all loss by leakage, falling off
'strength,' &c.

The spirits were deposited accordingly, and Shirreff granted accep ances to the amount of £6417, which he renewed when they became du Some months after this, a commission of bankrupt having issued again the London house of Stein, Smith, and Company, of which Stein was partner, he stopped payment in his Scotch distillery concern, and ex cuted a trust-deed of his property in Scotland in favour of Gibson an Brown, for behoof of his creditors, a short time before his renewed bil fell due. On this, Shirreff, without notice to the trustees, sold the spiri deposited with him for £7235, taking from the purchasers bills for the pric with which he retired the bills granted by him to Stein; and after deductin the sum of £180 : 17 : 6 as commission, and the further sum of £108 : 10 : as del credere commission on the sales, he paid the balance to Gibson, th trustee, who granted him a discharge. Thereafter the assignees unde the English commission raised an action of count and reckoning agains Shirreff for an account of the sales of the spirits. In this process, Shirre having claimed credit for the commission and del credere commission o the sales, the assignees objected that he was not entitled to sell, not withstanding the bankruptcy, till the bills actually fell due, and so coul not claim any commission at all; and, at any rate, that he was not entitle to a del credere commission, as he did not come under a guarantee fo the price. The Lord Ordinary found that he was entitled to make th sale of the spirits in question, 'but not to charge the commission thereon, and appointed him to put in an account of the sales on these principles He reclaimed and contended, 1. That the discharge by the trustee constituted a complete settlement of his accounts; and, 2. He averred in a condescendence allowed by the Court before answer, that, according te the custom of merchants, persons selling goods deposited with them in security, in circumstances similar to the present, were entitled to a commission on sales.

It was answered, 1. That Stein's whole funds being vested in English assignees by the commission of bankrupt prior to the date of the trust-deed, the trustees had no power to grant a discharge, which, besides, could not preclude the accounts being still opened up; and, 2. That the transaction here was simply a contract of pledge, well defined and known in our law, under which the creditor had only a right to be reimbursed of his advances and actual outlay, and that the custom of merchants could not apply to such a case.

The Court, holding that the Scotch trustees had no power to grant a discharge, at first adhered to the Lord Ordinary's interlocutor, being further of opinion that this was not a mercantile transaction which could be affected by the usage of merchants, but a mere pledge, where the cre-

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'the practice of trade, James Shirreff, entitled to 2½ per cent. of 'sale commission,'—and, on the second issue, 'entitled to 1½ per cent. de 'credere commission by the same practice,'—the pursuers tendered a bill of exceptions, which was thereafter presented to this Court, and counsel appointed to be heard thereon.

Forsyth and Cockburn for the Pursuers.—The law laid down by the Chief Commissioner is undoubtedly erroneous in principle, and it must be assumed that the verdict of the Jury on the usage in favour of the defender was the result of the erroneous direction in law.

Jeffrey and Rutherfurd for the Defender.—So far as regards the right to sell after the bankruptcy, the charge is not only correct in law, but the question has been decided by the interlocutor of the Lord Ordinary not brought under review by the pursuers, and is now res judicata; and as to the other point, the Judge did not lay down abstract principles of law, but made reference to the usage given in evidence, with a view to which alone the remit had been made, and his charge amounted in substance to this, 'If you are satisfied with the proof of usage, the law will 'sanction your giving effect to it;' which was, in fact, what had been decided by this Court in remitting the cause for trial.

The Court unanimously disallowed the bill of exceptions, with expenses.

Lord Justice-Clerk.—Not only from recollection, but from my notes, I see there was great diversity of opinion on former advisings. The interlocutor finding the defender entitled to sell, but not to commission, was brought under review by him; and three Judges adhered, and two were against it. Lord Craigie and myself were in the minority. We thought that the question depended upon usage alone; but it was decided otherwise. On a reclaiming petition, however, although Lords Pitmilly and Glenlee were still of their former opinion, Lord Robertson, Lord Alloway (who came in place of Lord Craigie,) and myself thought proof of usage should be allowed. A condescendence of practice was then given in, and the case remitted to the Jury Court; and I understood and see that the case was conducted upon usage alone. I am clearly of opinion that if the bill of exceptions was meant to raise a question that evidence of usage was not brought, the verdict should have been impeached upon that ground. If the verdict had been grounded upon law, it would have been in different terms. It is upon evidence alone; and there being no impeachment upon evidence, we are bound to hold the verdict well founded, unless it appears that such law was laid down as necessarily perverted the evidence, and drew the Jury's attention from the evidence. A party is not entitled to found upon every mere slip of the pen every hole which may be picked out in a Judge's charge, either when the bill of exceptions is made up on the spot or ex intervallo, (as I understand to have been the case here,) to overturn the verdict, if it does not necessarily affect it. As to the charge here, does not every part depend upon the concluding words 'if satisfied with the evidence given of the usage?' The pursuers' counsel wished to slur over this part altogether. It is of no consequence whether that clause be put at beginning or end of the charge objected to; the meaning will still be the same. As to whether it is good as an abstract pro-

No. 30.

DOWAGER LADY TORPHICHEN, Complainer.—*Fullerton.*
REV. A. BELL, Respondent.—*Jameson.*

Nov. 22. 1828.
2D DIVISION.
Bill-Chamber.
Lord Medwyn.
T.

Process—Bill-Chamber—A. S. 11th July 1828.—Reclaiming note, presented on the 13th of November, against an interlocutor of the Lord Ordinary refusing a bill of suspension at the instance of Dowager Lady Torphichen against the Rev. Mr. Bell, some time minister of Torphichen, refused to be received in respect of its not having the bill and answers appended in terms of the A. S. 11th July last.

TOD and ROMANES, W. S.—J. DICKSON, W. S.—Agents.

No. 31.

J. MUNRO, Petitioner.—*Rutherfurd.*

Public Records.—A warrant to transmit an extracted process from the public records refused, in respect it is competent to get certified excerpts of any part of it.

Nov. 25. 1828.
1ST DIVISION.
D.

MUNRO having obtained decree of absolvitor in a process at the instance of Fraser, which was extracted and transmitted to the Keepers of the Records, Shepherd, as trustee for the creditors of Fraser, afterwards brought a multiplepoinding in name of Munro, proceeding on the footing that he was indebted to Fraser. Munro objected to this process in respect of the absolvitor, and, with the view of supporting his objections, presented a petition to the Court, praying their Lordships 'to grant warrant 'upon and ordain the Keepers of the Records of the Court of Session to 'transmit the said decree, warrants thereof, and whole process, quam 'primum to the clerk to the said process of multiplepoinding in com-'mon form.' After it was intimated to the Depute-keeper, and appearance made by him, the Court, 'in respect the petitioner could obtain 'certified copies of the process, or any part thereof, as provided by the 'acts of Parliament, refused the desire of the petition as unnecessary.'*

Æ. MACBEAN, W. S. Agent.

No. 32.

J. JOHNSTON, Pursuer.—*Jeffrey—More.*
WEST of SCOTLAND INSURANCE COMPANY, Defenders.—*Sol.-Gen. Hope—M'Neill.*

Insurance.—It having been found by the verdict of a Jury that a house protected by a policy of insurance from damage by fire had been injured by the falling of the gable of another house in consequence of fire in that house—Held that the insurers were liable, although the house insured had not been on fire, and the gable of the other house had stood for two days after the fire was extinguished, and fell in the course of operations on it by order of the Dean of Guild, with the view of taking it down.

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* The acts are 50th Geo. III. c. 112, § 14, and 1st and 2d Geo. IV. c. 38, § 24.

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averred that although fire might have been the remote, it was not the proximate cause, and therefore they were not liable.

The following issue was thereupon sent to a Jury:—'It being admitted that the policy of insurance in process, dated February 11. 1824, was in force on the 25th of February 1825:

'Whether, between the 22d and 26th of February 1825, the property of the pursuer in Strichen's close in Edinburgh suffered such loss or damage as the defenders by the said policy undertook and promised to pay, and to what amount?'

The Jury returned a special verdict in these terms:—'That, in respect of the matters proven before them, they find that a fire broke out in Strichen's close during the night of Tuesday the 22d of February 1825, and was extinguished on Wednesday the 23d, and that several houses in said Strichen's close were destroyed by said fire, and in particular a house on the opposite side of the close to the insured premises of the pursuer, and that a gable of the said house remained standing after the fire, but so much injured by the fire, and in such a state, that the Dean of Guild and his Council apprehended imminent danger to the lives of the lieges by the falling of the said gable, and therefore, in the sound and proper exercise of their authority, granted warrant for taking down the gable; which operation was attempted on Friday afternoon, the 25th of the same month, under the direction of persons of skill appointed by the Dean of Guild, and who acted to the best of their judgment; and that in the course of their said operations, part of the said gable fell in consequence of the injury it had sustained by the fire, and struck against the insured premises of the pursuer, to which the fire had not communicated, whereby said pursuer suffered loss and damage: But whether, upon the whole matter aforesaid, the said pursuer is entitled to his action, the Jurors aforesaid are altogether ignorant, and therefore pray the advice of the Court; and if, upon the whole matter aforesaid, it shall seem to the Court that the said pursuer is entitled to his action, then the Jurors aforesaid find a verdict for the pursuer, and assess the damages at £389: 2: 5, together with legal interest thereof from the 26th day of March 1825 until paid, as libelled: But if, upon the whole matter aforesaid, it shall seem to the said Court that the said pursuer is not entitled to his action aforesaid, then the Jurors aforesaid, upon their oath aforesaid, find a verdict for the said defenders.'

The cause having been remitted to the Court of Session, the Lord Ordinary reported it upon Cases, and at the same time issued the subjoined note.*

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* 'The question involved in the present process being one of general importance, the Lord Ordinary has deemed it a proper case to take to report, presuming, too, that whatever his judgment might be, the intention of the parties was to have the point at issue settled, by bringing the matter under consideration of the Courts of Review. At the same time, the Lord Ordinary is of opinion that the case is not attended with much difficulty. He is quite clear that, in all questions of this kind, *fire* must be the proximate cause of the injury re-

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LORD GILLIES.—It has been ascertained by the verdict that the loss was sustained in consequence of the fire. It is true there was an interval of two or three days before the gable fell; but still the Jury say that the injury was in consequence of the fire, and therefore this interval can have no relevancy. The interference of the Dean of Guild was the act of the law. In short, this was a damnum fatale arising from fire, and as such falls within the policy.

LORD CRAIGIE.—I have considerable doubts upon this point, because it does not appear that, except for the interference of the Dean of Guild, the gable would have fallen.

LORD BALGRAY.—We must take the verdict as probatio probata of the fact, and the Jury say that the gable fell in consequence of the fire.

Pursuer's Authorities.—4. Murray's Reports, 191; 2. Park, 653, 7th edit.; 2. Marshall, 487; 4. Taunt. 126; 2. Bos. and Puller, 336; 5. Barn. and Ald. 107.

Defenders' Authorities.—5. Maule and Sel. 531; 4. Bing. 135; Marshall, 785, 3d edit. 4. Campbell, 361.

J. JOHNSTON, S. S. C.—J. ELDER, W. S.—Agents.

No. 33.

SCOTT and GIFFORD, Pursuers.—*Sol.-Gen. Hope—Russell.*
MILLER and KERR, Defenders.—*Jeffrey—Ivory.*

Title to Pursue—Proof—Registry Acts.—Held, in a question as to a title to pursue an action for recovery of the value of a vessel lost at sea on an implied insurance, that the certificate of registry was not, per se, conclusive evidence of the ownership of the vessel.

Nov. 25. 1828.
1ST DIVISION.
Admiralty.
S.

SCOTT and GIFFORD, registered owners of the vessel called the Earl of Dalhousie, raised an action before the Judge Admiral against Miller and Kerr, insurance-brokers in Glasgow, and Kerr and Son, merchants in Greenock, setting forth that Joseph Manticha, as the agent of the pursuers, had employed the defenders to effect insurance on the vessel from Greenock to a port in the Highlands, thence to Quebec, and thereafter to Dundalk and Greenock; that the defenders had been apprised that the ship was to call at Fort William for passengers; that, however, in effecting an insurance with the Sea Insurance Company, and by making reference to an insurance on another vessel, they had merely got leave to call at Tobermory; that in the mean while the vessel had sailed, and afterwards arrived at Fort William; that she sailed on the voyage to Quebec, but was lost in the course of it; and the Insurance Company had refused to pay the loss in respect of the deviation; and therefore the defenders were liable as insurers.

In defence, it was stated, inter alia, 1. That although, ex facie of the register, Gifford was one of the owners, yet in truth he was merely a trustee for Manticha, who, being an alien, could not, consistently with the registry acts, hold property in a British ship, or have an insurable interest, and therefore the title to insist was objectionable; and, 2. That in the course of the voyage to Quebec, after leaving Fort William, the vessel had deviated; and consequently, even supposing the defenders were to be regarded as insurers, they were not liable.

The Judge Admiral repelled the objection to the title of the pursuers,

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missible evidence for that purpose,—that proof that the Register Acts have not been complied with will defeat a title, but proof that they have been complied with, will not establish property in the apparent owner,—that no difficulty would be made in allowing the opposite party to show that the ship in reality belonged to another person,—and that although the Legislature has made the registration necessary to complete the title, yet this does not make it of itself proof of the title.

On the other hand, these propositions were disputed by the pursuers, who maintained, that when a British subject, qualified as such to hold property in British vessels, produces a regular and complete title to a ship as registered owner, and shows that he has duly complied with all the requisites of the Registry Acts, the registered title is conclusive and exclusive evidence of property against all the world; and it is incompetent to look behind the registry, and inquire whether he holds the property only in trust for a person who could not hold it in his own name.

The Court, however, unanimously found 'that the registry of the vessel in question, in the names of the pursuers Scott and Gifford, is not 'evidence per se that the said vessel is truly their property, and that it is incumbent upon the said pursuers to prove the fact by other evidence; 'and therefore recalled the interlocutors of the Judge Admiral, so far 'as they sustain the title of the said pursuers, and remitted the whole 'cause to the Jury Court.'

Lord President.—The result of the decisions seems to be, that where a person's name is not in the registry, he cannot claim the property of the vessel; but in a question of title to pursue an action against a person not claiming the property, it is not sufficient that his name be on the register. The case of sasines seems somewhat analogous. In order to be effectual against creditors, a sasine must be recorded; but the circumstance of registration, and of holding a sasine, is not universally conclusive as to the right of property.

Lord Gillies.—The pursuers, in order to insist in this action, must prove that they are owners of the vessel. It will not do to found upon the mere legal possession through the registry. They must prove actual possession or ownership.

Lords Craigie and Balgray concurred.

Pursuers' Authorities.—15. Vesey, 71; 1. Mad. 39; Calder, Nov. 12. 1824, (ante, Vol. III. No. 193); Tod, March 5. 1825, (ante, Vol. III. No. 416); 13. Vesey, 588; 11. Vesey, 621; Lumsden, Dec. 16. 1823, (ante, Vol. II. No. 567); 2. Barn. and Ald. 310; 3. Meriv. 322; 3. Tr. Rep. 709; 15. Vesey, 67; Porter, Dec. 1. 1816, (F. C.); 15. Vesey, 60; 4. East. 110; 6. Vesey, 639; Holt, 166-176; Abbot, 67; 14. East. 226; Abbot, 85.

Defender's Authorities.—2. Phillips on Ev. 46, (1. Ed.); Abbot, 85; 2. Taunt. 5; 14. East. 226; 3. Camp. 240; Abbot, 88. and 643; 4. Taunt. 652; 1. Holt, 321; 1. Phillips, 327, and 2, p. 48; 16. East. 141; 15. Vesey, 66; 2. Phillips, 52; 4. Taunt. 667; Holt, 172-176, (2. Ed.); 2. Taunt. 6; 14. East. 232; 16. East. 141; 4. Camp. 90; 3. Camp. 456.

A. Robertson, W. S.—Campbell and Macdowall, S. S. C.—Agents

No. 36. P. M'ARA, Suspender.—*Cockburn—Cuninghame.*
M. GILFILLAN, Charger.—*Skene.*

Nov. 25. 1828.
2D DIVISION.
Bill-Chamber.
Lord Newton.
F.

Bill-Chamber.—This was a bill of suspension which the Lord Ordinary appointed to be answered, but only on caution. The Court, of consent, remitted to the Lord Ordinary to consider the bill and answers, and do as he should see cause.

J. CULLEN, W. S. Agent.

No. 37. J. A. CHEYNE and L. MACKERSY, Petitioners.—*D. of F. Moncreiff—Skene.*
P. WALKER, Respondent.—*Cockburn—Alison.*

Sequestration—Bankrupt—Title to Pursue—7. *Geo. IV. c.* 67.—Held,—1.—That a cashier of a Bank which had ceased to carry on business, except to the effect of winding up, was entitled, under the above statute, to raise and prosecute diligence.—2.—That a charge on letters of horning, followed by arrestment not loosed within the proper time, against a party who had been fugitated as furth of the kingdom, without an execution of search, was sufficient to found an application for sequestration;—and,—3.—Question raised, and opinions given, but not actually decided, that a creditor is entitled to oppose sequestration being awarded, although no opposition is made by the debtor.

Nov. 26. 1828.
1ST DIVISION.
Bill-Chamber.
Lord Gillies.
D.

IN the month of August 1802, the Fife Banking Company was established, to endure for 21 years; and in 1823 a new contract was entered into, prolonging the company for five years. Ebenezer Anderson and George Aitken were appointed cashiers, and granted bond, along with the respondent Peter Walker and other persons, as cautioners for the due fulfilment of their office, to the extent of £6000. By a clause in the contract it was declared, that 'in order to prevent the risk of quarrel and 'litigation with the heirs and representatives of the cashier, accountant, 'or any of the agents or other office-bearers of the Bank, the state of the 'cash, bills, and whole transactions of the Bank, and of the affairs, in so 'far as concerns a question of accounting with either of these officers or 'their representatives, shall be proved by a certificate of a quorum of the 'directors; and in case of the death,' &c. And by a clause in the bond it was also declared, 'that in order to prevent risk of quarrel or litigation 'with our heirs or representatives, the state of the cash, bills, and whole 'transactions of the Bank, in so far as concerns a question of accounting, 'shall be proved by the certificate of the accountant and a quorum of the 'directors; and in the event of our deaths, the directors for the time, or 'a quorum of them, shall be entitled to enter into instant possession of 'the Bank repositories, books, bills, cash, and other papers contained 'therein, in presence of a Justice of Peace or other Magistrate.' Anderson was a partner, and as such signed the contract.

The bond contained an obligation of relief by Anderson and Aitken in favour of the cautioners, and a consent to registration and execution. The Bank was never incorporated; and having become embarrassed, a transaction was entered into in December 1825, by which they assigned t

No. 37. Nov. 26. 1828.

'presentatives of these parties;' and, second, Because, although Anderson had been fugitated, yet this was not inconsistent with the possibility of his being within the kingdom; and as no execution of search had been returned, and there was no evidence that he was furth of the kingdom, the petitioners were not entitled to assume that he was so; and therefore the charge given on this footing was inept.

On the other hand, it was maintained by the petitioners,

1. That no creditor was entitled to oppose the awarding of sequestration;—that this was competent to the debtor alone, and the creditor could only apply for recall after it had been awarded, and therefore Walker could not competently oppose the petition; and besides he had no legitimate interest to do so, but rather the reverse;—that with regard to the objection to their title, although it was true that the Bank had granted the deed, yet it was proved that it had never been acted upon, and had been abandoned by the parties in whose favour it was granted;—that although the Bank had also ceased to carry on business, yet it existed as as a Joint Stock Banking Company to the effect of winding up its business, and therefore fell within the provisions of the statute.

2. That the objections to the debt and the diligence were unfounded; first, Because both the contract to which the bond bore relation, and the bond itself, according to fair construction, declared that a stated account was to ascertain the amount; and, second, Because the fugitation afforded such a violent presumption of Anderson being out of the kingdom, that the petitioners were entitled to act on the footing of its being consistent with truth;—that there was no offer to prove that he was within the kingdom, and they were ready to establish that he was abroad.

Lord Gillies having reported the question on Cases, the Court repelled the objections, and awarded sequestration.

Lord Balgray.—There are several points in this case. The petitioners object, in the first place, that the respondent is not entitled, in terms of the Bankrupt Act, to offer any opposition, because it is only competent for the debtor to do so and that the creditor must apply for a recall. I am not at all satisfied that this is a sound or correct construction of the Act of Parliament. Surely, if a creditor is entitled to apply for a recall, he must have a title to object to the Court doing that which might warrant a recall. I also think that the respondent has a sufficient interest to oppose the petition. The second point is the assignment to the other banks; but, under the circumstances, I do not think that there is anything in it. The third is, that the company does not fall under the 7th Geo. IV. But although, no doubt, it has to a certain extent come to an end, it subsists to the effect of winding up. The fourth point is, that the stated account is only declared to be binding in a question with heirs and representatives. But this is too narrow and critical a construction. Besides, Anderson and his cautioners are bound to account for his intromissions, and have consented to registration for execution; and therefore, agreeably to the case of the Perth Bank,* the registration of the bond, with production of the state, was sufficient to warrant the dil

* See post, December 2. 1828.

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Nov. 26. 1828.

Against this judgment Galbraith reclaimed.

Jameson for the Pursuer.—Although it is true that in certain circumstances a party may retract a reference to oath, yet this is by no means the general rule, and is not permitted by the Court where it is obvious that an improper advantage is attempted to be taken. Accordingly, in Chalmers against Jackson, 8th February 1813, although a party was allowed to retract a reference, it was agreed upon the Bench that this was not competent in the general case. Now here the defender is attempting to avail himself of the death of his father, whereby it is now impossible for the pursuer to appeal to his conscience, and therefore he ought not to be permitted to depart from the reference made by him to the oath of the pursuer. It is a judicial contract with his ancestor, and is binding on him.

M'Neill for the Defender.—It is impossible to say that there was a concluded contract, because, as there was first a reference and then a deference, it remained for the Court to decide which of the parties was bound to emit the oath. In this state of matters, it was competent for either of them to retract. Accordingly, before the record was closed, we retracted—a proceeding which, it is established by the case founded on by the pursuer himself, was quite competent.

Lord Craigie.—The rule on this subject is borrowed from the civil law. A reference is truly a judicial contract. It should not be allowed to be withdrawn or departed from without sufficient reason; and in this case I see no such reason, but the reverse.

Lord Balgray.—I am of the same opinion.

Lord Gillies.—I also concur. The defender here evidently has retracted the reference, merely because there can be now no effectual deference.

The Court accordingly 'altered the interlocutor complained of, and found 'that the present defender is bound by the reference of his prede- 'cessor, and remitted to the Lord Ordinary to proceed accordingly; and found him liable in the expenses of the discussion.

A Gray, W. S.—Lockhart and Swan, W. S.—Agents.

No. 39.

M. Stobie, Suspender.—*J. W. Dickson.*
A. D. R. C. W. Baillie, Charger.—*Sol-Gen. Hope—Maconochie.*

Nov. 26. 1828.
1st Division.
Bill-Chamber.
Lords Balgray and Meadowbank.
S.

This was a special case, in which the Lord Ordinary refused a bill of suspension, and the Court adhered.

J. Crawford, W. S.—T. Paul,—Agents.

BRISBANE'S TRUSTEES, Pursuers.—*Skene*—*Shaw Stewart.*
JOHN LEAD, Defender.—*Murray.*

No. 40.

Violent Profits—Bona Fides—Landlord and Tenant.—A landlord who had granted a lease, having power to feu in whole or in part, having feued about half the farm, and required the tenant to cede possession to the feuar; and the tenant having refused, and the Sheriff and the Ordinary having ordained him to remove, but found no expenses due; and the Court havered and assoilzied, and thereafter unanimously adhered; and the House of Lords haversed that judgment, and affirmed that of the Sheriff and Lord Ordinary; and in the mile the lease having expired, whereby the tenant had remained in possession during the period of his lease, and the landlord was obliged to pay the feuar interest on the purchase money, which considerably exceeded the yearly rent—Held that the tenant was protected plea of bona fides, and was therefore not liable for the difference between the interest rent as violent profits.

Nov. 26. 1828.

2d DIVISION. Ld. Mackenzie. F.

late Brisbane of Brisbane let to the late John Lead a farm of 70 or fifteen years from Martinmas 1806, at a rent of £210, 'reserv- ways to the said Thomas Brisbane and his heirs, at any time dur- e currency of this tack, full power and authority not only to limestone and other stones, &c., but also to feu the whole or arts or portion thereof,—the said Thomas Brisbane and his fore- always allowing recompense for the ground so worked, planted, or in proportion to the rent payable for the whole.' Brisbane died , leaving a trust-deed in favour of the pursuers. In 1815 the s conveyed 34 acres of this farm to a Mr. Scott in form of a feu- the feu-duty, however, being only one shilling, and the price paid being £5500, binding themselves to pay interest on the price to rchaser, 'and that from Martinmas 1815, till he shall obtain the ral possession of the said lands.' In the month of July preceding, ustees intimated, under form of instrument, to the defender Lead, son and heir of the original tenant, that they had feued this por- f the farm to Mr. Scott, and required him to cede possession of able land at Martinmas thereafter, and of the pasture at Whitsun- 816; and further intimated that they 'would be ready, as at the of Martinmas next, to make such recompense to him as he should und justly entitled to, and that they were now willing to meet with with the view of ascertaining and fixing the amount thereof.' Lead, refused to comply with this requisition, on the ground that the feuing contemplated in the lease was merely the power of grant- feus for a considerable feu-duty, such as the proprietor had to grant in his adjoining village of Largs, and could not ex- right of selling a large part of the farm for a valuable consi- money under the form of a feu-right.

pence of this refusal, the trustees, in August 1815, presented the Sheriff of Ayrshire to have Lead ordained to cede pos- Sheriff, in the month of October, found that, 'agreeably nant of parties,' he must cede possession, but, at the same 'must be allowed recompense for the ground so feued, in

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'proportion to the rent payable for the whole, and improvements made 'thereon.' Of this judgment, however, Lead brought an advocation, in which the Lord Ordinary (Pitmilly) sisted procedure till the trustees should bring an action of declarator. This having been done, his Lordship, on the 28th of November 1816, pronounced an interlocutor repelling the reasons of advocation, and remitting simpliciter; and in the declarator decerning in terms of the libel, with a reservation of Lead's claim for recompense, and all questions as to its amount. His Lordship found no expenses due.

Lead having reclaimed to the Inner House, the Court, by a majority, on the 5th of February 1820, altered his Lordship's interlocutor, and assoilzied; and, on a reclaiming petition by the trustees, they adhered on the 27th of February 1821, being on this occasion unanimous.

The trustees then appealed to the House of Lords, both against the judgments of the Inner House, and that part of Lord Pitmilly's interlocutor which found no expenses due. Their Lordships, on the 25th of March 1825, reversed the interlocutors of the Inner House; but, at the same time, affirmed the judgment of Lord Pitmilly.*

In the mean time Lead's lease had expired in 1821, so that the trustees could gain nothing by the judgment in their favour, unless they were allowed, instead of the possession which they had been prevented by Lead from obtaining, the difference between the rent of the land payable by him under his lease, and the interest of the price which they had been obliged to pay to Mr. Scott in lieu of possession. They accordingly, on the cause returning to this Court to have the judgment applied, claimed from Lead this difference from Martinmas 1815 (at which period he ought to have ceded possession) down to the expiry of the lease.

To this demand, as being a claim for violent profits or damages, Lead opposed the plea of bonâ fide possession, which, he contended, protected him from any greater claim than for the rent stipulated by his lease.

The Lord Ordinary (Mackenzie,) before whom the cause had now come in place of Lord Pitmilly, sustained this defence of bona fides, and assoilzied Lead, observing in a note,—'The Lord Ordinary perfectly 'understands the argument of the pursuers, that the disputed question in 'this case related to the interpretation of the agreement; and that the de-'fender himself, who knew his own meaning, might have no difficulty at all 'in the matter, but be in mala fide in denying what he knew. It is an argu-'ment that may be conclusive in many cases; but the Lord Ordinary 'does not think the present case affords room for the application of this 'argument. The Lord Ordinary sees no reason to believe that in the 'lease the defender had not the understanding he alleges, though that 'could not entitle him to succeed against the legal interpretation of the 'words of the writing to which the lease was restricted. In giving this

* See 1. Wilson and Shaw, p. 68.

nion, the Lord Ordinary has not the least notion of suffering to be puted, in any respect, the accuracy of the judgment of the House of rds.' No. 40. Nov. 26. 1828.

he pursuers presented a reclaiming note.

ene for the Pursuers.—The plea of bona fides has never before sustained in a case of this nature. This is a question on a mu- ovenant, where the party, on the face of the contract, consented to ndlord feuing. His refusal to remove was a breach of covenant, the case is totally different from that of an attempt to set aside a possession, on the face of which the party is entitled to possess. s no distinction in this respect between a contract of lease and any contract, as to which it was never pretended that if one party, r may be his bona fides, refuse to fulfil what it is afterwards as incumbent on him by the contract, he could be protected by fides from repairing the loss suffered by the other party in con- of his breach of contract. Here the trustees, trusting to the implementing his part of the contract, came under obligations Scott, which they could not perform in consequence of his breach ant, and he is therefore bound to bear the loss thereby occasion- aying the difference between the rent and the interest paid to Mr. lieu of possession; otherwise the trustees will be in exactly the uation as if they had ultimately lost their cause, and the defender tuation in which he would have been, had he gained. Besides, gment of the House of Lords leaves Lord Pitmilly's interlocutor only judgment in the cause; and under it the trustees were en- o immediate possession.

ray for the Defender.—The present claim is nothing else than a gainst a tenant for violent profits—something more than his yearly ity. The general rule, however, (as correctly laid down by Mr. e,) is, that 'if the tenant has had a probabilis causa litigandi, the e will be restricted to the yearly tack-duty payable by the tack.' is impossible to deny that the tenant had a probabilis causa, his plea was sustained by two judgments of the Inner House— being an unanimous judgment; and even the House of Lords, y reversed these judgments, affirmed that of the Lord Ordinary o expenses due, thereby recognising the difficulty of the case. d this is a much stronger case than that of Carnegy v. Scott, ed; and it falls completely within the principles of the de- e Queensberry reductions, and other cases of the same de-

B. CLERK.—When the case was originally brought before the by Advocation from the Sheriff of Ayrshire, he did not concur interlocutor. He required a declarator to be brought, and ation till this was done, showing that he did not consider it a ry removal; and when he decided, he reserved all claims for When the cause was brought here, we had considerable diffi

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culty; but we altered, and assoilzied. The pursuers again reclaimed, and the Court were then unanimous in refusing his petition, Lord Glenlee coming round in consideration of the practice as to feuing on the Brisbane estate, and Lord Robertson also. Now, is it possible to fix on any point of time at which this person became in mala fide? We cannot, I think, in consistency with the principles laid down in the Queensberry cases, and those of Durris and Carnegy, fix any such period before the final judgment, and therefore we must adhere to the interlocutor.

LORD GLENLEE.—I am of the same opinion.

LORD PITMILLY.—So am I. It is too late to go back on the doctrine of bona fides on a contract of this description. I am not insensible to the consequences here, which are, that the landlord has won his cause, and gained nothing by it; but, in consistency with the decisions in the late cases, there is no remedy. These consequences moved me in the case of Carnegy, which was exactly the same as this; and there, in the Outer House, I at first found violent profits due. But in the mean time the Queensberry cases were decided in the House of Lords; therefore I could not proceed on the same principle as before, and on that account I ordered informations to this Division, and then I held that, in consequence of the decisions in the Queensberry cases, we could not find violent profits due till a final judgment against the party, which destroys bona fides, and creates a conscientia rei alienæ. That is just the case here. I hold that the decision in the House of Lords in the Queensberry cases fixes the law that the conscientia rei alienæ does not commence till a final judgment against the party, and on that ground we must adhere.

LORD ALLOWAY.—Mr. Skene attempts to put this case on the ground of personal contracts; but it depends on a different principle, arising from possession. In the case of Carnegy, I was satisfied that the previous decisions as to mala fides were correct; but then I doubted if there ever was a right of possession there from the beginning; and I also doubted, on the point argued here, whether every thing but the Lord Ordinary's interlocutor was not swept away. I did not, however, differ from the rest of the Court on the general point. But the case of Carnegy was totally different from this one. There the application was made immediately on the death of the liferenter, so that the possession was challenged from the beginning. But the present case falls completely under the rule adopted in the Queensberry cases, and still more lately again sanctioned by the House of Lords in the case of Vans Agnew.

THE COURT accordingly refused the reclaiming note, with expenses from the date of the Lord Ordinary's interlocutor; but they refused at the same time a note for Lead, praying for an award of expenses prior to that judgment.

For authorities see Carnegy v. Scott, Dec. 4. 1827, (ante, Vol. VI. No. 58); see also D. Gordon's Trustees v. Innes's Representatives, (case of Durris,) June 19. 1828, (ante, Vol. V. No. 370); Vans Agnew's Executrix, July 22. 1828, (3. Wilson and Shaw's Appeals, No. 15.

W. PATRICK, W. S.—W. A. MARTIN, W. S.—Agents.

BRISBANE'S TRUSTEES, Pursuers.——*Skene—Shaw Stewart.* No. 41.
J. and J. LEAD, Defenders.—*Murray.*

Lord and Tenant—Acquiescence.—It being provided by a lease that certain buildings ces should be erected on a farm, the tenant having the option either to advance the y funds himself, to be repaid at the end of the lease; or, if the landlord did so, to pay er cent. interest during the subsistence of the lease; and the landlord having ad- e money, but not having drawn the interest during the lease, held not barred by taci- m demanding it after its expiry.

lease granted to the late John Lead by Brisbane of Brisbane for ears from 1806, the latter came under an obligation to lay out a l to the first year's rent in rebuilding the houses on the farm,— t having it in his power to advance any surplus which might be and to receive payment of it at the end of the lease; or in case rd advanced such surplus, to pay interest for it at the rate of ent. The tenant further was empowered to subdivide and e farm according to a plan pointed out by the landlord, who und, at the end of the lease, to pay for the same according to of men mutually chosen; or if the landlord should himself nclosures, it was in that case provided that the tenant should r cent. on the money laid out by him, during the period of his n after the tenant's entry, a dwelling-house and offices were e landlord at an expense exceeding the year's rent, the surplus anced by the landlord himself, who also expended a consider- n the subdividing and enclosing the lands. It was disputed y demand for the six per cent. interest on these sums had been he expiration of the lease in 1821; but no settlement or dis- he rents had taken place, and, in point of fact, no interest was present defenders, however, sons of the original tenant, hav- to pay this interest, the pursuers, trustees of the late Bris- the present action, concluding for payment from the period veral sums of money respectively were laid out.

ce, they pleaded that the landlord was now barred by taci- n insisting in this claim.

Ordinary, 'in respect that documents in process instruct penditure on the houses &c. was laid out by the landlord, the tenants, which indeed is not alleged, and that no settle- scharge of the rents has taken place since the payment for penditure was due by the tenant;—that there is sufficient hat the claim was made against the tenant during the cur- e lease; and that there is no allegation on the part of the t the landlord ever departed from the claim,' found 'that the re not precluded, by taciturnity or delay in bringing it for- n now insisting in the present claims against the defenders.' unanimously adhered.

Nov. 26. 1828.

2D DIVISION.
Lord Medwyn.
F.

No. 41.
Nov. 26. 1828.

LORD GLENLEE.—Effect cannot be given to mere taciturnity, unless the conduct of the party could not have been such as it has been, on any other supposition than that he did not intend to make a claim. But I do not think that the case here. By the terms of the clause, the tenant had an option to advance the money himself; and his seeing the landlord erecting the buildings, without making any offer to pay the expense, was just taking the other alternative of paying the interest; and it is surely quite extravagant that he should have the benefit of the buildings &c., without paying any thing at all.

The other Judges concurred.

W. PATRICK, W. S.—W. A. MARTIN, W. S.—Agents.

No. 42.

ROBERT WIGHT, Pursuer.—*Marshall.*
A. KIDD, Defender.—*Sol.-Gen. Hope—More.*

Writer's Hypothec.—Circumstances under which it was found that a writer was not bound to subscribe, as consenter, a disposition of a property bought by him in his own name, but truly for another party, till he was paid an account of business due to him by the seller.

Nov. 27. 1828.
1ST DIVISION.
Lord Meadowbank.
D.

THE estates of Archibald Wight having been sequestrated, the pursuer Robert Wight was elected trustee. Previous to this event, the bankrupt had employed the defender Kidd as his law agent, to whom an account for business was due, and had placed his title-deeds in his hands. In December 1808, the pursuer exposed part of the bankrupt's property to public sale, and it was bought by Kidd in his own name, but truly for David Wight, farmer at Ormiston. The pursuer then, in 1810, applied to the Court to ordain Kidd to deliver up the title-deeds; but he having pleaded his right of hypothec, the Court found him entitled to withhold the writings in his custody till he received payment of the sums due to him, with the expenses of the litigation. The pursuer having reclaimed, a submission to Lords Pitmilly and Alloway (who were then at the Bar) was entered into, and at their desire Kidd delivered up the greater part of the title-deeds to the pursuer. On the 30th of June, they found 'that Mr. Kidd had a right of hypothec over the title-deeds in his 'possession, which he has now delivered up, at our desire, to the said 'Robert Wight to the extent of his account of business,' amounting to £132, and they ordained the pursuer to pay that sum; or, failing his doing so, they declared that Kidd 'should be entitled to retain out of 'the price of the subjects purchased by him from the said Robert Wight, 'the amount of the sums and interest above decerned for.' The pursuer did not pay the money; and Kidd having stated that he had bought the property for behoof of David Wight, the pursuer brought an action against them both, concluding that they should be decerned to pay the price, and to take a disposition in terms of the articles of roup. David Wight stated that he was ready to pay the price, and take a disposition, on its being subscribed by Kidd as a consenter; but Kidd pleaded that he was not bound to do so till the pursuer had paid him the sum awarded him by the arbiters;—that, however, he was ready to do so, provided the amount was deducted from the price payable by the other defender and handed over to him.

The Lord Ordinary ordained 'Kidd forthwith to adhibit his name as consenter to the disposition by the pursuer in favour of the other defender David Wight,' reserving to Mr. Kidd to make any competent application to the Lord Ordinary for retention of the claim due to him out of the price under the decreet-arbitral.' Kidd having reclaimed, the Court stopped his counsel, and called upon the opposite party to support the interlocutor. No. 42. Nov. 27. 1828.

Marshall for the Pursuer.—Nothing has been done to injure Mr. Kidd's claim. This is an action at the instance of the seller against the purchaser for payment of the price. We cannot get decree against him, unless he refuse to sign the disposition. We do not wish to injure his right, but are willing that the money should be consigned; and accordingly a motion has been made in favour of Kidd to apply to the Lord Ordinary for a payment out of the fund. By the present attempt, he endeavours to complicate the case, so that an available decree cannot be obtained against the defender Wight.

The Court, however, recalled the interlocutor complained of, and found "that the said Alexander Kidd is not bound to adhibit his subscription to the consenter to the disposition in favour of the said David Wight, defender, of the subject he purchased for his behoof from the said Robert Wight, pursuer, previous to his receiving payment of the amount of the decree and interest decerned for by the decree arbitral, dated 30th June 1826 years; that the said David Wight is bound to pay the same to the said Alexander Kidd, and that his discharge of the same shall be equivalent to payment of the amount thereof to the said Robert Wight pursuer; found the said Robert Wight liable to the said Alexander Kidd in the expenses incurred by him in the present discussion, and quoad the said Alexander Kidd is not bound to adhibit his subscription, previous to his receiving payment of the said expenses; and that the said David Wight is bound to pay the same to the said Alexander Kidd, and that the discharge shall be tantamount to payment of the amount thereof to the said Robert Wight, pursuer."

J. Kermack, W. S.—W. Dalrymple, S. S. C.—Agents.

HANNAH or THOMSON and HUSBAND, Suspender.—*Shaw.* No. 43.
J. CROSS, Charger.—*A. M'Neill.*

Wife.—Bill of suspension of a charge against a married woman passed simpliciter.

Question as to passing a bill of suspension of a charge on resignation granted by a married woman and her husband, and in which she pleaded, inter alia, that she could not be diligence stante matrimonio. The Lord Ordinary refused passing to the suspender Mrs. Thomson, as vestita viro, her own personal diligence, if necessary to be pleaded;" but the Court passed the bill simpliciter. Nov. 27. 1828. 1st Division. Bill-Chamber. Lord Craigie. H.

C. Fisher,—J. Cullen,—Agents.

No. 44.

D. LOTHIAN, Advocator.—*Sandford.*

MRS. JEAN M'CREE and Others, Respondents.—*D. of F. Moncreiff—A. Murray.*

Arrestment.—A party being authorized to sell the stock and cropping of a tenant, and to draw the bills granted by purchasers, and account to the tenant for any surplus, after satisfying the claims of the landlord; and he having sold and taken bills from the purchasers; and arrestments having been used in his hands by creditors of the tenant, some prior and others posterior to the payment of the bills by the purchasers—Held that the right to call him to account for the proceeds was an arrestable interest attached by arrestment prior to the payment of the bills, and the first arrestments preferred accordingly.

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2D DIVISION.
Ld. Cringletie.
F.

IN a process of sequestration before the Sheriff of Perth at the instance of Mr. Loch, as Commissioner for the Countess de Flahault, against Drummond, a tenant in one of the Countess's farms at a rent of £64, warrant was granted, on the 22d of August 1822, for the sale of so much of the sequestrated effects as would satisfy the half year's rent then due, (£32,) together with expenses. Drummond, however, having agreed to give up his lease at the Martinmas following, and being desirous to have his whole effects disposed of, and the rent of the current term also paid at as little additional expense as possible, granted to Mr. Loch the following letter:—'As I am anxious to save any additional expense being incurred in securing the landlord's right of hypothec for the current rent, payable at Candlemas and Lammas next, I hereby authorize you to carry the warrant of rouping you have already obtained against me into execution, not only for the rents already due, but for the current rent, and for every other claim due by me to the proprietrix under my lease or otherwise, and for the interest and expenses already incurred in carrying said sale into execution; any surplus arising after you have sold my effects, to be accounted for to me by your agent, Mr. Moncrieff, writer in Perth, who is at full liberty to subscribe the articles of roup, and to draw the bills, and receive the cash from the purchasers; credit to be given in the articles of roup till Candlemas next.' Under this authority, Mr. Moncrieff, (who had conducted the sequestration as agent for the Countess de Flahault,) sold the whole stock and cropping belonging to Drummond, the proceeds amounting to £190, and leaving a surplus, over and above the claim of the Countess, of between £60 and £70. Of these proceeds £31 were paid in cash; but for the rest of the price Mr. Moncrieff took bills from the purchasers. In January 1823, before these bills were paid to Mr. Moncrieff, the respondent Mrs. M'Cree, and other creditors of Drummond the tenant, used arrestments in his hands; and thereafter, in May 1823 and December 1825, the advocator Lothian, another creditor, also used arrestments in Mr. Moncrieff's hands, the bills having by this time been paid to him by the several purchasers. In consequence of these arrestments, a competition arose for the surplus proceeds of the sale, after satisfying the claims of the Countess de Flahault; to determine which, Mr. Moncrieff raised

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f multiplepoinding before the Sheriff of Perth. The Sheriff ferred Mrs. M'Cree &c. primo loco, Lothian brought an ad- which the Lord Ordinary altered, and preferred him to the in medio, his claim against Drummond exceeding its amount. ree &c. having then reclaimed, the Court appointed the parties n short Cases their arguments as to the validity and preference several arrestments.'

for Mrs. M'Cree, &c.—By Drummond's letter, authorizing on of the Sheriff's warrant of sale, Mr. Moncrieff was to draw and account to him for the surplus. The obligation, therefore, rt of Mr. Moncrieff was not to hand over to Drummond the ora of the bills which he received from purchasers, but generally t to him for the proceeds, and it necessarily subsisted from the e sale. Besides, by a rule of the Sheriff Court, the person con- sale of sequestrated effects is entitled to a del credere commis- consequently comes under an obligation to guarantee the pay- he price; and the tenant having in substance consented to an of the Sheriff's warrant, this must be held to have been done me condition, viz. that Mr. Moncrieff should have a del cre- nission as to the whole sales, and guarantee payment of the whole and not merely so much as was necessary to satisfy the amount the Sheriff's warrant had been granted. Consequently, on d also, Mr. Moncrieff was generally liable to account from the ; and being so liable, the obligation to account was an arrest- st, which could be attached before the money came into by payment of the bills, and was attached by the prior ar- January 1823; otherwise, till the bills were paid, the price ve been attached at all by Drummond's creditors, because s who had granted bills to Mr. Moncreiff were not debtors , but to Mr. Moncrieff.

Lothian.—The rule of the Sheriff Court as to the del sion, and consequent liability to guarantee, can only have to sales made under the Sheriff's warrant; and therefore, far as it exceeded the amount for which warrant had been credere commission could have been demanded, and no bility incurred by Mr. Moncrieff. As to that portion fore, he was merely acting in the capacity of factor for , and would have completely implemented all obligations im by handing over to Drummond the bills received sers, to the amount of any surplus over and above the untess of Flahault. In these circumstances, the arrest- ds by Mrs. Cree &c., before payment of the bills, was an arrestment of the ipsa corpora of bills, which, it is incompetent; and consequently the fund in medio was at- subsequent arrestments after the bills were paid, and the in Mr. Moncrieff's hands; and the respondent is incor-

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rect in saying that arrestment in the hands of the purchasers, before the bills were paid, would have been inept; for it was decided in the case of Dunlop v. Japp that the price of goods sold in such circumstances was arrestable in the purchaser's hands, unless the bills had been transferred to onerous indorsees.

LORD GLENLEE.—The point of difficulty is as to what was the precise situation of Mr. Moncrieff. If he was not liable, at the time of the first arrestment, to be called on to account, then it was inept; but if he was liable at the moment to be so called on to account, then the right to call to account might be attached. Now, though he could not be called on to pay any particular amount of bills till they were retired, yet he was liable to be called on to account from the moment of the sale. I cannot help thinking that this case is strongly similar to those where a jus crediti has been found arrestable; and that though the amount to be called for could not be demanded till the bills were paid, still the right to call to account existed from the beginning; and, according to the notions that have prevailed, it is liable to be attached, as in the case of Innes. * In the case of Haddow v. Campbell, quoted on the other side, the bill had been indorsed to a person for his own security; but from the way and manner in which it came into his possession, he could not be liable at all till the bill was paid, and so it was considered as an arrestment of the corpus of the bill; and therefore, whatever may be thought of the question of del credere commission, I cannot help thinking that the right was attached by the first arrestments; for how otherwise could it be affected? The same objection would apply to an adjudication; and I think the decisions apply.

LORD JUSTICE-CLERK.—I should be glad if we could bring this under the cases as to the jus crediti of a trust-fund, which I think well decided. But here the difficulty arises from the situation in which Mr. Moncrieff stood. If he was under a general liability to account from the beginning, I would agree with the opinion which has been delivered. But I doubt if he was in that situation. As to the money actually paid, the first arrestments were good; but as to the bills, it depends on the situation of Mr. Moncrieff. And here comes into consideration the question of the obligation to guarantee, and right to del credere commission. Now I do not think that he undertook any such risk. As far as the rent went, he was performing an official duty; but, quoad ultra, it was a private matter, in regard to which the regulations of the Sheriff Court cannot apply. And if he is not entitled to del credere commission, the bills at the time of arrestment being in his hands, is not this just an arrestment of bills? The party cannot answer, 'I do not arrest the ipsa corpora of the bills, but the produce when re-'covered.' So, if Mr. Moncrieff was not liable to a general accounting whether he got bills or ready money, but only liable to pay ready money, and hand over the bills, the prior arrestment must be inept. That is my difficulty; for on the general law I do not differ, but only as to the situation of Moncrieff.

LORD ALLOWAY.—I concur in the opinion of Lord Glenlee; and I hold it as a general principle, that wherever a person is accountable to a third party, that is an arrestable interest, and it has been so held from the earliest period of our law. It

* Creditors of Gordon v. Innes, Feb. 13. 1740, (715.)

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ven been held so where the subject of a trust was an heritable estate, though old, and has been decided in various cases, particularly in the case of Sir Arr Forbes, (Pindar v. Davidson.) Now, when this person undertook to sell, was t accountable for the surplus to Drummond; and can Drummond's creditors ttach this interest? I do not consider the point of del credere commission sary to the decision of this case, but I think it also sufficient for the decision. e regulations of the Sheriff Court, the party selling is entitled to charge del commission; and though Mr. Moncrieff originally could only sell to the of £32, yet, with consent of the landlord and tenant, he became entitled and upon credit, for the whole claims of the landlord; and on that he sells 0. Now, my notion of the question is this: Suppose one half of a bill essary to pay the landlord, and the other half surplus, could he have del ommission on one half of the same bill, and not on the other? It is in- with common sense; and I hold that all was to be sold under the rules eriff Court. But the point of del credere commission is not necessary to for still Mr. Moncreiff was accountable, and the interest to call him to as arrestable. Could the debt have been attached in the hands of the s, who had granted bills as debtors to Drummond? I think not, as they ors to Moncrieff, and not to Drummond. It is clear that bills are not ; but that does not affect this case. In the case reported by Kilkerran, s of Gordon v. Innes,) the party held bills; and though none were paid, ill held an arrestable interest. The case decided by Lord Braxfield v. Campbell) was an appropriation of a bill for a particular purpose, and is not applicable here.

PITMILLY.—On reconsidering this case, I have taken the same view as enlee. I think that it has been unnecessarily complicated by the intro- of the question of del credere, which does not enter into the case. The entirely depends on the nature of Drummond's right. If it was to call ff to account, the first arrestment was competent; but if, on the other rummond had only a right to demand the ipsa corpora of the bills them- hen it was incompetent. In this state of the question, I think the matter edere may be thrown out of view, though I consider that the right to del commission extended only to what was sold by the Sheriff's warrant, as from the regulation of the Sheriff Court. But I do not think it enters question whether this is a competent arrestment or not. We must just e situation of the funds. Part of them was sequestrated, and a warrant nted to pay the landlord's preferable debt. Then the tenant consents the whole, and he gave authority to sell the whole under the letter, hese terms:—'I hereby authorize you to carry the warrant of roup- already obtained against me into execution, not only for the rents but for the current year, and for every other claim due by me to &c.; any surplus arising after you have sold my effects to be o me by your agent, Mr. Moncrieff, who is at full liberty to sub- s of roup, and to draw the bills, and receive the cash from the Now it is extremely difficult to distinguish between the two parts of are slumped together, and we cannot separate them; and therefore rummond had, was merely a general right to call Mr. Moncrieff to to demand the bills; for Moncrieff had a right to draw the bills, had nothing to do with them, but only to demand Moncrieff to

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account for the surplus; and therefore I think we should return to the Sheriff's interlocutor.

THE COURT accordingly altered the interlocutor, and returned to that of the Sheriff.

Advocator's Authorities.—2. Bell, 76; Thorald v. Forrest and Sinclair, March 5. 1767, (753); Thorald v. Peutress and Roberts, July 14. 1768, (756); Haddow, Dec. 7. 1796, (763); Dick, June 1. 1815, (F. C.); Dunlop v. Japp, Feb. 21. 1752, (751.)

Respondents' Authorities.—2. Bell, 79; Creditors of Gordon v. Innes, Feb. 13. 1740, (715); Grierson v. Ramsay, Feb. 25. 1780, (759); Pindar, May 27. 1824, (ante, Vol. III. No. 47); Kyle's Trustees, Nov. 14. 1827, (ante, Vol. VI. No. 7.)

J. BROWN, W. S.—J. KER and H. G. DICKSON, W. S.—Agents.

No. 45.

M. and G. MIDDLETON, Advocators.—*Maitland.*
W. MEGGET, Respondent.—*Whigham.*

Landlord and Tenant—Warrandice.—A subtenant in one of the Queensberry farms, the leases of all which had been challenged as in contravention of the entail of the estate, having, after decree of reduction had been pronounced in the leading case chosen to try the validity of the leases, granted a subtack, without any expressed warrandice, for 'the length of the 'Queensberry lease'—Held that the period for which the subtack was granted was that stipulated in the principal lease, had it been allowed to come to a natural termination; and that where no warrandice is expressed in a lease, absolute warrandice is understood; and consequently, on the principal lease being reduced, the holder of this subtack was found entitled to damages for the whole period of endurance in the original lease.

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2D DIVISION. Ld. Cringletie. F.

THE Reverend Mr. Yorstoun was tenant under one of the Queensberry leases, which was to subsist for nineteen years from Whitsunday 1810. Martin Middleton held a subtack of part of the farm, which was to expire in 1821. On the 15th of June 1819, (about a month before the judgment of the House of Lords in the case of Halscar, selected to try the validity of the Queensberry leases, all of which, including Mr. Yorstoun's, had been challenged by summonses executed in 1815,) Middleton renounced this subtack in consideration of a new one to be granted in favour of his son Edward and himself 'from Whitsunday 1819 to the termi-'nation of Mr. Yorstoun's lease.' Megget, again, was subtenant to Middletons in part of the farm held by them under a lease which was to expire at Whitsunday 1821. A few days before that term, (the Halscar lease having been finally reduced in this Court about six months before,) he took a renewal of his sublease at the same rent 'from Whitsunday 1821, 'the length of the Queensberry lease.' Mr. Yorstoun's lease having been reduced, and he and the subtenants removed from the farm in 1822, the Middletons brought an action of relief and damages against Mr. Yorstoun on account of being deprived of possession prior to the period at which the principal lease would have expired if not set aside, which they contended was the period intended by the words, 'the termination of Mr. 'Yorstoun's lease,' in their subtack from him; and in this action they obtained decree in their favour. (See ante, Vol. V. No. 100.) Megget also, after he had been four years removed, in like manner raised a similar action of relief and damages against Middletons before the Sheriff of Dum-

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s, contending that by 'the length of the Queensberry lease' was meant endurance stipulated in the lease; and that though there was no ex- ss warrandice in his subtack, absolute warrandice was necessarily im- d by law.

his action having been advocated ob contingentiam of the action at instance of Middletons against Mr. Yorstoun, the Lord Ordinary d that Megget had no title to insist in the action, dismissed the and assoilzied the defender, but chiefly on the ground that the d warrandice must be held to have been from fact and deed only. dletons reclaimed, and contended that even supposing the warran- be absolute, it could only extend to the period for which it was ention of parties to grant the sublease; but that, as at its date the Halscar had been actually reduced, it was impossible to suppose ddletons meant to give, or that Megget could understand that ved, a subtack for the whole endurance of the original lease, when matter of absolute certainty that it would be reduced, as actually d in a very few months; and that in this respect the present case from that between Mr. Yorstoun and the Middletons themselves, ease there having been granted before the judgment of the House s in the Halscar cases in 1819, and there being, besides, in that declaration that the farm was to be possessed, 'subject to all the tions of the Duke of Queensberry's lease,' some of which had re- to the concluding years of the tack.

ALLOWAY.—I regret that, in the report of the case between the Mid- and Mr. Yorstoun, the opinions of the Judges were not given; for I n consistency with them, and with the decision in that case, no other nt could have been pronounced than one finding the respondent Megget l to damages, just as the Middletons themselves had been.* They

following are the opinions referred to by his Lordship:—
JUSTICE-CLERK. Though there is something ambiguous in the phraseology of this yet we are bound to look to the effect due to the other clause, declaring that it subject to all the regulations of the Duke of Queensberry's lease,' and these relate ons for all the years of the principal lease; and we are not warranted to say that on the the man did not mean to warrant for the whole period; and looking to the situation n, I cannot come to the conclusion contended for by the defender's counsel, that he been satisfied of the unsoundness of his lease. The lease of Halscar had been sus- It is true that it was remitted by the House of Lords, with an expression of opinion of the whole Judges; but ten of these agreed that the reasons of reduc- epelled. It was again appealed; it was heard early in spring, and no decision nced when this sublease was granted; and the long interval after it had been nouncing judgment, rather raised a presumption that it was to be affirmed. e is, in fact, with the executors of the late Duke of Queensberry, and I am

I entirely concur. I cannot help thinking that the word 'termination' s 'expiry;' but if termination by reduction had been in view, being an le of termination, it would have been clearly expressed. The pursuer had till 1821, at £95; and would any subtenant take a new lease, giving £115, d not to be warranted for a longer period than till the reduction of the prin-

concurred.

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must give the measure they received, in consequence of which they have got damages. Where no warrandice is mentioned in a lease, absolute warrandice is understood; and provided the length of the lease is the natural termination of the original tack, the warrandice will apply to the whole endurance. Now Megget is entitled to contend that the Middletons gave to him the same right which they themselves got; and the words in Megget's sublease ('length of 'Queensberry lease') are stronger than those in theirs from Yorstoun, viz. 'the ter-'mination of Mr. Yorstoun's lease.' In conformity, therefore, with the decision in the case of Yorstoun, I think we cannot pronounce any other interlocutor than one finding this party entitled to damages for the whole period of the original lease.

Lord Justice-Clerk.—(After reading his notes of the opinions of the Judges in the case of Yorstoun.) I cannot give a different judgment here; and indeed the words are more emphatic than in the subtack to the Middletons.

Lord Glenlee.—I own I am not satisfied with the grounds on which the Lord Ordinary has thought the warrandice to be only from fact and deed, as I think it would be a dangerous doctrine.

Lord Pitmilly.—I am of the same opinion.

The Court therefore altered the Lord Ordinary's interlocutor, and remitted to his Lordship to receive a condescendence of damages.

Advocators' Authority.—Hutchison and Lorimer, May 23. 1828, (ante, Vol. VI. No. 296.)
Respondent's Authority.—Middleton, Dec. 19. 1826, (ante, Vol. V. No. 100.)

T. Ranken, S. S. C. -J. Phillips, S. S. C.—Agents.

No. 46.

W. Anderson Junior, Suspender.—*Cuninghame.*
M. Cation and Husband, Chargers.—*Keay—A. Lothian.*

Minor—Process.—A minor proximus majorennitati, who was married and lived separate from his father, but was an apprentice, having granted a bill to his stepmother, on which he was charged by her and his father, having brought a suspension on the ground that the bill was truly granted to his father, and belonged to him jure mariti, and was null and void, and that at all events he had counter claims—Held that, in the circumstances of the case, and in the state of the process, a reduction was not necessary.

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William Anderson was married in 1800 to Christian Duncan, and the suspender was their eldest surviving son. By a disposition executed by her father, the suspender had right to certain heritable subjects, under burden of her liferent, exclusive of the jus mariti, and also to a legacy of £100. In 1816 he was bound an apprentice to a mason for four years. His mother died in May 1819, and in November his father married the charger, Margaret Cation. In December the suspender granted a bill to her for £25, payable twelve months after date. At this time he was still an apprentice—was 20 years and 5 months old—was married, and resided separately from his father. When the bill fell due in December 1820, having been charged by his stepmother and his father for his interest, he brought a suspension. Thereafter a litigation took place between him and his father, of the nature of a count and reckoning, be-

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ie Sheriff of Fifeshire, but in which it was alleged that no judgment ronounced in relation to the bill. Subsequent to the lapse of the iennium utile, the proceedings in the suspension were revived; and part of the suspender it was alleged,

That he had not received any value for the bill, and that it was d as an accommodation to his father; and,

hat although ex facie it was taken in favour of his stepmother, was merely for the sake of appearance; that at all events it truly d to his father jure mariti; and as the suspender was in minority was granted, and it was taken in favour of his administrator in as null and void.

other hand, his stepmother alleged that, prior to her marriage, ossessed of a sum of money deposited in her own name in a at it had been allowed to remain in that situation subsequent to age, on an agreement that it should continue to be her exclusive and that out of that fund she had given value for the bill. fore contended,

the suspender was bound to pay the contents to her; and,

the bill was not null by exception, and no reduction of it had mpted.

ord Ordinary sisted process, in order 'that the suspender may d repeat a summons of reduction of the bill charged on.'

st this judgment he reclaimed.

ghame for the Suspender.—Although the bill is granted in fa- the wife of the suspender's father, yet it belongs to the father jure nd consequently must be held as a document in his favour. But it ted that, at the date of it, the suspender was a minor; and as the nium utile has expired, we have now no redress, except by re- he charge. It is true that it has been held that bills by minors parties can be set aside only by reduction; but this is the case by a minor to his administrator in law, which is null by excep- rawford, June 19. 1827, Wilson and Shaw's Appeal Cases, p. 608.

for the Chargers.—The suspender was, at the date of the bill, majorennitati—was married—forisfamiliated—and, although tice, was truly sui juris. In all the cases which have hitherto regard to bills by minors, the question as to their validity has in a reduction. In particular, it was done so in those of Sir kenzie, July 25. 1666, (8959); Bannatyne, January 1704, his was held necessary in Waddel, Jan. 18. 1812.

in reply.—In all these cases third parties were interested, sent One is between the minor and his administrator in law.

—I do not exactly see the necessity for a reduction in this e rests upon an allegation of no value, or at least of counter may be tried between these parties in a suspension. Under the ances of this case, I do not think that we can hold the bill null the same time, it does not appear that a reduction is requisite.

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LORD CRAIGIE.—I cannot see what objection there can be to bringing a reduction; and indeed less expense would have been incurred in doing so, than must have been incurred in contesting the point. Besides, the charge is not at the instance of the father, but at that of the woman.

LORD BALGRAY.—The father, however, is a party to the charge.

LORD GILLIES.—This is a case of some nicety; and it is necessary to attend to the situation of parties. It is said the suspender was sui juris at the date of the bill. He was merely an apprentice, and consequently did not lose his dependence on his natural guardian. The administration of his father was therefore subsisting at this time. If he had been engaged in business on his own account, the case would have been different. But it is also said that the bill was not granted to his father. It is not pretended, however, that his jus mariti was excluded; and consequently, although the bill was taken payable to his wife, it vested immediately in her husband. In all the cases which have hitherto occurred, the bill was either payable to a third party, or the father and son were bound together. But here the bill is granted by the minor to his father. If the parties go into a count and reckoning, and the father founds upon this as a document of debt, will he not be barred from doing so on the ground that he was auctor in rem suam, and therefore that he cannot avail himself of it? Here the quadriennium utile has expired, and the administrator insists on payment of the bill. Although I have great doubts upon this case, I think the suspender is entitled to be heard on the merits without a reduction.

LORD PRESIDENT.—At first I thought a reduction necessary, but now I think it is not so. There is a great mistake prevails among the lower classes as to the effect of the jus mariti, of which I have had opportunities of knowing particular instances. It is supposed that if a wife keeps a sum of money locked up in her own repositories, or deposited in a bank, the husband has no right to it, and on that footing the wife tests upon it. But it belongs to the husband as much as if it were in his own pocket. Now here the bill is taken to the wife, and consequently it belongs to the husband jure mariti. I have some doubts, whether, under the circumstances of this case, the administration of the father was in existence at the date of the bill. The suspender was married—resided in a separate house—had property of his own, and consequently was forisfamiliated; at least I think that, in a question with a third party, it would be held that he must be regarded as forisfamiliated.

Keay.—We never argued that the suspender was not entitled to be heard, in the suspension, on the merits; but, in answer to his plea of the bill being null and void, we stated that it could only be listened to in a reduction.

LORD PRESIDENT.—That depends on the fact whether he was under the patria potestas or not. If he was so, the bill will be null; if he was not so, the case will be different.

LORD GILLIES.—There is a good deal in what your Lordship says; and besides, if it should turn out that the jus mariti was actually excluded in regard to this fund, or if the suspender on that footing granted the bill, his present plea may be unavailing.

LORD PRESIDENT.—We may find that, in hoc statu, there is no necessity for a reduction.

LORD GILLIES.—Precisely.

THE COURT accordingly recalled the interlocutor, and found 'that there 'is no necessity for an action of reduction in hoc statu.' No. 46. Nov. 28. 1828.

R. WILSON,—P. PEARSON,—Agents.

J. and J. CARRUTHERS, Pursuers.—*Jeffrey*—*Henderson.* No. 47.
PHILLIPS or HOGG, and Others, Defenders.—*Ro. Bell*—*G. G. Bell.*

...es.—Where the representative of a deceased defender is called as a party to an ac... thereupon renounces and allows decree cognitionis causâ to pass against him, he is en... ...penses, unless he occasion unnecessary expense to the pursuer.

...UTHERS brought an action of ranking and sale, and a reduction, ... Phillips and others; and after it had depended for some time, ... died. The Lord Ordinary thereupon 'appointed the represent... ...f Peter Phillips, and those of any other party deceased, inter... this cause, to be called as parties thereto.' Phillips's represent... his daughter, the wife of James Hogg in Mount Benger; and ... to a letter written by the agent for the pursuers, Mr. Hogg's ...ote that they did not mean to interfere, 'as they never intromit... ...h the late Mr. Phillips's effects.'

...is the agent for the pursuers replied, that the regular course was ...e a renunciation, and produce a defence; and that if they were ...ted to him, he would lodge them in process, and consent to an ...or from the passive titles.

...arance was then made for Mr. and Mrs. Hogg; and defences hav... ...n lodged to the above effect, the Lord Ordinary assoilzied them ...e passive titles, decerned against them cognitionis causâ tantum, ...nd them entitled to expenses.

...nst this latter finding the pursuers reclaimed, and contended that ...s ought not to have been found due, seeing that they were under ...ssity of calling the representatives as parties. But the Court, hold... ...t where a representative is called to an action, and lodges a de... the effect of enabling the pursuer to get decree cognitionis causâ ...nd does not create any unnecessary litigation, he is entitled to be ...ed for his expenses, unanimously adhered.

Nov. 28. 1828. 1ST DIVISION. Lord Meadowbank. II.

T. RANKEN, S. S. C.—W. MARTIN, S. S. C.—Agents.

W. THOMSON, Pursuer.—*Jameson.* No. 48.
J. LOW, Defender.—*Robertson.*

...question of expenses, in which the Lord Ordinary decerned ... but the Court altered, and found no expenses due.

Nov. 28. 1828. 1ST DIVISION. Lord Meadowbank.

C. GORDON, W. S.—J. R. STODART, W. S.—Agents.

No. 49.

CAPTAIN J. KID, Pursuer.—*Skene—Marshall.*
J. WALKER, Defender.—*Murray.*

Et é contra.

Submission.—Under a reference forming part of an agreement, and not being a regular submission, held competent to require from an oversman an explanation of his award.

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2D DIVISION.
Ld. Mackenzie.
F.

AFTER the proceedings in this case, mentioned ante, Vol. V. No. 90, (which see,) the parties gave in a joint minute, naming two individuals 'as referees for carrying into effect the agreement and reference between 'them, in terms of the interlocutor of Court, with power to the said re- 'ferees to choose an oversman in case of difference;' and the Lord Ordinary interponed his authority thereto, and appointed the referees or oversman to report to his Lordship. The referees, having differed in opinion, appointed as oversman Colonel Gordon of Park, who returned a report, wherein he found as follows:—'viz. That he the said John 'Walker has forfeited all and every claim which he may have had for 'meliorations on the houses in the farm of Upper Inverichney, or for 'or on account of the value thereof, in any manner of way, upon leav- 'ing said possession; and further, that, over and above, the said John 'Walker has subjected himself, and is liable to the said Captain James 'Reid in the sum of 100 guineas, all in respect of the said John Walker 'having failed to implement the agreement of lease entered into betwix 'him and the said Captain James Reid, and the allowance granted to 'him, notwithstanding said agreement of leaving the said possession of 'Upper Inverichney at Whitsunday 1821.' Walker having given in objections to this report, the Lord Ordinary sustained them, 'so far as 'to find that the report cannot be received as it stands, but that the re- 'feree ought to explain clearly, whether, in estimating the damage due 'to Reid by Walker for abandonment of the farm libelled, he takes into 'account the whole consequences of that abandonment, and in particular 'the advantage (if any) resulting to Reid from the forfeiture of Walker's 'claim on account of the houses, as one consequence of that abandonment 'and also the value received in consequence thereof by Reid from Walker 'in wheat-farming and ploughing;' and his Lordship thereafter remitted to Colonel Gordon to reconsider his report with reference to these explanations. Walker thereupon reclaimed, and contended that Colonel Gordon's powers were exhausted by the report; that it must now stand or fall altogether, and that it was incompetent to allow an arbiter to explain or amend his award; or, at any rate, that if a new remit was to be made it ought not to be to the same person, who had a natural bias in favour of his already expressed opinion, which would incline him to give explanations in consistency therewith, and that there should be no specification in the interlocutor pointing out the particular explanations wanted. The Court, however, adhered.

USTICE-CLERK.—I have not much difficulty here. The only reason id not formerly send the case back to Mr. Wilson for explanation he had subjected himself to a personal objection. This is not a omission in the proper sense of the word, to be followed by a regular bitral, subject to all the rules of a regular submission. The parties agreed to name referees to carry into effect the agreement and re- tween them, but there is a clear difference between a submission and ent; and I am satisfied that the Court, in this proceeding, did not con- a proper submission, but merely a mode of settling matters by the f persons named by the parties; and though Colonel Gordon is oversman, yet he does not pronounce a formal decreet—arbitral, but re- opinion. The Lord Ordinary's interlocutor might perhaps have been iously worded, but in substance it merely requires an explanation of ; and, in the circumstances, this not being a formal submission, I think o objection to requiring this explanation.

her Judges agreed.

MACMILLAN and GRANT, W. S.—J. J. FRASER, W. S.—Agents.

No. 49. Nov. 28. 1828.

Messrs. Pringle, Wilson, and Bruce, Depute-clerks of Session, were to- d to the Bar, and admonished by the Court strictly to obey the 104th f the Act of Sederunt, 11th July 1828, prohibiting the principal Sum- tters of Advocation or Suspension, Petition or Complaint, from being gents or others interested, except in the cases there mentioned.

Nov. 29. 1828.

SON and J. HAY, Advocators.—*D. of F. Moncreiff—Tawse.*
R. LAMBERT, Respondent.—*Ivory.*

No. 50.

n—Advocation—Profanity.—A bill of advocation to the Court of Session of an a Sheriff, founding on the statutes prohibiting the profaning of the Sabbath, and enalties against a party sailing a steam-boat with passengers on Sundays, and held incompetent.

dvocators, David Jobson and James Hay of Dundee, repre- mselves as members of the kirk-session of Dundee, and as a specially authorized and empowered by the kirk-session of th concourse of the procurator-fiscal, presented a petition to the orfarshire, setting forth, 'That by the laws and acts of Par- rticularly by the acts 1579, c. 70; 1592, c. 124; 1593, c. 163; l; 1661, c. 18; 1672, c. 22; 1693, c. 40; 1695, c. 13; and —profanation of the Lord's day is prohibited, by whatever ersons, under the penalties therein contained: That not-

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1ST DIVISION. Bill-Chamber. Lord Meadow- bank. H.

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'withstanding thereof, Ralph Lambert, master of the steam-boat Rapid, 'has for some time past been in the practice, on the Lord's day, by him-'self, or by others in his employment, and acting under his orders and 'directions, of taking passengers on board the said steam-boat at the pier 'of Dundee in the county of Forfar, and sailing with such passengers to 'Broughty Ferry in the county of Forfar, and there landing them; and, 'in like manner, of taking such passengers on board said steam-boat at 'Broughty Ferry aforesaid, and sailing with them to Dundee aforesaid, 'and there landing them; and, in particular, the passengers were so 'taken on board of and landed from the said steam-boat upon Sabbath 'the 20th day of July current (1828,) or upon one or other of the Sab-'bath-days of that month, to the great profanation of the Lord's day, 'whereby it is evident the said Ralph Lambert has contravened the laws 'enacted against Sabbath-breakers;' and therefore concluding for war-rant of service, and for 'judgment or sentence against the defender for pay-'ment to the private complainers of the penalties authorized by law 'against Sabbath-breakers; and further, to decern against the said 'Ralph Lambert for payment of the expense of this complaint, and of 'the whole procedure to follow hereon; and in the mean time to inter-'dict, prohibit, and discharge the said Ralph Lambert from sailing the 'said steam-boat, and from taking passengers on board of or landing 'them from the said steam-boat, on the Sabbath-day, within the bounds 'of your Lordship's jurisdiction; and, upon afterwards advising the 'cause, to make the said interdict perpetual.'

In defence, Lambert stated that Broughty Ferry was a bathing-place, greatly resorted to by the inhabitants of Dundee; that there were no public conveyances between the two places on Sunday; and that, for the accommodation of the public, he had been induced to sail his steam-boat between Dundee and the Ferry every Sunday, at four o'clock in the afternoon, when divine service had terminated; that, in doing so, he had no intention to offend the religious feelings of any one, but to give an opportunity of enabling those who were necessarily obliged to go between the two places, or were desirous to enjoy innocent recreation, to do so in an economical way; and he pleaded, inter alia, that the pursuers had no title to insist—that the statutes were not applicable to the case libelled—that the petition was vague and irrelevant, and that no specific sums were concluded for.

The Sheriff-depute sustained 'the dilatory defence that no precise 'sum or sums in name of penalties are concluded for in the libel, contrary 'to the provision in the late Act of Sederunt, c. 2. § 1—the more espe-'cially, as no less than nine different statutes are libelled on, imposing 'different penalties for different offences; and therefore dismissed the 'complaint, in as far as it concluded generally for payment to the pri-'vate complainers of the penalties authorized by law against Sabbath-'breakers;' and repelled the other dilatory defences. Thereafter, a

ving been made up, he dismissed the petition in toto, for the splained in the subjoined note.*

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plication is in name of Messrs. Jobson and Hay, as a committee of the kirk-ses- here is no sufficient authority produced for warranting their instituting the ir individual names, as representing the kirk-session. Neither has it been shown -session have powers to pursue such an action as the present through and by ommittee of their body, supposing them to have authorized that measure. Fur- k-session can have no title to complain of what takes place at Broughty Ferry, out their parish, though this forms one half of the complaint.

t complained of, that of transporting persons from Dundee to Broughty Ferry, ack to Dundee, being performed on board of a vessel sailing in the Frith of eriff conceives he has no powers to interdict the defender, as craved, "from id steam-boat, and from taking passengers on board of, or landing them from am-boat, within the bounds of his jurisdiction," assuming the act complained ofanation of the Lord's day; for the Sheriff has no Admiralty powers to entitle fere with the sailing of the vessel in the Frith of Tay. Neither, it should powers as Judge Ordinary of the county entitle him to interdict the defender g persons who choose to go aboard of his vessel, and to compel him to detain ssengers from landing, and oblige them to remain longer on board than they in- over, it is the sailing of the vessel between port and port on the Lord's day that ate the profanity alleged, and not the act of allowing persons to come on board and afterwards allowing them to go on shore.

ion is laid solely and entirely on statutory law; but it has not been shown that e the remedy of interdict,—the only remaining conclusion of the libel, supposing lained of to amount to a profanation of the Lord's day. It does not, however, Sheriff, looking to what is tolerated in other instances in both ends of the island, any sufficient ground for that charge. In England, stage-coaches and all other nces, as well as water conveyances, are permitted on Sundays as lawful acts. in Scotland there are particular statutes against the profanation of the Sabbath h are here libelled on; but it is always a question what shall amount to a profana- ay. It is not maintained by the pursuers that the running of the mail-coach with and from Dundee is a profanation of the Sabbath; or the using of hackney- -chaises, gigs, and caravans of every description, saddle-horses, &c. The em- , of ferry-boats is sanctioned by universal practice as quite lawful on Sundays; ith goods and passengers sail on that day of the week from the port of Dundee ts of Scotland, and (as it may happen) arrive there on Sabbath, and set ashore rs, without objection from any quarter.

boat in question does not sail till after the morning and afternoon service is ose who use it are upon their necessary and lawful affairs, there can be no the part of the defender in hiring his vessel to them, than would attach to passage-boat hired to go to Broughty Ferry. But it is impossible practically d distinguish, among the whole passengers, those who embark from motives cessity, from those who go solely for pleasure and amusement. How can it, e made to appear that many of those who are passengers have not come by land day, or the day preceding, for the purpose of attending divine service in Dun- turning to their families and homes? On the other hand, it is believed, and d, that many of those who avail themselves of the privilege of going to and re- roughty by means of the defender's vessel, are hard-working people, employed occupation from Monday morning till Saturday night, and who, after attending nce or twice a day, make a sea trip during a summer evening for the sake of ation, and to enable them the better to resume their weekly labours, and there- tence for themselves and their families. It humbly appears to the Sheriff that cient ground for charging persons acting in this way with profaning the Sab- oss and recross the Tay in the regular passage-boat on Sundays, merely for th and recreation, without being held guilty of profaning the Lord's day.

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A bill of advocation was then presented; and it having come before Lord Meadowbank during vacation, his Lordship appointed it to be printed, in order to be reported to the Court, and issued this note:—'The Lord Ordinary has great doubt whether this bill be competent, 'lst, In consequence of the terms of the act 1696, c. 31, which expressly 'prohibits advocations of all the said processes against profanity and im-'morality; and, 2dly, Because the matter at issue is of the nature of a 'crime, and, if so, cannot be entertained in the Court of Session. The 'Lord Ordinary, however, deems it desirable that the opinion of the 'Court on these points should (if it be competent) be obtained before 'disposing of this bill of advocation, especially as, although the terms of 'the statute aforesaid be against advocations in such cases, the spirit of 'it would seem *not* to apply to judgments *refusing to grant* the remedy 'prayed for against the profanity and immorality complained of.

'The Lord Ordinary, however, has doubts, founded on the broad 'terms of the recent act of Parliament, whether he is warranted in order-'ing the bill to be printed, and taking the same to report. But it seems 'indispensably necessary that a Lord Ordinary should have it in his 'power, when entertaining doubts, especially on the competency of such 'applications, that he has thought it better to adopt this step than to 'refuse the bill by an interlocutor which would be final.'

When the bill came to be advised,

THE LORD PRESIDENT observed, that none of the statutes applied to the act libelled, and that the act 1696, c. 31, was quite express against receiving such an advocation.

Dean of Faculty for the Advocators.—By the late Judicature Act, the Lord Ordinary is bound to pass the bill. No doubt, if it is manifestly incompetent, he is entitled to refuse it. At present, the sole question relates to the competency, and therefore the merits cannot be gone into, and on these we have a great deal to say.

LORD PRESIDENT.—You will certainly require to do so.

Dean of Faculty.—We were told so in the case of stage-coaches; but

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'Neither would such a charge lie against them, were they to transport themselves on a Sunda' 'in any hired carriage, or on foot, from Dundee to Broughty, and thence back to Dundee; an' 'it is difficult to draw the proposed line of distinction between crossing and recrossing th' 'Ferry from Forfarshire to Fife in a steam-boat for recreation and health, and going fro' 'Dundee to Broughty, and returning in the defender's steam-vessel; neither sailing, fro' 'the like motives, during the time of divine worship. But if there be no profanity attachabl' 'to such passengers and travellers personally, how can that charge be made good against t' 'Fife and Forfar trustees, or against the defender, the owner of the vessels employed in tran' 'porting such passengers, more than against the proprietors of the carriages employed' 'conveying travellers by land from Dundee to Broughty Ferry? It may be said that t' 'defender's vessel is to be assimilated to that of a Sunday stage-coach, which it is unlawful' 'run that day. But, besides that in some important particulars these two modes of conve' 'ance are not equally calculated to give offence to persons of a more strict turn of mind,' 'is extremely doubtful whether it would be held to be a profanation of the Sunday, were o' 'of the Leith stage-coaches to run once every Sunday from Edinburgh to Leith, and the' 'back again, after the service of the day was over.'

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tisfied the Court, and succeeded in preventing them from travelling ndays. The question here, however, is, whether the Lord Ordinary bound to pass this bill.

D BALGRAY.—If it be incompetent, do you mean to maintain that d not refuse it.

of Faculty.—Certainly not; but here the Sheriff refused to exer- powers, and we are entitled to complain of that. We contend had jurisdiction, whereas he says that he has not; and it will retended that your Lordships cannot competently judge whether jurisdiction or not. He has pronounced no judgment on the nd consequently the act 1696 has no application.

GILLIES.—I thought the case had been brought before us on s, and I regarded it as an ill-advised proceeding; but I see there minary question as to the competency.

BALGRAY.—I have looked at the act 1696. The words are very d general.

GILLIES.—But the answer to that is, that this is an advocation Sheriff, who has not pronounced judgment one way or another erits, but has found that he has no authority to judge in the

PRESIDENT.—We had better take time to consider.

—Besides the objection on the act 1696, there is one suggested ord Ordinary, whether this Court has a jurisdiction, seeing that er libelled is of a criminal nature; and therefore the bill should n presented to the Court of Justiciary.

e case coming to be again advised, the

of Faculty stated that he was ready to pass from the penalties.

PRESIDENT.—But if the case was originally criminal, you can- rt it into a civil process.

of Faculty.—In an election case, where the Court held they entertain an action in regard to a conclusion for penalties, it l from, and the jurisdiction sustained quoad ultra.

AIGIE.—I think that, under all the circumstances of this case, it uashed.

LGRAY.—I have looked into the acts of Parliament, and the only as the slightest application to the case is the statute 1695, c. 13.

LIES.—The proper question is, whether this is an action of a cri- If so, then we have no jurisdiction.

URT, accordingly, being of opinion that the action was of a crimi- ture, refused the bill as incompetent.

G. LYON, W. S. Agent.

No. 51.

T. Mowat, Advocator.—*A. M'Neill.*

Sir J. Stewart Denham, Respondent.—*Fullerton—Macallan.*

Nov. 29. 1828.
2d Division.
Lord Medwyn.
F.

Landlord and Tenant.—Various illiquid alleged claims of damages by a tenant against his landlord refused to be sustained as grounds of compensation, in a process of sequestration, from rents during the currency of the lease.

H. Fotheringham, W. S.—Ainslie and Macallan, W. S.—Agents.

No. 52.

J. Bryson, Complainer.—*Rutherfurd.*

C. Weir, Respondent.—*Jardine.*

Process—Jurisdiction.—Question raised, but not decided,—1.—Whether a bill of advocation of a judgment of an Inferior Judge, sustaining his jurisdiction in a pending cause, having been refused by a Lord Ordinary, whose judgment is by the Judicature Act declared to be final, forms res judicata on that point, when the whole cause is brought to this Court after a final judgment by the Inferior Judge;—and,—2.—Whether an action for abstracted multures, when there is no dispute as to the right to levy them, be competent before the Judge of the defender's domicile, he not being the Judge Ordinary of the bounds within which the thirl lies.

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2d Division.
Bill-Chamber.
Lord Alloway.
F.

The respondent Weir, miller at New Mill in the parish of Hamilton, having a claim against the complainer Bryson, who resided in the town of Hamilton, (a burgh of barony,) for a trifling amount of abstracted multures, brought his action for payment before the Magistrates of Hamilton, whose jurisdiction, however, did not extend over any part of the thirl. To the competency of this action, it was objected, that processes for abstracted multures could only be brought before the Judge Ordinary of the bounds within which the thirl lay; but the Magistrates having repelled this preliminary defence, 'in respect that it is admitted that 'the defender's residence is within the territory of the burgh of Hamil-'ton and the jurisdiction of this Court, to which he is subjected ratione 'domicilii,' Bryson presented a bill of advocation on the point of jurisdiction. This bill was refused by the Lord Ordinary, (Cringletie); and the Ordinary's judgment in such cases being declared final by the Judicature Act, the cause proceeded before the Magistrates, who ultimately decerned against Bryson for the amount sued for. Of this final judgment Bryson presented a bill of suspension, on the ground, inter alia, of want of jurisdiction on the part of the Magistrates. To this it was answered, that, besides being unfounded on the merits, this plea was finally decided by Lord Cringletie's refusal of the bill of advocation, so that the point was now res judicata. Lord Alloway, as Ordinary, having refused the bill, Bryson reclaimed.

Rutherfurd for the Complainer—Although by the Judicature Act, § 45, it is declared that the judgment of a Lord Ordinary passing or refusing a bill of advocation of an interlocutory judgment by an Inferior Court shall be final, the true object and meaning of that provision is merely to prevent a process in the Inferior Court being unnecessarily

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preliminary defences shall go through all the stages of the session; but it never could be intended to preclude questions, at occurring here, from being deliberately tried, when the cause finally decided in the Inferior Court, as this would make the of a single Lord Ordinary final, without review by this Court se of Lords, on questions often of the greatest importance. the merits of the objection itself, it could scarcely be disputed for abstracted multures could only be brought before the inary of the bounds, which the Magistrates of Hamilton in ere not.

for the Respondent.—This is a question not involving any lage, or to levy multures, which is not denied, but merely for a unt as abstracted multures, resolving into an ordinary question npetent before the Court of the defender's domicile; but, be- rms of the Judicature Act are precise, that a judgment of the ary refusing a bill of advocation of an interlocutory judgment al, and it is therefore impossible now to entertain the objection.

LOWAY.—It was stated to me in the Bill-Chamber that a previous oint of jurisdiction had been refused by Lord Cringletie. Perhaps sider sufficiently the words of the statute. On the merits, however, is to have been a mere action of debt, competent before any Judge the bounds of the debtor's domicile, there being no dispute as to the right; and thinking it only an action of debt, I see no objection to e any Judge of the territory where the defender resides.

ENLEE.—I should have been for passing the bill, if the point of juris- open; for the claim sued for does not arise from an agreement, but rights to multures, and it is totally different from an action of debt. whether the point be not foreclosed by the interlocutor of the Lord using the former bill. However, I think it an important point, and to be seriously considered. I am not satisfied that the advocator ave reclaimed against the Lord Ordinary's interlocutor refusing the suspect the statute applies to interlocutory judgments of a different hat sustaining his jurisdiction, which is not properly interlocutory; e most important question here.

TICE-CLERK.—I concur in thinking that the most important point t case; and I cannot hold it to be foreclosed by the Lord Ordinary's first bill, at least not without much more argument. Section 45 of e Act refers to 50th Geo. III., which specially mentions, as one of n which advocation is to be allowed from interlocutory judgments, , including defect of jurisdiction; and so this was an interlocutory in section 45 of the Judicature Act, though on the matter of jurisdic- espondent's argument be right, it would prevent any review by us, or Lords, of a single Lord Ordinary's interlocutor. On the question itself, I never can hold this to be a common question of debt. That, point of inferior importance to the other question, on which we must rgument; and I would propose minutes.

We will rather consent to the bill being passed than incur the ex-

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pense of argument, as if the question was considered to be attended with difficulty, the only result would probably be to pass the bill.

THE COURT accordingly, of consent, remitted to pass.

SCOTT, FINLAY, and BALDERSTON, W. S.—YOUNGS, AYTOUN, and RUTHERFORD, W. S.—Agents.

No. 53.

J. MERRY, Complainer.—*Skene—Hopkirk.*

A. DALLAS and J. HENDERSON, Respondents.—*D. of F. Moncreiff—Baird.*

Road—Jurisdiction.—1.—A party having purchased some parcels of ground, and made a road to enable him to pass from a turnpike road at the extremity of one trust, to a parish road without passing through a toll-bar within the next trust, held to be an evasion of that toll, not protected by the exception in favour of proprietors passing along their own private roads, in the General Road Act.—2.—Judgment of Sheriff, on the complaint of the trustees whose toll was evaded, final and conclusive, without review by the Court of Session.

Nov. 29. 1828. 2d DIVISION. Bill-Chamber. Lord Newton. F.

THE road from Glasgow to Bathgate by Baillieston is divided into two trusts, which meet at Baillieston. On the Bathgate side, within about 159 yards from the point of junction, there is situated the Baillieston toll-bar, at which there strikes off on the east or Bathgate side of the toll-house a parish road to the north, leading past Swinton, near which the complainer Merry has some property. In going from Glasgow, where Merry resides, to his property at Swinton, he was necessarily obliged to go along these 159 yards of road within the Bathgate trust, and pass through the Baillieston toll-bar before turning up the parish road to Swinton, and consequently to pay toll at that bar. In order to avoid this, Merry, along with two or three other persons, purchased from different proprietors certain small lots of ground, on which they made a road striking off from the turnpike road just at the point of junction of the two trusts, but turning off from the extremity of that part within the trust nearest Glasgow; so that, in going from Glasgow, it was not necessary to pass the boundary, or touch the Bathgate road, in order to turn up this new road, which, after being led a few yards northward, was turned to the east, so as to run parallel to the turnpike road, and enter the parish road already mentioned as striking off immediately to the east of the Baillieston toll-bar, a few yards from its junction with the turnpike road —being in all about 35 yards longer than the road through the toll-bar. By these means Merry avoided entirely payment of toll at the Baillieston bar. The trustees of the Bathgate portion of the road, however, considered this to be an evasion of their toll-bar, and to fall within the provisions of the General Turnpike Act, (4th Geo. IV. c. 49. § 45,) which enacts, inter alia, that 'if any person shall do any other act whatever in 'order to evade the payment of any of the tolls, and whereby the same 'shall be evaded, every such person shall, for every such offence, forfeit 'and pay any sum not exceeding £5;' and they therefore presented a petition to the Sheriff of Lanarkshire in name of the respondents, the treasurer of the trust and the tacksman of the Baillieston bar, praying to have Merry found liable in the penalty of £5 for having passed along this new road on a particular occasion libelled. In defence Merry pleaded,

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rietor of the ground through which the private road passed, hin the exception in the 45th section of the General Road ır of the proprietors and occupiers of lands through which s run; and he further contended, that as he did not pass on he Bathgate road, but struck off into his private road before nmenced, he could not possibly be guilty of an evasion of e Bathgate trustees, nor could they sue him for an alleged nitted beyond the limits of their trust. The Sheriff found, ne fair and legal interpretation of the act 4th Geo. IV. c. 49, the defender did evade the toll-dues at said Baillieston toll- erefore subjected him in a modified penalty of £2. 2s. and erry thereupon presented a bill of suspension, which having y the Lord Ordinary, Dallas and Henderson reclaimed.

aculty for Respondents.—After observing on the merits— ıdgment of the Sheriff in matters of this nature is declared by to be final and conclusive, without review by any Court; on that ground incompetent. The other party attempts to by saying that the act complained of was beyond the juris- trustees; but to have the benefit of that, they must assume ıt on the merits, of which the Sheriff had power to decide.

he Complainer.—The whole question is, whether the act was beyond the jurisdiction of the trustees or not; and so or the complainer of competency is involved in that of the

culty in reply.—The question as to competency depends sdiction of the trustees, but on that of the Sheriff. Now nded that he exceeded his jurisdiction. It is only said es have done so; but the Sheriff is the proper Judge, and s final.

EE.—Generally speaking, I am disposed to pass a bill, if there is t facts, or any difficulty in law; and though, on reading this bill, here were sufficient allegations to warrant its being passed, yet ts stated in the answers, which are not now denied, that Merry roprietor of the ground through which the private road passes, nde for the precise purpose of evading the toll by this cut going oll-house, I became satisfied that this was a case altogether out of the act, in regard to a person passing through his own grounds; re brought to the plea, as the only ground for passing, that the ff into the private road before coming within the limits of the . But I think that the general clause in the statute as to evasion se as this. Besides, there is a great deal in the objection to the re is no act of the trustees tried to be carried into execution by is complained of. They merely applied to the Sheriff. I can ower in his judging whether this was an evasion or not; and his ed to be final.

Y.—I have come to the same conclusion; for though the only r the bill should be passed, I think the trustees have made out

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a good case, both on the merits, and on the competency. The evasion complain of is ingeniously done, but it is clearly an evasion falling under the 45th secti of the General Road Act; and I am not much moved by the consideration th the trusts meet at this place, it being plainly an act to evade Baillieston Bar. am, however, still more influenced by the objection to the competency. Th question was clearly competent to the Sheriff to decide, and his judgment is d clared to be final and without review. Now the complainer here must first mak out that the Sheriff has exceeded his powers. But there is no excess, as th subject-matter of the complaint here was undoubtedly within his jurisdiction; an therefore, both on the merits and on the competency, I think the bill should b refused.

Lords Justice-Clerk and Alloway having concurred,

The Court altered the Lord Ordinary's interlocutor, and remitted to refus the bill, with expenses.

J. G. Hopkirk, W. S.—Dallas and Innes, W.S.—Agents.

No. 54.

Dr. Barrie Fleming, Suspender and Defender.—*D. of F. Moncreiff —Cuninghame.*

Jean Twaddle, Charger and Pursuer.—*Skene—Bain.*

Poinding.—Held incompetent for the creditor of an individual to poind property alleged to belong to him jointly with another party.

Dec. 2. 1828. 1st Division. Lord Newton. H.

The mother of the suspender Dr. Barrie Fleming, the heiress of entail in possession of the estate of Newk in Lanarkshire, granted a commission to him in 1810, authorizing him to set tacks, uplift the rents, remove tenants, raise all necessary actions before the Sheriff, either in her or his own name, for protection of the estate, and renounced all management of it till the commission should be recalled. In 1817 he let the lands to Andrew Baird till Martinmas 1822; and, on the expiration of that period, the lease was prolonged for another year, by a missive subscribed by him and the tenant. Baird having incurred an arrear of rent to the extent of £500, Dr. Barrie presented a petition to the Sheriff in his own name, as proprietor of the estate, for a warrant of sequestration, which was granted and executed in July 1823. At this time Baird's son, Andrew Baird junior, resided with him, and was ostensibly joint tenant. In August of the same year, the tenant gave written authority to Dr. Barrie 'to sell the effects included under the sequestration,' together with any other effects 'on my farm that may not be therein included, or as much 'thereof as will satisfy and pay you the rent specified in the petition for 'sequestration, &c.; and that as well towards payment of those rents 'which are resting and owing, as those that are payable for the current 'year.' This was also signed by Andrew Baird junior. Under the warrant and this authority, the effects were sold in December for payment of the arrears. The proceeds, however, it was alleged, were insufficient to pay them fully. Between the date of the sequestration and the sale, a quantity of dung had been collected upon the farm; and it was admitted that the current year's rent had not been paid.

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n while the charger Jean Twaddle had obtained a decree the Justices, for the aliment of a bastard child, against d junior, as cautioner for the father of the child, who was virtue of this decree, she executed a poinding of the dung of March 1824. By this time the Bairds had been removed mises, and the lands let to a new tenant. Dr. Barrie there- ted a petition to the Sheriff, in which he described him- ewk,'—referred to the petition and warrant of sequestration, that the effects were threatened to be carried off by the d therefore he prayed for interdict. Interim interdict was granted; and after a litigation with the charger, and her er administrator in law, who objected to Dr. Barrie's title, substitute (Mr. Mackenzie) continued the interdict, 'in re- the defenders have failed to establish in their debtor, Andrew ior, the character of tenant in Newk, or to show that he had, ner character, right to the dung in question.' Thereafter, on om the Circuit Court to inquire into Dr. Barrie's title, the stitute (Mr. Dick) found that he had no title, and dismissed s. But, on an appeal to the Sheriff-depute, he found 'that the Newk, mentioned in the proceedings, were taken by Andrew nior from the petitioner Dr. Barrie by the missive No. 7.; ther Andrew Baird senior, nor his son Andrew Baird ju- any other person in their right, can challenge Dr. Barrie's eparatim finds, that the said Dr. Barrie, by the factory and on granted to him by his mother, was entitled to recover rents, do all legal diligence for that purpose in his own name; ough the dung in question is not included in the sequestration, by law, and in virtue of the right of hypothec which Dr. Barrie led to exercise either as proprietor or as factor, he was entitled the dung upon the lands, in opposition to any poinding either w Baird senior or junior, until satisfied and secured in pay- is rent; further finds that Andrew Baird senior and junior ority to sell and dispose of the effects on the farm, both those e sequestrated, and those which were not, for payment of said that the dung having been collected for the use of the farm, d thereon, no further delivery was necessary to authorize Dr. se and apply it for the purposes of said farm; but finds rrie must account to the tenant or tenants, or those in his he just value and price of said dung, as well as for the other and must repay any surplus, if such be, as arises from his s; therefore reserves claim or action in competent form at of Andrew Baird senior or junior, or those in their right, ;' and accordingly altered, and continued the interdict. while the dung was applied to the purposes of the farm g tenant, under the authority of Dr. Barrie; and the on brought an action against them, founding on the 33d

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Geo. III. c. 74, § 5, and 54th Geo. III. c. 137, § 5, in which she concluded for double the amount of her debt, in respect of carrying off the poinded goods. The Sheriff-substitute, (Mr. Dick,) 'in respect that 'the defenders had admitted the poinding of the dung in question, and 'that before the question of interdict had been disposed of, they used that 'dung on the farm of Newk, and that they have not shown, nor even 'averred, that they did so by legal authority, decerned against him for 'double the amount of the debt.'

Of this decree a suspension was brought by Dr. Barrie; and at the same time the charger raised a reduction of the judgment of the Sheriff in the question of interdict.

The Lord Ordinary decerned in the reduction, for the reasons explained in the subjoined note;* and in the suspension, he, in respect of the judgment in the reduction, repelled the reasons of suspension.

Against these judgments Dr. Barrie reclaimed.

Cuninghame for Dr. Barrie.—In this case, Dr. Barrie had ample powers from his mother, and under them obtained a warrant of sequestration.

Lord President.—Yes; but you did not libel yourself as factor.

Cuninghame.—The case does not turn upon that. Baird was the sole tenant, and he granted a missive, authorizing Dr. Barrie to sell the

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* 'The Lord Ordinary is of opinion that the defender's application for an interdict against 'the pursuer's proceeding to sell the dung under her poinding, was, in the circumstances, 'inept, and ought to have been dismissed. It was grounded on a previous sequestration, ob- 'tained at the defender's instance, in the character of proprietor of the lands; but such se- 'questration was ineffectual, because the lands belonged to the defender's mother, and he had 'no right of property in them at all. He held a commission from her, empowering him to 'manage as her factor or commissioner; but, however broad the terms in which his powers 'as such are granted, there is plainly nothing which could entitle him to assume the charac- 'ter of proprietor, or to make any judicial application as such.

'The Lord Ordinary could have seen ground for the interlocutor of the Sheriff-depute on 'the point of title, had it appeared that the tack or missive of 1817, on which Andrew Baird 'commenced possession of the farm, had been granted by the defender in the character of 'proprietor. But this document has not been recovered; and, in the absence of all evidence 'as to its terms, it is not to be presumed to have been granted in a false character. The 'after missive of 1821, continuing the possession for another year, bears reference to the ori- 'ginal one, and contains nothing inconsistent with the supposition that the defender was act- 'ing as his mother's commissioner; on the contrary, his holograph acceptance of the tenants' 'offer, produced in the process of suspension, is subscribed 'J. Barrie, factor to Mrs. B. "Fleming.' Further, the sequestration, even although competently obtained, could not have 'affected the dung in question, seeing it did not exist when the sequestration was granted. 'Neither can the defender's application for an interdict be supported by the mandate to sell 'granted to him by the Bairds, senior and junior; as such mandate, unless carried into effect 'by taking possession and selling, could be no bar to a poinding by a creditor. The defender 'might perhaps have been entitled, as his mother's factor or commissioner, to object to the 'dung being carried off the farm, on an offer to pay the value to the poinding creditor; but 'no such offer was made, nor was the application for interdict put upon this ground. As to 'the property of the dung, although the missives are in the name of Andrew Baird senior, it 'is not disputed that the son was in fact joint tenant with the father; and it is sufficiently 'proved by the documents founded on, and in particular by the mandate to sell, that he was 'recognised as such by the defender.'

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r the arrears and for the current rent. The dung was not but as it was upon the farm, it was hypothecated for the state of matters, a pointing was attempted, not for a debt in possession, but of his son. We then applied for an inter- said that we did so under a wrong title.

SIDENT.—A man may have a perfect good right to apply Law, but still he may do so in a wrong form.

e.—True; but we had sufficient authority both from the l the tenant; and the question is, whether the charger could oind the dung? She says that the son was a joint tenant, y; but assuming that he was so, she could not poind joint he debt of the individual. In regard, again, to the penal- statute, we submit that they cannot be enforced in such a

he Charger.—There is no question here as to what Dr. have done, but only as to what he actually did. If the ere irregular, the judgments complained of are well founded. lled himself as proprietor of Newk, whereas he was not sets forth that the lands were his lands, and the tenant But all this is inconsistent with the fact; and he had no apply in this character, than he would have had to describe ke of Roxburghe, and proprietor of Fleurs. It is said, he had authority from the tenant to sell; but that is no inding creditor.

SIDENT and GILLIES.—That is quite clear.

is further said that a poinding of a joint property for an t is not competent; but that is a plea competent only to d not to the suspender.

LIES.—But the tenant gave authority to him to sell.

RAY.—Could he not interfere on behalf of the tenant?

e do not admit that he had any such authority, and we are e that the dung belonged to Baird junior. In regard to , it does not seem to be disputed that if the judgment in is well founded, the charger is entitled, under the statute, amount of her debt.

culty in reply.—Let us attend to what is truly the point in is proved that Baird senior was the sole tenant. If the s that Baird junior was joint tenant, she is bound to prove not done so. The Lord Ordinary, however, goes on the t he was joint tenant. This we deny; but what we say umed that her statement is true, and see how the case will vas joint tenant, then the dung was joint property. But nnot be disputed, that a poinding of joint property for an is incompetent. If so, then the charger was not entitled ng, and consequently she has neither the character nor inding creditor. The whole of her case rests on a mere in libelling the title of Dr. Barrie; for it is not dis-

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puted that his mother was entitled to oppose the poinding in virtue of her hypothec. Besides, there is a mandate from the tenants, which was equivalent to a decree; and such a title was sufficient to authorize him to apply for interdict.

Lord Craigie.—Taking the dung as joint stock, it is clear that it could not be poinded for a debt of one of the individuals. The mandate, besides, was a sufficient authority to oppose the poinding. Dr. Barrie might have founded on it when the officer was executing the poinding; and surely he was entitled, in virtue of it, to apply to the Sheriff.

Lord Balgray.—My chief difficulty is as to the title of the charger, or as a poinding creditor. For, assuming that the son was a joint tenant, she could not poind the joint stock for his debt. Besides, the dung remained hypothecated for the current rent, and so the proprietor, or those acting for her, were entitled to prevent it being carried off till the rent was paid. I have not the slightest conception that in a case of this kind, which is truly a competition between a landlord and a poinding creditor, the former can be subjected in the penalties of the statute for taking possession of the dung.

Lord Gillies.—Dr. Barrie has been placed in a very hard situation. Arrears of rent were undoubtedly due; and because he was endeavouring to make them effectual, by preventing an article being carried off which was hypothecated for payment of them, he has been involved in this expensive litigation, and found liable in penalties. We have nothing to do with the sequestration, and the introduction of it into the argument tends only to produce confusion. The dung did not fall under it, and therefore the case just stands as a competition between the hypothec and the poinding. Dr. Barrie was entitled to apply for a sequestration on behalf of the proprietrix; but, to avoid the expense of doing so, the tenant gave him authority to sell, and the Sheriff has properly found that he is bound to apply the proceeds in extinction of the rents, and to account for the surplus to the tenant, or those in his right. He was therefore entitled to prevent the dung being carried off, and there appears to be no ground on which he can be subjected in the statutory penalty. But, at all events, the charger's plea rests on this being joint property, and it is clear that she cannot poind it for the debt of an individual.

Lord President.—At first I thought the interlocutor right; and if the case had depended on the regularity of the sequestration, I would have remained of that opinion, because all legal diligence must be strictly correct. But there was here (independently altogether of the sequestration) a right of hypothec; and this gentleman, on behalf of his mother, was entitled to go either to the Sheriff or to the tenant for authority to sell. He accordingly got authority from the tenant, and under it had right to prevent the effects being carried off. Besides, the poinding is clearly inept. If the father was sole tenant, it is plainly bad; and if he was joint tenant, it is equally so.

The Court therefore altered both interlocutors, and in the reduction assoilzied; and in the suspension suspended the letters, and found expenses due.

Suspender's Authorities.—Redcastle, Dec. 18. 1673, (6222); Kilk. p. 273, and 6228; 1. Bell, 68.

W. Waddell, W. S.—Wotherspoon and Mack, W. S.—Agents.

ER and H. HEPBURN, Suspenders.—*D. of F. Moncreiff—Sol.-Gen. Hope—More.*

nd J. STEWART, for the PERTH BANK, Chargers.—*Jeffrey—Fullerton—Jameson.*

No. 55.

gence.—Found competent to raise summary diligence on a bond binding a party dance which might be due by a bank agent on his intromissions, as the same ertained by a stated account, although there be no consent to the registration of and it be not recorded.

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1st DIVISION.

Lord Eldin.

D.

2, James Cameron and Patrick Bisset were appointed agents erth Union Bank at Dunkeld; and on the 30th of October, ether with the suspenders, Fisher, Hepburn, and others, as , granted a bond proceeding on this narrative :—'Whereas ctors of the Perth Union Bank have for some time employed, e agreed to employ us, the said Cameron and Bisset, for cir- the notes of the Bank, and for transacting other business at ce for them which they may have occasion to execute;'—there- ey and the cautioners bound themselves 'to content and re- the said Perth Union Bank, or to John Syme, cashier of the ank, and his successors in that office, for behoof of the said or to his or their assignees, and that at the office of the said Bank h, the whole sums that shall be due and resting owing by us.' bsequent clause they further obliged themselves, 'conjunctly erally, as said is, and our foresaids, to warrant all drafts and ac- or indorsed bills, or other remittances that shall be made by us, l Cameron and Bisset, or either of us, or by others in our name, ood and effectual to the said Bank, and that until payment there- be made to the said Bank or their cashier, or others deriving om them; but declaring as to the cash-accounts already granted, may be hereafter granted by the directors of the said Bank, nay be under the management of us, the said Cameron and we shall not be anywise liable for the solvency of the obligants onds granted for the same.' Power was then given to the Bank mmary possession of the Bank notes, bills, &c. in the reposito- agents, and the obligants bound themselves 'to content and he said Perth Union Bank, or to the said John Syme, their oresaid, or to his successors in office, for behoof of the said d their foresaids, the balance which shall, in consequence of said obligations granted by and incumbent on the said Cameron t, James Cameron and Patrick Bisset, be found resting by either of them, by said Bank, according as the same shall be and ascertained by the account kept by the Bank with them, whenever the same shall be demanded, with a fifth part more penalty,' &c. And thereafter there followed this clause:— hereby declared, that a stated account made out from the said Bank, and certified by the cashier or accountant of

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'the Bank for the time being, shall be sufficient to constitute and ascer-
'tain a balance and charge against us, the said Cameron and Bisset,
'James Cameron and Patrick Bisset, and us, the said Roderick Robert-
'son, James Fisher, Henry Hepburn, John Greig, and James Henderson,
'and that no sist of suspension, or other sist of execution, shall pass or
'be competent, at the instance of us or either of us, of any diligence
'raised on these presents, except on consignation only: Consenting to the
'registration hereof in the books of Council and Session, or others com-
'petent, therein to remain for preservation, and that letters of horning or
'six days charge, and all other execution necessary, may pass and be
'directed hereupon, as effeirs.'

Cameron and Bisset acted as agents till January 1823, when they were removed; and on the 29th of that month, the bond was recorded in the books of Council and Session, and an extract obtained. On the 19th of February, a stated account was made up by Syme as cashier, and Stewart as accountant of the Bank, showing the balance then due to be £12,258 2s. 10d.; and, on the 22d, a bill for letters of horning was presented by Syme, narrating the bond, and bearing that by a stated account made out from the books of the Bank, 'and subscribed by me as cashier 'and by John Stewart, accountant of the said Bank, as relative to the 'said bond, it appears that, on the 19th day of February current, there 'was due to the said Bank, in terms of the said bond and stated account 'exclusively of bills then current, and other sums not then payable, 'the sum of £12,258: 2: 10 sterling, besides the interest due thereon, as 'the said bond, registered in your Lordships' books, and having a de-'creet of your Lordships interponed thereto, upon the 29th day of 'January last, and the said stated account, subscribed as aforesaid, here-'with to show, will testify.' On the same day this deliverance was written upon the bill:—'Edinburgh, 22d February 1823.—Fiat ut pr. becaus 'the Lords have seen the ext. bond and stated acct.' Letters of horning were thereupon expede also on the same day, containing authority to charge the obligants 'to make payment, jointly and severally, to our sai-'lovite, as cashier foresaid, of the foresaid principal sum of £12,258 '2s. 10d. sterling, with the legal interest due thereon from the date the 'sums contained in the said stated account respectively fell due, and till 'paid, after the form and tenor of the said bond, decreet interpone 'thereto, and stated account, in all points.' And the letters concluded in the usual form, to be 'according to justice, because the Lords have seen 'the registered bond and stated account above mentioned;' and to have been given forth 'ex deliberatione Dominorum Concilii.'

A charge having been given upon these letters, Fisher and Hepburn presented a bill of suspension, without caution or consignation, on various grounds; but particularly, that as the bond merely contained an obligation to pay a balance, and not any specific sum, and as there was no consent to the registration of the stated account, and it had not been recorded, summary diligence was incompetent.

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cond Division of the Court, on the 11th February 1824, in re- o caution being offered, adhered to the Lord Ordinary's inter- fusing the bill.* Caution, however, being afterwards offered, as passed; and the letters having come to be discussed before in, Fisher and Hepburn contended,

t as the charge was at the instance of Syme, as cashier of an un- ted society, he had no title to pursue.

t summary diligence was incompetent for the reason above men- nd,

t the Bank had been guilty of such conduct as was sufficient to he cautioners.

mean while an ordinary action was brought by the Bank; and, l of July 1825, his Lordship conjoined the two processes, and l all the objections to the claims of the Bank, excepting such as founded on the allegations of the suspenders that the transac- f the Bank with their agents, for whom the cautioners were , were fraudulent, unfair, or otherwise improper, or unwarranted obligation of the cautioners,' in relation to which he ordered a endence.

r and Hepburn having reclaimed, the Court, after ordering Cases question of title, and taking the opinions of the other Judges, re- he objection to it,† and appointed the suspenders 'to give in a con- idence, stating articulately the practice in regard to the registration ed accounts referable to cash-accounts, or to obligations such as that ed on,' and answers by the charger; on advising, their Lordships d 'to the Deputy-keeper of his Majesty's Signet to examine the records, and to report as to the state of the practice referred and d to in this condescendence, and the answers given in thereto, the period of the last forty years preceding the date of the charge; thorized the said Deputy-keeper, if he shall deem it essential, to t with the Clerk to the Bills on the subject before making his re- In consequence of this remit, the Deputy-keeper made the sub- eport.‡ Thereafter their Lordships ordered Cases, which they

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te, Vol. II. No. 653. p. 695, and Fac. Coll. of above date.

te, Vol. VI. No. 62. p. 216.

edience to the above remit, the reporter made inquiry as to the examination of the ords, which is ordered in the interlocutor, relative to the matters alluded to in the dence and answers, when he ascertained that the only mode by which he could ful- t of the remit, would be to examine the whole bills for hornings deposited at the e, during the last forty years. This appeared to be a labour which it was quite power to undertake, as in all probability it would have occupied several months. ming the counsel and agents for the parties of the impossibility of his undertaking is search, they requested him to institute an inquiry among the most experienced the Society of Writers to the Signet, and at the Bill-chamber and Signet-office, er to report upon the state of the practice referred to in the condescendence and ins ascertained. The reporter has since held a meeting of the Commissioners and inquired of the members who attended as to their practice (if they had ire to these matters remitted to him. He also made similar inquiries at the

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appointed to be boxed for all the other Judges, and the following question to be laid before them for their opinion :—'Whether the letters of 'horning, and the charge given thereon in name of John Syme, cashier 'of the Perth Union Bank, to the suspenders, proceeding on the bond

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'agents for different banks, and at the solicitor for the Post-office, and he likewise applied to 'the Clerk to the Bills, and at the Signet-office; and he now begs leave humbly to report,

'1. In obligations for cash-credits, the practice is to specify in the bond the amount of the 'credit. In applying for horning on such bonds, to enforce payment of what may be due, not 'exceeding the sum specified in the bond as the amount of the credit, the usual practice is to 'record the bond, and not the stated account, and to pass a bill for horning, upon production 'of the registered bond and the principal stated account. Some instances have occurred, in 'which the stated account has been recorded along with the bond; and in those instances a 'horning frequently passes the Signet without a bill.

'2. The reporter has not heard of any instance of a horning proceeding upon a registered 'bond for a cash-credit, containing an obligation of unlimited amount.

'3. Bonds by bank agents and their sureties usually contain a general obligation to ac- 'count, and to pay whatever balance may be due, but with a limitation as to the amount for 'which the sureties are liable, either each of them individually to a certain amount, or the 'whole conjunctly and severally; and it is declared that a stated account, subscribed by the 'bank accountant, or other officer, shall constitute a balance and charge against the obligants. 'Upon such bonds there are various instances of hornings passing upon production of the 'registered bond, and of the principal stated account. Such hornings were generally against 'the sureties, for payment of a sum not exceeding the amount to which the obligation by the 'sureties was limited. The reporter has not heard of any instance of a horning upon such 'bonds against the bank agent himself for payment of a sum not exceeding the amount to 'which the obligation of the sureties was limited.

'4. It is not usual for banks to take obligations by their agents and sureties to an unlimited 'amount; and the reporter has not heard of any instance of a horning proceeding upon such 'obligation, either before or since the date of the charge in process.

'5. The reporter has seen a printed form of a bond, dated in the year 1811, granted by 'deputy-postmasters and their sureties, in which the parties are made to bind themselves to 'make just count, reckoning, and payment to the postmaster-general, or his successors, for 'behoof of his Majesty, of whatever sums the deputy-postmaster may intromit with; and it is 'declared that production of a certified account, together with an extract of the bond, shall be 'a sufficient warrant for letters of horning. The bond also contains an obligation to pay the 'expenses of diligence, the amount to be liquidated by the account of the person employed, 'without defalcation on any account whatever. Upon these bonds, which contain no limita- 'tion as to the amount, it would appear that hornings for the balance due by the deputy-post- 'masters proceed upon production of the registered bond, and the principal account relative 'thereto. The reporter has not learned whether a horning has ever issued for payment of the 'expenses of diligence, in terms of the obligation in the bond relative to expenses.

'6. When bonds are granted by a bankrupt for payment of a composition under a seques- 'tration, the obligation is a general one to pay the composition on the whole debts at the 'rate therein specified; and it is held in practice, that a creditor ranked on the sequestrated 'estate is entitled to pass a bill for horning, authorizing a charge for payment of the compo- 'sition, upon production of the registered bond, and a certificate by the trustee, specifying 'the sum for which the creditor has been ranked under the sequestration. There are many 'instances of such hornings.

'7. The reporter has not heard of any further practice than what is stated above, relative 'to hornings for payment of a sum of money due upon obligations of unlimited amount.

'8. There are many instances of bonds by parties and their sureties, containing obligations 'of unlimited amount, such as bonds for factors, tutors and curators, &c., in which there is a 'clause of registration authorizing letters of horning. When the party in whose favour such 'bonds have been granted wishes to proceed against the obligants, the practice is to institute 'an ordinary action for payment of whatever sum may be alleged to be due under the obliga- 'tion.'

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elative stated account founded on by the Bank in this process, legal and competent?'

pport of the affirmative of the proposition contained in this ques- e Bank maintained that the diligence had proceeded in entire ity both to the theory and the practice of the law of Scotland in o the issuing of diligence under the Signet. According to the f the law, no diligence can issue, except in virtue of a decree of reme Court. But decrees are of two kinds,—the one being actually ced by the Judge—the other being held, fictione, to have been so ent of the party. In the one case, the judgment is recorded in s of the Court as a judicial act; and in the other, it is done by f the consent of the party to registration. An extract from these the warrant for diligence under the Signet being issued. It may however, that in order to proceed with the diligence, it is neces- refer to something which has no connexion with, or is extrinsic of ree; as, for example, where the diligence is asked, not by the whose favour the decree or registered obligation is expressed, one apparently unconnected with it—as an assignee. In that s not necessary to record the assignation; but a bill is presented, for the authority of the Court to allow the decree to be issued ly to the assignation; and when a warrant is obtained to that he diligence is unobjectionable. So, likewise, where a party, as ase of a cash-bond, comes under an obligation to pay a sum of which may be greater or less according to circumstances, and s that a stated account shall ascertain the precise amount, it is not y to record the account, but merely to exhibit it to the Court, btain a warrant from them for a decree being issued to the amount entioned. In the present case, the diligence has been conform- h to the theory and the practice. The suspenders bound them- pay the balance as it should be ascertained by a stated account, sented to registration of the bond, in order that execution might so as to make that ascertained balance effectual. The bond terms of this consent, registered; and an extract, or, in other decree obtained, authorizing diligence to issue; and the stated was exhibited to the Court, by whom a warrant was granted diligence should go out to the extent of the sum there men-

e other hand, the negative was maintained by the suspenders, uded,

at, according to the law and usage of Scotland, summary dili- mnot proceed against any party for payment of a specific sum of unless that sum has been liquidated either by the decree of a nt Court ordaining payment to be made, or by a decree of regis- nterponed to a bill or bond for payment under the hand of the and that, although it was true that where a sum was thus liqui- he diligence might proceed either for the whole of it, or for any

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smaller sum forming a component part of that whole, yet, where there was merely an obligation to account for a balance, it was impossible that diligence could issue for any specific sum.

2. That there was no statute or usage empowering the Court, sitting in the Bill-Chamber, to entertain any species of process for the liquidation of debts, or to grant warrant for letters of horning, except in implement of a decree previously obtained, and registered in the books of some court of record:—that as the Bill-Chamber warrant for issuing diligence was not a decree, but presupposed the existence of a regular decree; and as in this case the only decree which could be pronounced was to account for a balance; and as there was no consent to register the stated account for execution, there were no means of fixing any specified sum as the balance, and consequently no diligence for such sum could be issued; and,

3. That it was proved by the report of the Deputy-keeper that this was the first instance in which an attempt had been made to follow out summary diligence upon an obligation such as that charged on; and there was no expediency, nor any principle of law, on which to justify and authorize it.

The Court, on advising the opinions of the Judges, 'recalled, in hoc 'statu, the conjunction of the processes, repelled the objections proponed 'to the legality and formality of the charge, and remitted to Lord Mea-'dowbank, in place of Lord Eldin, to hear parties further in the cause; 'but found no expenses due.'

Lords Glenlee, Cringletie, Meadowbank, Mackenzie, Medwyn, and Newton, delivered the following opinion:—

We are of opinion, in answer to the question remitted to our consideration, that the letters of horning, and the charge given thereon, in name of John Syme, cashier of the Perth Union Bank, to the suspenders, proceeding on the bond and relative stated account founded on by the Bank in this process, were legal and competent.

The objection to their legality, made by the suspenders, is founded on the assumption that no diligence by horning can competently issue, unless the sum for which the charge is given be fixed and liquidated either by an actual decree of a court, or by that implied decree which is held to be interposed to a deed, registered in virtue of a clause consenting to its registration for the purpose of summary diligence.

We do not think, considering the practice of the Court, and the understanding of the country for many years past, that this proposition is strictly true. Were it indeed so, we do not see how horning could proceed on any registered bond but one, constituting of itself a pure and liquid obligation to pay a precise sum. But there are various classes of bonds on which summary diligence has in practice been allowed to issue, where the sum for which it is to proceed is left undefined, and in several of which it could not possibly be otherwise, as the obligation respects debts to be afterwards contracted, and the amount of which is uncertain and contingent. It is impossible in such cases to imply, from the registration of the bond, a decree interponed to it, constituting the precise debt for which horning is to be granted, while the bond itself leaves the matter undetermined. Accordingly the holders of such securities have only been enabled to obtain the benefit of summary diligence

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lucing into the deed a consent by the granter to hold a subsequent state-
certaining the amount of the debt, to be a sufficient constitution of it to
t of authorizing the diligence. Thus, in bonds for cash-accounts, or for
ces which may turn out to be due by bank agents, there is usually inserted,
was in the present case, a clause by which the obligants consent that a
count, made out by an officer of the Bank, shall be held to constitute the
lue, to the effect of authorizing a charge for payment.

the admission of this mode of constituting the debt, it will be observed
es not rest merely on the consent of the obligant; for, in virtue of the
on, there is an implied decree of the Court interponed to the bond, bearing
stated account shall be held a constitution of the debt, in so far as to be
nt authority for diligence. Now, holding that there is a decree in these
e see nothing anomalous, or contrary to principle, in the Court's granting,
verance in the Bill-Chamber, a warrant for letters of horning, on produc-
n extract of the bond, and of the stated account, which it has previously
to be sufficient to authorize such warrant. It is a mistake, we conceive,
se that the warrant is a constitution of the debt. It is the stated account
nstitutes it, and the warrant follows as a consequence.

ears from the report of the Deputy-Keeper of the Signet that it has not
practice to record the stated account; and, in the view we take, it does
to be necessary. There can be no consent to registration in the stated
itself as it is prepared by the creditor; and were there a clause in the
senting to its registration for the purpose of diligence, it would be incon-
vith the stipulation there, that the stated account shall be held of itself a
constitution of the balance due. The arrangement would then be,
the stated account should constitute the debt, but the decree interponed
virtue of the registration.

he suspenders argue that the practice in these cases is not inconsistent
eir doctrine as to the necessity of a decree; because, in bonds for cash-
, or those by cautioners for bank agents, there is always, perhaps with the
exception of the present case, a sum specified as the limit of obligation.
, it is said, an express obligation come under to pay this definite sum; and
the decree interponed in virtue of the registration constitutes this as the
e, although the creditor may, at his option, restrict his charge to a part of

an, however, in so far as regards the present question, see no principle for
ishing betwixt limited and unlimited obligations. In the case of bonds for
nd contingent debts, the limited sum is not admitted to be due; for indeed
can be due at the date of the bond. It is specified merely as a maximum
which the obligation is not to extend. The consent that diligence may
or that sum is not absolute, but conditional. It is only in the event that,
he future advances by the creditor, or intromissions by the bank agent, a
to that extent shall be due.

suspenders found upon the particular words usually employed in a cash-
bond to constitute the obligation. But even looking at these words alone,
ying out of view the whole tenor and object of the deed, it is plain that they
no absolute obligation to pay the maximum sum. The obligation is alter-
to pay either this sum, or, in the option of the obligants, such part of it as
erson who is to operate on the account shall value for or draw out beyond

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what he pays in; in other words, that the obligants shall only pay the maximum, if the balance due on the account shall amount to so much. Now, the production of the stated account is at all events necessary to constitute the balance, even where equal to the limiting sum, and no diligence can issue on the bond without its production. Were it otherwise, there would be no use at all for the provision as to the stated account. The creditor could have no occasion for a consent to admit it as sufficient to authorize diligence, because, having the power under the bond itself to charge for the full sum, he might, at his option, restrict his diligence to any part of it he thought proper.

But further, it is not true that the benefit of summary diligence has been confined to the case of those bonds in which the obligation is limited to a certain definite sum. As an instance of the contrary, we may refer to bonds for the payment of a composition to creditors. In these the rate of composition is no doubt mentioned, but there is no enumeration or specification of the debts on which it is to be paid. The bond contains nothing to limit the extent of the liability to any definite amount, or by which the sum for which any individual creditor is entitled to charge can be at all ascertained. Accordingly it is absolutely necessary, before diligence can issue, that there be produced, not only an extract of the bond, but a certificate by the trustee, showing for what the creditor has ranked, or a document sufficient to establish or liquidate the debt.

Now, the competency of summary diligence on composition bonds is not disputed. Indeed it does not rest on practice merely, but on the authority of an express decision of the Court in the case, 11th February 1806, Brown and others v. Campbell and Company. In that case, as appears by the report of it in the Faculty Collection, the question was fully considered; and the same objection, supported by the same arguments now used by the suspenders, was unsuccessfully insisted on.

We think there is nothing in the observation of the Deputy-keeper that he has never heard of a horning proceeding on a registered bond for a cash-credit containing an obligation of unlimited amount, because we think it improbable that any such bond ever existed. In the case of bonds for bank agents also, we suppose it has very rarely occurred that the cautioners have failed to limit the extent of their responsibility. The obligation on the agent himself is naturally, and we believe always, left unlimited; but we conceive it would be strange indeed, if, on account of this difference, summary diligence might issue on such a bond against the cautioners, while it would be incompetent against the principal debtor. The reason why the Deputy-keeper may not have heard of a horning against the agent for a sum exceeding the amount of the obligation of the sureties may most naturally be, that the Bank directors generally take care to keep his balance within the sum defined by the cautioners.

The necessity for an ordinary action in the case of bonds for factors, tutors, and curators, and other similar cases where the obligation is unlimited, is easily explained. There is no consent in these that a certified account made up by the creditor, or in any way, shall be held to ascertain the balance due; and as there is no mode, short of an action, for constituting the debt, the clause of registration authorizing letters of horning, which may be found in such bonds, must necessarily be inoperative,

Lords Justice-Clerk and Alloway, delivered the following opinion:—

We consider this to be a case of great importance, as it enters most deeply into

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les and nature of summary diligence, and must regulate in future all the kind.

stion put to us is, 'Whether the letters of horning, and the charge eon in name of John Syme, cashier of the Perth Union Bank, to the , proceeding on the bond and relative stated account founded on by n this process, were legal and competent?'

ive that they were not.

general rule laid down by all our institutional writers, and supported rm practice of this Court, 'that no creditor can execute diligence on ion without the previous sentence of a Judge. But because it was necessary, when the obligation was clear, to have a formal warrant in iligence, the expedient was fallen upon, that most deeds should bear a which the granter consents to their registration in the books of any Court. This registration, in consequence of the granter's consent, is, gment of law, a decree as to the special effect of execution; and indeed the essential character of a decree, for the deed bears to be registered ity of that Judge in whose books it is recorded; the extract is signed rk of Court, and mentions the appearance of the granter's procurator te, consenting to the decree, Erskine, b. 2. t. 5. §. 54.'

e upon bills of exchange, which do not contain any clause for registra- eds upon the registered protest, as regulated by the statutes 1681, , c. 36, and 12th Geo. III. c. 72. Thus there is no doubt that summary an alone proceed under the direction of this Court; and it is only in to the decrees of this Court that horning does issue under the Signet; this Court interpones its authority to diligence being issued upon the ny other Court, an extract of that decree must be produced, and re- ant for execution from this Court.

rrants for diligence are, therefore, of two kinds: 1. An extracted decree rt in an action which has been brought and decided, and which is a mediately for horning; or, 2. Where the authority of this Court is to the extracted decree of any competent Court; or where it proceeds mal obligation, registered in the books of Court, and there the grounds h it proceeds are equally clear; the debtor consents that his procurator te shall appear before the Judge, and allow decree to be pronounced im in terms of his obligation; and until a comparatively late period, it ssary in point of form, before a decree of registration could issue, that an or procurator should subscribe a consent to the issuing of such decree, of the obligation undertaken by the debtor. Until the Act of Sederunt mber 1670, such subscription was indispensably necessary; and by that permitted 'to insert the consent of the advocates as procurators to the tion, as they were in use to do formerly, and accordingly to give out ex- thereof, notwithstanding that the advocates do not subscribe their consent.' day, every registration proceeds upon the advocates therein named g for the parties; and, as Mr. Ross observes, 'a registered writing, not- anding it was gradually divested of its formalities, continues in effect and tion the same as a decree in absence taken upon or in terms of an unre- ed deed, 1. Ross, 120.' Thus a decree in terms of a registered deed can e in the ipsissimis verbis of the deed itself. And if the terms of the deed ered will not answer the purposes of the creditor, from being indefinite, so

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as not to warrant a charge for any specific sum, it is necessary for the creditor to raise an ordinary action, to ascertain and constitute the debt for which he insists upon payment.

Without an actual decree, therefore, pronounced by a competent Court, or a decree of registration for the specific sum alleged to be due, there can be no legal warrant to issue letters of horning for payment of that sum; and such warrant could not proceed, even with the authority of this Court, upon the decrees of Justices of the Peace or Bailies of Barony, even where the parties had been fully heard, and where a judgment causâ cognitâ had been pronounced, because this Court has no power to warrant summary diligence upon such decrees.

In short, the charge must be in the precise terms of the decree or of the bond, and cannot be supplied or rendered more specific by extrinsic means; and if any thing further be requisite, it can be attained by authority of the Court alone.

But it is said there are certain cases entitled to summary diligence, but which cannot be obtained without a direct warrant of this Court granted in the Bill-Chamber. This observation applies to the decrees of Inferior Judges, and to persons standing in the right of the original creditor. In the first, the warrant was originally granted by this Court, and is now granted by a proper officer, and the fiat ut petitur is written on the bill, because the extracted decree of the Inferior Court has been shown. With regard to the second, the right of the original creditor may be transferred, or he may be dead, in consequence of which, by our former law, no registration could have taken place; but in both cases the practice has been regulated by statute. By 1693, c. 15, it is expressly provided, 'that all writs registrable may be registered after the death of the creditor at the 'instance of his heir, executor, or assignee, as well as of before, and that upon 'production of a service or retour in the case of bonds or other rights heritable, 'or a confirmed testament, containing the bond or other rights, in case they be 'moveable, or of a special assignation, though not intimated in the case of either; 'which registration shall have the same effect, both as to probation and summar 'execution, as if the creditor were still alive.' And the same is again provided by the statute 1696, c. 39.

Here, then, as the officers intrusted with this department are acting merely ministerially, they must give effect to the express enactments of these statutes, in the same way as if the original creditor in the bond had appeared. And this sufficiently accounts for what might otherwise be considered an anomaly in our practice upon this subject.

These principles, so far as we know, have uniformly regulated the practice of this country; and those cases which are said to be exceptions admit of we think, an easy solution, and are not adverse to the general rule.

If summary diligence be demanded upon a bond for any specific sum, say £5000, it is clear that the persons ministerially intrusted with this department of the law must issue letters of horning upon the production of an extract of the bond. If demanded, the horning must be issued for the full amount; but if the party demanding summary diligence desires that the claim may be restricted to a lesser sum, either on account of partial payments, or on account of any claim of compensation which he is willing to admit, it must so be restricted, because the party entitled to ask summary execution for the full sum may unquestionably obtain it upon a less sum than that contained in the obligation.

In the same way, if a bond for a cash-account be granted to a bank by A. B

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to the amount of £5000, and this bond is to be put in execution against parties, it is surely in the power of the creditors to restrict the diligence they crave; and they may exhibit an account by the cashier or officers of nk, as showing the grounds upon which they have so restricted it. But h A. B. and C. had been jointly bound, and the account had been kept in e of A., and although he had drawn far beyond £5000, the sum contained bond, there could be no ground for summary diligence beyond that sum ainst A. And although bonds are very often granted for indefinite sums ioners for factors, or tutors and curators, and many others intrusted with yet it seems to be admitted that in all these cases summary diligence is ut of the question, and that the amount of the debt must first of all be ned by the decree of a Court of Law.

onceive that the report of the Deputy-keeper of the Signet is most im- evidence of the practice, and of the universal understanding of the

bond in question there is no sum whatever specified. It is an obliga- which the suspenders became responsible as cautioners to this Bank for nts. As to the nature of that responsibility the parties are at variance. does not enter into our consideration, because our opinion depends upon in which this execution was demanded. If it had contained a specific parties, by consenting to the registration, had agreed that summary dili- ight issue for that sum, or for any sum below it. But, as there is no um, we cannot conceive that summary diligence can proceed upon this il the amount due on it shall be ascertained by the decree of a Court. cannot conceive that the persons acting merely minister ially, without rties, or without any discussion whatever, could be warranted to issue iligence upon this bond,—first for £12,258: 2: 10, and very soon after- nother sum of £12,197: 13: 9 If they were entitled to do this, for now, warrants may yet be issued for ten times these sums, although um whatever specified in the bond; and these are sums merely stated an accountant of the Bank, whose account may receive the effect to ntitled in an ordinary action, but can never afford a sanction by itself personal diligence.

puty-keeper's report, which is the only evidence in the cause, and ne be founded upon by the parties as exhibiting the practice, it is t he never heard of any instance of a horning proceeding upon a d for a cash-credit containing an obligation of unlimited amount; on in the profession has been found, who ever attempted to enforce ligence a bond of unlimited amount.

nds, although in general definite as to the cautioners, are unlimited pals, and afford, from the Keeper's report, complete evidence of the is subject. For, although all these bonds contain the precise same e present case, there is no instance of summary diligence having any of them, even against the principal, for a larger sum than the tained in the bond.

the most numerous bonds that are granted are those of unlimited as bonds for factors, tutors and curators, and for the different ed by this Court, as factors loco absentis, judicial factors, &c. limited obligations in such bonds; and if such a clause as the one

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in question could have the effect of authorizing summary diligence, and of superseding litigation on the subject, practitioners would long ago have introduced this mode of instructing the balance due by the report of a respectable accountant, who, as a neutral person, and one whose business must depend upon the high character he possesses for impartiality and accuracy, would be superior beyond all comparison to an officer of the Bank, himself a party, and naturally interested to report in his own favour.

But it is said that the diligence in the present case would not be a greater exception to the general rule than what has been warranted in other cases. We doubt whether any of the exceptions founded on are at all similar to the present case; nor can we admit the conclusion, that because in practice one exception has been introduced to a general rule, all other exceptions should also be admitted, and the rule itself thus overturned.

The case of diligence having been allowed upon a bond for a composition under the Bankrupt Acts we do not hold as any exception at all, because in that bond the obligation is quite specific. For instance, in the only case reported upon this subject, Brown and others against Campbell and Company, 11th February 1809, the bond was granted in reference to a decree of the Court approving of the composition, in which the trustee had laid before the Court a full statement of the debts which had been ranked upon the estate, and which it was absolutely necessary to exhibit to the Court before their approbation could be given. This approbation could only proceed upon the Court being satisfied that the proportion of creditors, both in number and value, had approved of that composition. The obligation also was specific, and the bond of caution referring to the decree of the Court approving of the composition bound the cautioners to pay the composition of 7s. in the pound, which is just as specific an obligation as can be granted. If the bill in that case, which had been claimed on the estate, amounted to £300, the composition amounted to £105, just as distinctly and specifically as if that exact sum had been mentioned.

There is hardly any bond that does not contain a penalty of one fifth; and yet, in an adjudication, the most severe diligence we are acquainted with, effect is always given to this as a specific sum. The objection, therefore, in this case did not occur in that case of Brown, as the obligation was for a specific sum, and the certificate by the trustee that this debt was one of those ranked upon the estate, was merely to show that it was one of the debts to which the decree of the Court, as referred to in the bond, was interponed. It is impossible, therefore, to say that this was an obligation for an indefinite sum, as in no case could the obligation exceed the 7s. per pound on those debts which were reported to the Court as ranked on the estate. And accordingly Mr. Bell states this case as his authority for making effectual the composition contract by summary diligence when the debt is liquid. Thus, 'if the creditor holds written vouchers for his debt; or even where it is not 'so liquidated, if he has entered his claim, in terms of the act, during the subsist-'ence of the sequestration, the creditor is entitled, on a debt so proved, not only 'to insist for his composition, but to have summary diligence on the bond for pay-'ment of it;' 2. Bell, 486, 3d Edit.

No doubt, it was stated that the looseness of the procedure upon summary diligence had even gone the length of warranting a messenger who had letters of horning against the firm of a company, to charge whom he pleased as the members of that company. We conceive that this is a mistaken conclusion, founded on the

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homson v. Liddell, 2d July 1812, and which that case does in no respect The only point decided there was, that action or diligence may proceed of the partnership by its firm, though personal execution of course is pos- against the individuals. In that case it was admitted that Andrew as a partner of the company of John Liddell and Company; and al- maintained that it was a foreign company, and that their funds were at o reason could be assigned why he should not be subject to the diligence ll the partners of that company, of which he admitted himself to be one

remains to take notice of what has been stated with regard to the Post- ds. In the first place, from some late proceedings in the Court of , we observe that the bonds are now made specific. In the trial of n, 9th June 1828, the bond produced was for the specific sum of £80, his cautioners were bound. With regard to those Post-office bonds y still remain indefinite, we do not know of any case of this kind having tried; otherwise we think the same objections might have occurred upon by summary diligence upon these bonds. But as the Crown debtors his country in a very different situation from other debtors, we suspect rown debtor ever could have had any interest to try the question, as the s summary and effectual means of recovering the debts due to it by a tent, or Exchequer horning.

PITMILLY.—I understand the question put to the consulted Judges in to be confined entirely to a preliminary objection taken by the sus- the letters of horning raised by the chargers, and to the charge pro- hereon. This question does not touch the pleas of the suspenders on of their case, but merely relates to a matter of form. It is limited mpetency, and to the legality, in point of competency, of the letters , and charge given thereon; and thus involves only the consideration, n point of form, the chargers were entitled to do summary diligence ner resorted to by them, or should have made their claims the sub- ordinary action.

opinion that the letters of horning and the charge were competent, ore in this sense legal. I cannot distinguish in this respect be- mary diligence being resorted to as the form in which a claim is he creditor when the amount in the bond is limited to a certain and summary diligence being done when, as in the present case, is not limited to any precise maximum. The competency of sum- nce is admitted and established in the former case. I think it must competent, and on the same principle, in the latter case; and that his question otherwise would imply more than a doubt of the le- oint of competency, of summary diligence in several classes of cases is method of enforcing the obligation in favour of the creditor has ally resorted to in practice, without any doubt of its competency been suggested, except in one or two cases in which, such doubts n started, the formal objection has been repelled by the Court. In ase, when it came before the Second Division in the Bill-Chamber h of February 1824, I would have been of opinion, had I thought diligence incompetent and illegal, that the bill should have been hout caution.

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But it is unnecessary for me to enlarge on the reasons which induce me to think the letters of horning and charge competent, as I subscribe to the reasoning contained in the printed opinions of Lords Glenlee, Cringletie, Meadowbank, Mackenzie, Medwyn, and Newton, which I have had an opportunity of perusing.

Lord Corehouse.—I concur in the opinions given by Lords Glenlee, Cringletie, Meadowbank, Mackenzie, Medwyn, Newton, and by Lord Pitmilly, that the letters of horning and charge in this case were competent and legal. In pecuniary obligations, when diligence is raised in virtue of a clause of registration, the sum for which it proceeds must be certain. But it is immaterial whether the sum be rendered certain in consequence of its amount being specified in the instrument containing the clause of registration, or in consequence of a consent in that instrument that the amount shall be fixed in a certain manner. In the latter case, the maxim, certum est quod certum reddi potest, directly applies. Were it otherwise, diligence could not be raised on any obligation, however definite, when the amount of the sum to be paid depended on any future contingency. Such a rule would diminish the utility of this important process; and accordingly it is inconsistent with the practice of the country, and the decisions which have been referred to. I do not think that the distinction is well founded between obligations in which a maximum is fixed, and those in which it is not. Both are equally illiquid; and diligence can proceed on neither, unless the mode of liquidation is settled by a consent in the instrument. If it be settled, I see no reason why diligence should not proceed equally on both. I do not think that it was necessary or competent in this case to register the stated account. It is not the result of the liquidation, nor the evidence by which it is obtained, that must enter the register, but the mode of liquidation which parties have agreed to adopt when the time of payment shall arrive.

Lords Craigie and Balgray concurred with the majority; Lords President and Gillies with the minority.

Suspender's Authorities.—2. Ersk. 5. 24; 1. Ross, 120; 4. Ersk. 3. 9.
Charger's Authorities.—Forrester, June 27. 1815, (F. C.); 1. Bell, 277.

A. Gifford, S. S. C.—W. Murray, W. S.—Agents.

No. 56.

J. A. Cheyne and L. Mackersy, (for the Fife Bank,) Pursuers.—*Jameson—G. G. Bell.*
G. Little and Others, Defenders.—*Alison—G. Napier.*

Title to Pursue.—Stat. 7th Geo. IV. c. 67.—1.—Action sustained at the instance of cashier for behoof of an incorporated Bank.—2.—Question raised, but not decided, Whether an entry at the Stamp-office by a Bank, under the above statute, made after the period therein mentioned, entitled them to the benefit of it.

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1st Division.
Lord Meadowbank.
S.

By the contract of the Fife Bank, the partners bound themselves to contribute a joint stock, and to carry on business by means of a cashier and other officers. Having become embarrassed in 1825, an arrangement was entered into with the British Linen Company and National Banks, and, at a meeting of the partners held upon the 12th of January 1826, the following resolutions were entered into:—'That the meeting

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considered this statement, agreed, 1. That in order to meet the of the British Linen Company and National Banks, a call of ould be made on each share against the partners, to be paid hree months from this date; and that the money shall either d, or bills for the amount, with satisfactory security, put into ds of the Banks within fourteen days from this date; 2. bond for £50,000 more shall be granted to the Banks, signed obligants as may be satisfactory to them; and, with a view of the above arrangements into effect, the meeting appoint Messrs. and Mackersy, as cashiers for the Fife Bank, with full powers igate into the affairs, to use diligence, and sue for debts due to Bank, in their name.'

mpany thenceforth ceased to exist, except to the effect of wind- affairs. By the 7th Geo. IV. c. 67, regulating 'the mode in ertain societies or copartnerships for banking in Scotland may be sued,' it was declared that it should be lawful for every 'joint ciety already established, or that may hereafter be established and for the purposes of banking, may sue and be sued in the the manager, cashier, or other principal officer of such society rtnership, provided that such joint stock society or copartnership serve the regulations prescribed by this act.' One of these regu- 'That every such joint stock society or copartnership already shall, between the 25th day of May and the 25th day of July (1826) and each succeeding year, and every such joint stock so- copartnership hereafter to be formed, shall before such joint c. shall begin to carry on business, and thereafter, in each suc- year between the said 25th day of May and 25th day of July, account or return to be made according to the form contained hedule marked A. to this act annexed, wherein shall be set forth names, titles,' &c.

ubsequent section it was declared, that if any bank should carry ness without having made such a return 'between the days or herein before appointed for that purpose, such society or copart- so offending shall, for each and every week they shall so neglect e such account and return, forfeit the sum of £500.'

he 31st of July 1826, a return was made to the Stamp-office by Bank, with the view of being qualified to raise actions in names shiers: And several of the partners having declined to make the ntribution, actions were instituted against them in name of 'James nleck Cheyne and Lindsay Mackersy, joint cashiers for the Fife ing Company.'

efence it was pleaded,

hat as the Bank was an unincorporated society, they had no title ue in name of their cashiers.

hat supposing they had a title at common law, it had been taken by the provisions of the above statute; and,

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3. That the pursuers had not qualified themselves in terms of that statute, seeing the entry had not been made till the 31st of July.

The Lord Ordinary 'sustained the dilatory defences in respect the 'provisions of the late statute, 7th Geo. IV. c. 67, have not been com- 'plied with, dismissed the action as incompetent accordingly,' and found expenses due.

The pursuers having reclaimed, the Court, on the 14th of December 1827, ordained the parties 'to prepare and lodge mutual Cases on the 'following questions:—1. Whether the pursuer had a title at common 'law to carry on this action? 2. Whether, supposing a title at common 'law, such title is taken away, or in any manner affected by the provi- 'sions of the statute, 7th Geo. IV. c. 67; and, 3. Whether, supposing 'no title at common law, the pursuers have sufficiently qualified them- 'selves to carry on the action under the statute: Ordained the Cases, when 'lodged, to be seen and interchanged, and finally revised, printed, and 'boxed within ten days thereafter, with the view of consulting the Judges 'of the Second Division, and permanent Lords Ordinary, on the above 'points; for which purpose remitted the said Cases, when finally lodged, 'with the above questions, to their Lordships for their opinion.'

Cases were accordingly prepared and lodged; but in the mean time the House of Lords had pronounced judgment in the case of the Commercial Bank, sustaining their title to pursue in a similar form at common law; and the Court, therefore, without requiring the opinions of the Judges in terms of the above remit, recalled the Lord Ordinary's interlocutor, sustained the pursuers' title, and remitted to his Lordship to proceed accordingly, reserving the question of expenses. *

Lord President.—We were led to hesitate in regard to the title at common law, in consequence of the doubts expressed in the House of Lords; but as these have now been removed, the title ought to be sustained; but at the same time no expenses should be found due, or at least they ought to be reserved.

Pursuer's Authorities.—(Statute.)—1. Blackst. p. 87; Comyn's Dig. voce Parliament, § 10; Bridgeman's Index, voce Statutes; 1. Ersk. 1. 50.

Low and Rutherford, W. S.—W. Martin, S. S. C.—A. Grieve, W. S.—G. Lyon, W. S. Walker, Richardson, and Melville, W. S.—Agents.

No. 57.

J. Alston, Pursuer.—*Sol.-Gen. Hope—A. Connell.*
G. and R. Denniston and Company, and C. Campbell, Defenders.—*Jameson—Ivory.*

Relief—Title to Pursue—Cautioner. Held that although a cautioner in a bond, who has not paid the debt, has a right to insist for relief from the principal obligants, yet he has no title to insist to that effect against a co-cautioner.

* A similar judgment was pronounced in an action at the instance of the Leith Bank.

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Lord Meadowbank.
H.

August 1817 Denniston and Company obtained a cash-credit to tent of £2000 from the Commercial Bank, and, together with the er John Alston, and the defender Colin Campbell as cautioner, ibed a bond for payment of that sum. The names of Alston and bell, although mentioned in the narrative, were omitted in the obli- clause, and in the testing clause Alston was called 'Ralston.' redit was operated upon for several years; and Denniston and Com- aving stopped payment, and executed a trust, Alston, on the 1st 1826, raised an action against them and the individual partners, whom was solvent,) and against his co-cautioner Campbell, con- that the company and the partners should be ordained either to him of the bond, or pay to him the amount thereof, to enable him mplish his relief, and that Campbell should relieve him of one half sum which he might be obliged to pay to the Bank. At this time had not paid any part of the bond, and it was alleged that he t been called on to do so by the Bank. Joint defences were lodged Company and Campbell, in which the former pleaded that the was premature, as they were only obliged to relieve Alston on his actual payment; and the latter, that as Alston had not paid any o the Bank, he had no title to insist for relief against him. There- n August 1826, a formal requisition was made by the Bank upon for payment of the full sum, with interest; and in March 1827 ount was paid by the trustees of the solvent partner, who was now In the mean while a record was in the course of being made up, s subsequently closed, so that the question came to be one of es. One of the pleas in law maintained by the Company was, that was in fact not bound as a cautioner; but no such defence had ated.

Lord Ordinary decerned against Denniston and Company, and them liable in terms of the libel, but 'sisted process as to the ler Colin Campbell till this interlocutor shall become final, or be by the Court.'

ast this judgment these parties reclaimed.

PRESIDENT.—Is a cautioner not entitled, at any time, to bring n of relief against the principal obligant? This may not relieve n his obligation towards the creditor.

son for the Defenders.—But there is a question here with a co- r, and the process is sisted as to him.

Gen. Hope for the Pursuer.—There is no interlocutor against The process is merely sisted till the issue of the question with ons. These parties are clearly liable in expenses; and although iginally pleaded that we were not entitled to insist for relief, we had not paid the debt, yet they afterwards departed from d said that because Mr. Alston was described as Ralston, he ly not bound as a cautioner.

BALGRAY.—That was not exactly their plea. What they said

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was, that you need not have been so easily frightened, because it was extremely doubtful whether you were effectually bound.

Lord Gillies.—But there was no defence to that effect.

Jameson.—The action was brought before Alston had even been called on to implement the bond; and although he had not paid his half, he concludes for payment or relief from his co-cautioner. This he had no title to do till he had paid the debt. But he never paid it. On the contrary, it was paid by the solvent partner of the company; and therefore he was never in titulo to make any demand upon the co-cautioner. We therefore contend that the co-cautioner is entitled to be assoilzied. But the Lord Ordinary has refused this. Then, as to the other parties, Mr. Alston went on to make up a record after the bond had been paid, so that the expenses of that part of the case ought to be laid upon him.

Solicitor-General.—It is not now disputed that Mr. Alston was a cautioner, although a contrary plea was attempted to be maintained. In the defences it was said we had not been called on, and as at this time we had no written evidence of the fact, we were necessarily compelled to obviate the allegation by means of a record; and therefore the expenses have been justly placed upon the opposite party.

Lord President.—It is perfectly clear that Mr. Alston was entitled to bring his action of relief against the other obligants, whether he had paid the debt or not.

Jameson.—Certainly; but not against the co-cautioner.

Lord Craigie.—When the action was brought, the pursuer was liable for the whole debt, because, although the obligation is imperfectly expressed, there was a rei interventus. Then the principal obligants become insolvent; and in that case I apprehend he was entitled to insist on being relieved by all the parties. If they had said in defence, (consistently with the fact,) that the debt was paid, then any future proceedings would have been unnecessary; but that was not the case.

Lord Balgray.—My only doubt is, whether the pursuer was not entitled, after the principal obligants were put under trust, (independent altogether of any demand upon him,) to bring his action against all the parties? I rather think that he was. But if there has been any unnecessary litigation, he may not be entitled to expenses.

Lord Gillies.—It is not pretended that any extrajudicial demand for relief was made; and I think it rather hard to allow this gentleman to come per saltum into a Court of Law against his co-cautioner, and involve him in expense. I think he had no right, under the circumstances, to bring the action against Campbell.

Lord President.—I agree that, as Mr. Alston had not paid the debt, he was not in titulo to come against Campbell. In regard to the other parties, I do not think that we can rest any thing upon the want of courtesy in not asking relief from them before bringing the action. He was not bound to do so. In defence they did not say that the debt was paid; and therefore, till the discharge was produced, Mr. Alston was entitled to go on with his action; but he ought then to have stopped.

THE COURT accordingly 'recalled the interlocutor of the Lord Ordinary 'reclaimed against, so far as regards Colin Campbell, one of the defend- 'ers, sustained the defences proponed for him, and assoilzed him from 'the conclusions of the libel, and found the said Colin Campbell 'entitled to the expenses incurred by him; also altered the inter- 'locutor of the Lord Ordinary complained of, in so far as to find the 'other defenders only liable to the pursuers for the expenses incurred 'prior to the date of lodging in process the discharge or assignation 'of the bond in question; but, quoad ultra, refused the desire of the 'note.'

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CAMPBELL and MACK, W.S.—GIBSON-CRAIGS and WARDLAW, W. S.—Agents.

No. 58.

TRUSTEES of the GLASGOW and CARLISLE ROAD, Suspenders.—*Rutherfurd—Hopkirk.*

T. WHITE and Others, Chargers.—*Jeffrey—D. Macfarlane.*

—Brevi Manu—Expenses.—1.—Trustees having shut up part of a road not turnpike, purpose of bringing persons travelling along it into their turnpike road, in order to hem pay toll, a suspension and interdict at their instance against parties removing the tions put up by them refused;—but,—2.—these parties not allowed their expenses, in of having removed the obstructions brevi manu, instead of applying for redress by law.

TOR to the formation of the new road from Glasgow to Carlisle, the unication from Lesmahago to Strathaven was by a direct line, which riginally entirely a parish road, but part of which had been assumed npike under an act for the old Carlisle road, continuing, however, partially maintained out of the statute-labour funds. By the act aking the new road, the trustees, who undertook the burden of t of £4415 upon the old road, were empowered to use such parts old road as they found to answer the new line; and also where ltered the line, to shut up and sell such parts of the old road hall in consequence of such alterations be no longer of use, or eby any gate or turnpike may be avoided.' This act further re- *the old* act authorizing the assumption, as turnpike, of part of the etween Strathaven and Lesmahago. This old road was still the t and most direct communication between those places; and, in from the one to the other, it was not necessary to touch the new Close by Lesmahago on the old road there had been a toll-bar, nd been removed in 1820, in consequence of the repeal, in the new the former statute authorizing the trustees to assume it as turn- and a corresponding bar was then erected on the new road, which part ran nearly parallel to the old one. Across this old road the s, in 1822, erected a barrier at the place where the toll-bar had ly stood, which compelled all persons going from Lesmahago to aven to strike off at this point and proceed by a cross cut made by stees into the new road, along which they were obliged to travel y passed the toll-bar, beyond which another cross cut conducted ack to the old road, by which they went on to Strathaven. This ding was not challenged, because, in consequence of the distance

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between the two cross-cuts not being 200 yards, the trustees were found, by a judgment of the Quarter Sessions, not to be entitled to levy tolls from the persons thus brought up from the Strathaven road, and compelled to travel out of their way along the new road. In November 1825, however, the trustees made a third cross-cut between the two roads, whereby the distance to be travelled along the new road exceeded 200 yards; and they built a wall across the old road where this new cut entered it, so as to compel passengers to go along their new road for more than 200 yards in their way between Lesmahago and Strathaven, and consequently to pay toll at their bar. On this the charger White, who resided near Lesmahago, caused the wall to be pulled down brevi manu, and also removed the barrier erected in 1822. The trustees thereupon presented a bill of suspension and interdict, which was passed to try the question of right; but the interdict against White, and the persons who had been employed by him in removing the wall or barrier which they had re-erected, having been refused, they reclaimed to the Court, who granted interdict in the mean time as to the barrier originally erected in 1822, but adhered to the Lord Ordinary's interlocutor quoad ultra, (see ante, Vol. IV. No. 220.) The letters of suspension having been expede, the trustees contended, that having undertaken the burden of the debt on the old road, they were entitled, under the powers of their new act, to shut up this part of the old road as useless, and as affording means for the evasion of their tolls.

The Lord Ordinary found the letters orderly proceeded, and recalled the interdict, but found neither party entitled to expenses; and the Court unanimously adhered, refusing a reclaiming note for the trustees on the merits, and one for White &c. on the point of expenses.

Lord Ordinary.—By finding the letters orderly proceeded, the Lord Ordinary means no more than, in the words of ordinary form, to find that he does not now grant suspension or perpetual interdict, as craved in favour of the trustees generally, from further intermeddling with the old road or dike; for he does not intend to find that the mode of proceeding in time past, adopted by the respondents in relation to the gate, was proper, or even that their proceedings relating to the dike formed an advisable way of trying the question. But as the complainers ask a suspension and interdict that would permanently fix their right to do what they have attempted, that the Lord Ordinary thinks them not entitled to. He thinks it ultra vires in trustees to shut up a small piece of a line of road not turnpike, when useful in itself, merely in order to force travellers on that road to go out of their way, and pass for a short space along another road which is turnpike, in order to pay toll; and this is manifestly what is attempted to be done in this case. The Lord Ordinary does not think it makes any difference that, when the old road was turnpike, there was a toll upon it in the part now shut up; for now it is not turnpike, and has not the benefits for which toll is paid.

Lord Justice-Clerk.—Unless the trustees could show that this road is one which the lieges are not entitled to use, their proceedings could not be justified under the statute, nor at common law. I think the Lord Ordinary was right to refuse expenses, as not sanctioning the brevi manu procedure of these parties; but

bstract question of right on the part of the trustees has been raised, and I am that they have not made good their right to compel persons who have no oc- to use their road, to come up to it in order to pay toll. No. 58. Dec. 2. 1828.

RD GLENLEE.—I am quite of the same opinion. The only pretence for the edings of the trustees is to prevent evasion; but it is clear that that is not ason, as, before their last operation, all the people travelling this road passed gh their gate without being liable in toll, and the new operation was to make liable. The whole proceedings of the trustees have been contrary to law, , and common sense; and although the Lord Ordinary was right in not expenses, I think those incurred since the date of his Lordship's interlo- should now be awarded.

RDS PITMILLY and ALLOWAY agreed.

J. G. HOPKIRK, W. S.—J. WEMYSS, W. S.—Agents.

. H. ALEXANDER, Advocator.—*D. of F. Moncreiff—Monteith.* No. 59.
F. SEYMOUR, Respondent.—*Sol.-Gen. Hope—Cockburn—More.*

isdiction.—It being provided in a statute creating certain new penalties that they may overed before any two Justices of the Peace, and that if any person shall be dissatisfied heir judgment, 'it shall and may be lawful' for him to appeal to the Quarter Sessions, decision should be final — Held (without determining whether the judgment of the r Sessions would be subject to review by the Court of Session) that a party cannot bring use into this Court from the Petty Sessions, but must first appeal to the Quarter Sessions.

the 10th Geo. II. c. 28, entituled 'An act to explain and amend much of an act made in the 12th year of the reign of Queen Anne, tuled 'An act for reducing the laws relative to rogues, vagabonds, rdy beggars, and vagrants, into one Act of Parliament, and for the re effectual punishing such rogues, vagabonds, sturdy beggars, and rants, and sending them whether they ought to be sent,' as relates ommon players of interludes,' it is enacted, that if any person shall, ut a license, 'act, represent, or perform, or cause to be acted, re- ented, or performed, for hire, gain, and reward, any interlude, edy, comedy, opera, play, farce, or other entertainment of the stage,' person shall for each offence forfeit the sum of £50 sterling; and rther provided, 'that all the pecuniary penalties inflicted by this for offences committed within that part of Great Britain called land and Wales, and the town of Berwick upon Tweed, shall be vered by bill, &c.; and for offences committed in that part of Great in called Scotland, by action or summary complaint before the rt of Session or Justiciary there; or for offences committed in any of Great Britain, in a summary way before two Justices of the e for any county, stewartry, &c.: And if any person or persons think him, her, or themselves aggrieved by any order or orders ch Justices of the Peace, it shall and may be lawful for such per- or persons to appeal therefrom to the next General Quarter Sessions e held for the said county, stewartry, &c., whose order therein shall inal and conclusive.' Dec. 2. 1828. 2d DIVISION. Ld. Mackenzie. F.

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Under this statute the respondent Seymour, manager of the Theatre Royal of Glasgow, presented a complaint to the Justices of Peace of Lanarkshire, against the advocator Alexander, manager of a minor theatre in the same city, for having performed certain entertainments of the stage without the license required by the statute. After certain objections to the relevancy of this complaint had been repelled, a judgment was pronounced by two Justices, finding that Alexander had contravened the statute, and amercing him in the full penalty of £50. Thereupon Alexander, without entering an appeal to the Quarter Sessions, at once presented a bill of advocation to this Court, on the ground, inter alia, that the entertainments complained of did not fall under the statute. This bill having been passed under reservation of the competency, as mentioned ante, Vol. VI. No. 186, came to be discussed before Lord Mackenzie on the expede letters. Seymour contended that the advocation was incompetent, because, whether the Court of Session had jurisdiction to review the judgment of the Justices or not, the advocator was at any rate bound to have followed the course pointed out by the statute of seeking redress in the first instance by an appeal to the Quarter Sessions. The Lord Ordinary found the advocation not competent, dismissed the same, and found Alexander liable in expenses, adding in a note,—'It appears to the Lord Ordinary, 1. That, 'considering the peculiar nature of the penal jurisdiction created by the 'statute, the intention of the statute must be held to have been, that the 'judgment of the Quarter Sessions should be without review by the 'Court of Session; 2. That this being the case, the statute must, agreeably to the decisions in the Post Horse Cases, (by which the Lord Ordinary holds himself bound,) be held to require that the review of the 'Justices shall be by the Quarter Sessions only.'

Alexander reclaimed.

Monteith for the Advocator.—The only question now before the Court is the competency of the advocation from the Justices of the Peace, without going to the Quarter Sessions; and the difficulty is, whether, after going to the Justices, it is imperative under the words in the statute, 'it 'shall and may be lawful to appeal,' to go to the Quarter Sessions. In considering this point, two questions arise:—1. Whether the jurisdiction of this Court is entirely excluded; or, 2. Whether it is only excluded hoc statu, till the parties go to the Quarter Sessions. (1.) As to the question of absolute exclusion:—The Lord Ordinary assumes that there is no appeal from the Quarter Sessions to this Court; and it is of some consequence to keep this in view, and ascertain whether there be a total exclusion, as the Lord Ordinary's interlocutor is founded on the assumption of an absolute exclusion of the jurisdiction of this Court. The general principle is, that the jurisdiction of this Court is not excluded, except by express words; and so it has been held that the words 'finally to determine and adjudge' are not sufficient to exclude this jurisdiction; Buchanan v. Toward, 1754, (7347); and Patillo, 1797, (7386.) And even where there is undoubted evidence of the intention of the Legislature to exclude, effect will not be

o it, unless expressed in the clearest terms ; Guthrie, Dec. 10. No. 59.
p. Jurisdiction, 17.) ; Anderson, Feb. 28. 1811, (F. C). Where- Dec. 2. 1828.
ect has been given to exclusions, the most express words have been
eclaring there shall be no review by advocation, &c. ; as, for ex-
in the Small Debt Act, stat. 39. and 40. Geo. III., and in the
ost Horse Act, 4. Geo. IV. c. 26. The words of the statute here
stion are, ' If any person, &c. shall think himself, &c. aggrieved
ny order or orders, &c., *it shall and may be lawful* for such person
ersons to appeal therefrom to the next General Quarter Sessions,
whose order shall be *final and conclusive*;'—nothing being said as
judgment not being subject to review by advocation, suspension,
In the immediately preceding clause, the parties are allowed to go
first instance to the Court of Session, so that there is nothing in
aracter of the causes which render them not proper for this Court.
only doubt is, whether if, in place of going to the Court of Session
first instance, the parties adopt the alternative of going to the Jus-
the jurisdiction of this Court is to be held excluded ? It has been
that the words ' finally determine' have been decided not to be suf-
t to exclude. It is said that ' shall and may' are imperative words.
will fall to be considered under the second point. It has no refer-
to the *absolute* exclusion, but only to the necessity of going to
ter Sessions before coming here. Besides, the words here are, ' shall
may *be lawful*;' and these are permissive, not imperative words.
ne English Courts of Law, this is the interpretation which has been
to them on this very statute; for, in the only cases under it,
urisdiction of the Supreme Courts was never questioned. The point
not argued certainly, but no doubt upon it was ever raised. In
King v. Handy, 6. T. R. 286, the jurisdiction of the King's Bench
view the judgment of the Justices was recognised, although it does
ppear whether the appeal was directly from the Petty or from the
ter Sessions; but in the King v. Glossop, Chetwynd's Supplement
rn's Justice, p. 387, the appeal was brought direct from the *Petty*
ons to the King's Bench by certiorari. The other party founds
y on certain cases under the Post Horse Act. These admit an easy
er as to the point of absolute exclusion. As to those under the terms
e *original* Post Horse Act, which are not ' shall and *may be lawful*
pply,' but ' *shall and may* apply,' the only one which seems to go to
point of absolute exclusion is Mill v. Mair, June 7. 1822 ; but the
quent cases under the same act do not support it, the ratio in
subsequent cases being, that the party did not go to the Quarter
ons. And it appears that the Legislature doubted the soundness of
decisions, because, in the last Post Horse Act, all difficulty is re-
d by the jurisdiction being excluded in express words. It is im-
ble, therefore, to hold the exclusion absolute; and this brings the
to the *second* point, whether the party is excluded, hoc statu, be-
he has not, in the first instance, gone to the Quarter Sessions.
wherever this Court has jurisdiction, appeal may be made to them

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at once from the Petty Sessions, unless it is made imperative by statute to go to the Quarter Sessions. The other party maintain that 'shall and 'may be lawful' are imperative; but there is a great distinction between the words 'shall and may appeal,' and the words it 'shall and may be 'lawful to appeal.' They are not only different in grammar and common sense, but the difference has been sanctioned by the Legislature. Thus in the Post Horse Act they are contradistinguished from each other, the one being evidently used as imperative, and the other as permissive, (§ 57.) In another statute, the same thing occurs, viz. the Jurisdiction Act, 2d Geo. II. c. 45, where it is provided that, as to the judgments of certain Courts, 'it shall and may be lawful' to complain to the Judges on the Circuit. Now this never was interpreted to mean that the parties cannot advocate or suspend without going to the Circuit. On the other side, the only cases founded on are those under the Post Horse Act, where the words are 'shall and may.' The latest of these is Mill v. Craigie in the House of Lords, June 25. 1827, (2. Wilson and Shaw, p. 642.) But, besides the argument on 'shall and may be lawful,' which do not occur in that statute, we further maintain, with reference to that case, that the jurisdiction of the Court of Session there was absolutely excluded, the case having occurred under the New Post Horse Act, in which the jurisdiction of the Session is excluded per expressum, so that in that case there was no court of appeal but the Quarter Sessions; and the decision there consequently is no authority here, where there is not an absolute exclusion of the jurisdiction of this Court. But, lastly, we aver on the record excess of power on the part of the Justices, which the Lord Ordinary does not advert to at all; and it is clear that excess of power makes the jurisdiction of this Court competent, though otherwise excluded, as completely settled in the cases of Young, June 28. 1814, (F. C.); Dawson, February 18. 1809, (F. C.); Corstorphine, March 10. 1812, (F. C.), and many others. So that on this part of the case the only question is, whether we have distinctly averred excess of power; and it is submitted that in the sixth reason of advocation, where we state 'that the 'performances complained of do not fall under the statute,' we have sufficiently done so. We cannot debate these till the record is closed; but there is a sufficient averment to entitle us to be heard.

Cockburn for the Respondent.—The argument of Mr. Monteith is only against the Lord Ordinary's note, not against the judgment. The Lord Ordinary may be wrong in holding that the exclusion is absolute, if the party had gone to the Quarter Sessions, and yet his judgment may be right. But the question has not yet arisen, whether the judgment of the Quarter Sessions be final, but only if the party must go to the Quarter Sessions in the first instance? And I shall therefore say nothing on that point, but shall only contend that the case must come through the Quarter Sessions. Then what is the meaning of the words, 'it shall and may be lawful' to go to the Quarter Sessions? The interpretation of the other party is just, that 'it shall and may be lawful *not* to go;' and, according to them, the introduction of the word 'not' would make no difference on the meaning;

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cannot be a correct interpretation. The English cases quoted her side, I can allow no effect to. These related to certiorari, we know nothing. But, besides, this point was never raised, here can be no decision on it. This is not the first time that the arisen in our own Courts. A meaning has been given to these r words in the case of Mill, and we ought not to go back now bal criticism on their meaning. No doubt, the words there were nd may,' and not 'shall and may be lawful' as here; and it is t in the Jurisdiction Act these last are held to be permissive. But a difference to beattended to here. When a statute creates ffence, and a new series of tribunals and forms for trial not known t common law, the party must follow strictly the form of process out in the statute; but when, as in the Jurisdiction Act, it merely an intermediate Court to appeal to in causes, and from Courts pre-, the previous jurisdiction is not to be taken away by implication. owever, we must follow out the form of procedure set forth in the all being statutory. But it is said there is an averment of excess diction. That, however, was pleaded in the case of Mill, and the found they could give no redress. Besides, that is the very reason e party should have gone to the Quarter Sessions, as they must dress through the avenue provided by law; but further, it is not d in this case. The sixth reason is a reason on the merits. The es are entitled to judge whether the performances complained of hin the words of the statute; and it was within their jurisdiction judgment, whether they were wrong or not in their decision.

n of Faculty for the Advocator.—Mr. Cockburn rests his case on the decisions under the Post Horse Duty Act. Now these affect the question. He will not enter into the question of e exclusion; but it is necessary to do so, if he rests on these because the exclusion there was absolute; and the sentence of arter Sessions being there exclusive, the Court therefore found e party could not stop midway, and come to this Court from tty Sessions, in order to evade the conclusive judgment of the r Sessions. Now, here there are no excluding words abso- and look at the words as to appealing from the Petty Sessions— gain, the words are essentially different from those in the Post Act. 'Shall and may appeal' is a direct obligation on the person al, if he is to seek redress at all, and is totally different from the n that 'it shall and may be lawful to appeal,' which is, if the ay think proper to appeal; and the reason for the distinction is, the judgment of the Quarter Sessions is not to be conclusive under the Post Horse Act. There was a case of Bremner relative ndly Societies, where this very question occurred. It was de- y the Friendly Society Statute that 'it shall and may be lawful' lain to the Justices of Peace; and it was decided that, notwith- , the party might go at once to the Sheriff. The practice of is decisive under this very statute. If the other party maintain

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that in these cases there was an excess of power, then they bring themselves into a dilemma; because it comes to this, that it is either competent to come at once from the Petty Sessions, or that inflicting a penalty for an act not within the statute is excess; for that was the case in the English decisions.

Sol.-Gen. Hope for the Respondent.—This is a very simple point. This is altogether a statutory jurisdiction on the part of the Justices; and the jurisdiction of this Court in this matter is also statutory. When, therefore, the case is once brought before the Justices, their jurisdiction is not exhausted till the final judgment of the Quarter Sessions; and the statute clearly implies that the parties are to go on to an end before the Justices. The Dean says that the jurisdiction of this Court over the two Justices is not *excluded*. I say it is not *given;* and as it is wholly statutory, it cannot be exercised unless given. The case of Bremner does not touch this question, as the claim by the members of the Friendly Societies was a matter of common law, which they were always entitled to bring before the Sheriff, and not a claim created by statute.

Lord Alloway.—I confess I entertain some doubts of the Lord Ordinary's interlocutor, and on the reasons he has assigned. The sole ground rested on by his Lordship depends on comparing this with the cases under the Post Horse Acts, which I do not think are at all similar to that here in question. In cases where this Court had originally jurisdiction, we will not allow it to be cut off by words merely saying that the judgment of the Inferior Court shall be 'final.' There is, however, another class of cases where this Court could not have jurisdiction originally; and of course, if the jurisdiction be not given, and if there be no excess, this Court can have no power of review; and this leads to a different construction in the two sorts of cases. Now the statute as to the Post Horse Duty is different in every respect from this. It is entirely a Revenue Statute, as to which this Court have no original jurisdiction; and besides, the whole policy of the statute is different; and so in the last act this Court has no power at all, and is entirely struck out even as to the £50 fine, in regard to which its jurisdiction was allowed under the former act. Under the act here in question, the Court exercise a jurisdiction which they have exercised for a very long period on this subject, as a common right of jurisdiction, since the act of Queen Mary in regard to the Abbot of Unreason; and their power is expressly recognised in this statute. The only doubt arises as to the proceedings allowed before two Justices, in regard to which it is declared that 'it shall and may be 'lawful' to appeal to the Quarter Sessions. 'I agree with Mr. Monteith that it is necessary first to determine whether review of the judgment of the Quarter Sessions by this Court is absolutely excluded. It would be contrary to every other decisions on the subject to hold that the words 'final and conclusive' excluded the jurisdiction which this Court previously had; and I conceive this question cannot be regulated by the decisions under the Post Horse Acts, which were Revenue Statutes. Then, if this Court has a general jurisdiction, by what words is it excluded? Is it by the words 'shall and may be lawful?' These are the very words which occur in the act for appealing to Circuit Courts, which does not exclude appeal to the Court of Session. The English cases are decisions in point on both questions; for I cannot conceive that the objection could have

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ed, if in England it had been held a good one; and, on the whole, I ering the interlocutor of the Lord Ordinary.

LENLEE.—I do not mean to object to the distinction stated by Lord etween revenue questions and others of their own nature competent hat might come into consideration if the question was, whether we ew the judgments of the Quarter Sessions? But when the only ques- the case must go through the Quarter Sessions, it is very different. I t find the cases referred to by the Lord Ordinary, and therefore I y opinion on the statute itself. Now, certainly, the nature of the ques- ch as we might entertain; yet here is a new offence and penalty, and s of process, of which the pursuer has his choice. One is to this hen the other mode is by complaint to the Justices. I do not think ence between 'may and shall,' and 'may and shall be lawful,' essential ining this case, as I think the meaning of the statute is, that the to go through the whole form of procedure pointed out by the Legis- nd there are many reasons for requiring the case to be brought through rter Sessions. This is all, however, on the supposition that the com- the Petty Sessions is competent. Suppose, for instance, that the enter- s complained of were not set forth in the complaint to have been exhi- or hire,' it would not be competent. But there is nothing charged here ncie under the act; and therefore it was not incompetent to bring it be- Justices to try the fact, whether the entertainments complained of did er the statute.

PITMILLY.—It is necessary to fix the precise nature of the question s, as very different views have been taken of it at the Bar. I conceive question is, whether the party must not first go to the Quarter Ses- ter getting the judgment of the Petty Sessions? And to that point alone sider myself entitled to direct my opinion at present. If I were to con- e first question, it would require very particular attention before I could t the jurisdiction of this Court was absolutely excluded; but I will not opinion on it, and will confine myself to the second question, whether t necessary to go to the Quarter Sessions? As to that, I concur in ion last delivered. This appears to me to be a new jurisdiction, created te, which must be completely followed out. The meaning of 'shall y be lawful' is, that if the party is to appeal at all, that is the way to ress. As to the English cases, the only thing to be gathered from that the point was not argued; and therefore I think we should do as ase of Craigie, and find the advocation incompetent, in respect the s not appealed to the Quarter Sessions, as I cannot at present go into ons stated by Lord Mackenzie. As to the alleged excess of power, it is a which arises afterwards. If there were a clear excess of power, it might petent now to determine on it; but it is equally so to reserve it till e Quarter Sessions have decided.

JUSTICE-CLERK.—I shall also abstain from giving any opinion as to an appeal would lie to us from the judgment of the Quarter Sessions, fine myself to the question, whether the advocation from the Petty Ses- competent? And I consider that it depends entirely on the words of the by which alone it must be determined. I cannot read the act without

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being convinced, that while the Legislature creates new offences for the first time, it gives a form of process for recovering penalties, with which the parties must conform. I am not much moved by the construction of 'shall 'and may be lawful' in the Jurisdiction Act, because this is a new offence here; and though I do not found my opinion on the grounds stated by the Lord Ordinary, as to the cases under the Post Horse Act, (on which I agree very much with Lord Alloway,) I concur in the judgment; but would qualify it by adding, in respect an appeal was not taken to the Quarter Sessions.

THE COURT therefore refused the reclaiming note for Alexander; but, in consideration that the period for appealing to the Quarter Sessions was expired, and that the full penalty had been awarded by the Justices, found no expenses due.

A. HAMILTON, W. S.—G. DUNLOP, W. S.—Agents.

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J. PATTISON Junior, (BLINCOW'S TRUSTEE,) Pursuer.—*Skene—Wilson.*
A. ALLAN and COMPANY, Defenders.—*D. of F. Moncreiff—Sandford.*

Bankrupt—Stat. 1696, *c.* 5.—1.—Circumstances under which a party who had agreed to accept of a composition from his debtor, was entitled to take a bond for payment of the full debt.—2.—A banker, who was creditor by a bond payable by instalments, having, in the ordinary course of business, received indorsed bills from his debtor, the proceeds of which were put to his credit in an account-current, and applied, by an order from the debtor, in payment of an instalment past due—Held that although the indorsation was made and the order granted within sixty days of the debtor's bankruptcy, they did not fall under the act 1696; but that the indorsation of bills, and an order for payment of an instalment not due, were struck at by the act.

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1st DIVISION.
Lord Newton.
D.

WILLIAM and HENRY BLINCOW, silk-merchants in Glasgow, stopped payment in July 1825; on which occasion they offered a composition of five shillings in the pound, provided every creditor, whose debt exceeded £20, should accede to it within a month. Previous to this they had been in the custom of doing business with the defenders Allan and Company, bankers in Edinburgh, and who were creditors for £500. They agreed to the above proposition; but it was alleged that the stipulated accession had not been obtained, and that the Blincows settled with their creditors in the best way they could. On the 22d of August William Blincow applied to Allan and Company for the loan of £2000, for which, as well as the £500, he offered to grant a bond, with his two brothers, Valentine and Robert, as cautioners. He informed them, at the same time, that it was his intention to begin business in Edinburgh, and to do the whole of his banking business with them. To this request Allan and Company agreed; and on the 28th of September a bond was executed for the loan of £2000 and the prior debt of £500, payable in three instalments of £833 : 6 : 8 each, at twelve, eighteen, and twenty-four months—the first being thus payable on the 4th of October 1826—the second on the 4th of April 1827—and the last on the 4th of October of the same year.

William Blincow accordingly came to Edinburgh, where he began business as a silk-merchant, under the firm of William Blincow and Company, of which he was the sole partner. Two accounts were then opened by Allan and Company with him, the one being relative to the (entitled to payment of more than the composition;—secondly, of the in

Lord Cunl belonas to Bolton. Mineral hotel

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ne other being an ordinary account-current. On this latter ncow operated, by putting the cash and the bills which he re- e course of his trade into the hands of Allan and Company, m credit for the amount, less the discount, and by drawing out heques; and this money was consequently placed to his debit. e first instalment on the bond became due on the 4th of Oc- it was paid by a sum of £833: 6: 8 being transferred from t-current to the bond account. Early in 1827 Allan and declined discounting Blincow's bills, to the extent which he hout a guarantee. Accordingly, on the 24th of February, his lentine bound himself to see them paid to the extent of £500. ond instalment fell due on the 4th of April 1826, but was not on the 25th of that month Allan and Company obtained from two brothers an obligation 'to pay you regularly any bills you ount from this date for William Blincow and Company that ishonoured, or only part paid, by the acceptors of them, and all that may be incurred.' On the following day, being the 26th, rew upon Allan and Company for £494: 12: 6; and a bill rned dishonoured for £152. 14s., these two sums, making 6, were put to his debit in the account-current. On the 27th d bills to Allan and Company to the amount of £1001. 15s., er deducting discount, left a sum of £979: 12: 8, which was put it in the account-current. He again indorsed bills to them upon so that upon that day there stood at his credit in the account- 811: 14: 9. On the 5th of May he transmitted to them from an order in his favour for £200, to be placed to his credit in t-current; and at the same time wrote to them that he should ed by your writing off the second instalment of my bond due to l 4th, and debit my account-current with the amount.' This d on the 7th; and on the same day a cheque for a sum equal lment, being £833: 6: 8, and £45: 8: 4 of interest, was pre- is brother Valentine, and the amount transferred to the credit account. A balance still stood in Blincow's favour on the ac- nt; and on the 12th of May he discounted bills to the extent : 8, and paid in cash £342: 8: 10, which, with an acceptance ier Valentine in his favour, and indorsed by him to Allan and eft at his credit £848. On the same day Valentine presented y Blincow for a sum equal to the third instalment, being , and £5: 6: 8 of interest; and at his request the amount to the credit of the bond account, in liquidation of the instal- come due on the 4th of October. On the 30th Blincow's in his individual and social name, were sequestrated under t Act, and the pursuer Pattison was thereafter elected trustee. of reduction was then brought by Pattison, first, of the bond t of £375, (being the difference between the old debt of composition,) on the footing that Allan and Company had lly bound by their accession, and therefore they were not

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dorsations of the bills and of the cheques between the 26th of April an 7th of May, whereby the second instalment had been paid, on the groun that they had been made and delivered within sixty days of the banl ruptcy;—and, thirdly, of the indorsations and cheque whereby the la instalment had been paid off. These two latter conclusions were reste upon the act 1696, c. 5; but although it was alleged that the indors tions and cheques had been given by Blincow to defraud his other cred tors, and bestow a preference on Allan and Company, yet there was n allegation that Allan and Company were either participant in the frau or were aware of his bankruptcy.

In defence Allan and Company pleaded,

1. That the pursuer had no title to object to the bond having bee granted for the debt of £500, because it was a debt due, not by Willia Blincow and Company, but by William and Henry Blincow, and whos creditors alone had any right to complain of it; that, however, the co dition of the accession had not been complied with, and, on the contrar the whole arrangement had come to an end; and,

2. That as the bills had been indorsed to and discounted with them and the cheques granted in their ordinary course of business as banker and as there was no allegation that these documents had been obtaine for any fraudulent purpose, they did not fall under the act 1696; and at all events, Allan and Company were entitled to retain them in securit and payment of the bond debt.

The Lord Ordinary reported the case, and at the same time issue the subjoined note.*

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* 'The Lord Ordinary does not think the pursuer's claim for repetition of the £375 w 'founded. The agreement by the defenders to accept of the composition was clearly co 'ditional, and the condition having failed, it was not binding upon them; they were therefo 'at liberty to include their full debt in the bond they afterwards took.

'The other question, arising from the payment of the second and third instalments of t 'bond, is attended with more difficulty, as these payments were in effect in a great measu 'made by the indorsation of bills which were not payable for a considerable time afterward 'Had the defenders not been the bankrupt's ordinary bankers, with whom he was in use 'discount his bills, there would have been little doubt that the transaction, although in t 'form of a discounting of the bills, and an application of the proceeds, by order of the bankru 'to the payment of his debt, would have been reducible, as falling under the spirit of the ac 'It is said, however, by the defenders, that being his ordinary bankers, they discounted the bil 'in question in the course of trade, and only applied the balance which stood in his favour 'their running account to the payment of the instalments of the bond, in consequence of h 'order to that effect; that the pursuer has not averred on the record that they were in t 'knowledge of the impending bankruptcy, and is not entitled to assume in argument that th 'acted on such knowledge.

'It is not necessary, however, to the operation of the act 1696 that the creditor shall 'proved to have been in the knowledge of the impending bankruptcy, or guilty of fraud 'accepting of the security. It is enough if the debtor intends to favour him, and to give hi 'a preference over his other creditors. Now it seems from the circumstances pretty obvio 'that the debtor meant to give such a preference, if not through favour to the defenders, 'least through favour to his own brothers, the cautioners in the bond; and that one of the 'Valentine Blincow, who personally managed the transaction as to the payment of these i 'stalments, was aware of his brother's situation, and transacted the whole business for t 'purpose of relieving himself and the other cautioner. Indeed, if they were able to fulfil the

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the case came to be advised,

LORD PRESIDENT stated, that the only difficulty which the Court in regard to the last instalment of the bond.

of Faculty for the Defenders.—As there is no imputation of ne case must be considered on the basis that the defenders did w of the bankruptcy, and that there was no collusion. The , therefore, comes to be, Whether this case falls under the act It is not an action of relief from payment of the bills, but is a re- of them.

BALGRAY.—It is also a reduction of the cheques.

of Faculty.—Yes; but it is only directed against Allan and ny. Attend, however, to the state of the account. Allan and ny, as the bankers of Blincow, had his funds in their hands. They m advances, and he replaced the sums drawn out just in the or- way of all banking transactions. They could not refuse his drafts, ld they, consistently with the nature of their business, decline his Now, prior to the 7th of May, he had discounted bills, the pro- f which were put to his credit in the account-current, on which he draft, which Allan and Company were bound to honour, and in compliance with his orders, was put to the credit of the second ent.

DS PRESIDENT and BALGRAY.—But it was past due,

of Faculty.—No doubt it was; but then it was a payment in r what was equivalent, and therefore is not struck at by the sta- Then other bills are discounted, cash is paid, and an acceptance ted by Valentine Blincow, who was entitled to insist, as one of the its in the bond, that the proce ds should be applied to payment of although not due. Besides, Allan and Company had an un- d lien over the bills in security and for payment of the last in- t.

e for the Pursuer.—The defenders endeavour to characterize the ion as of the nature of a payment, whereas we aver that it was provision for payment, and, as such, a preference struck at by ute. There is no doubt that, in the general case, the indorsation to a prior creditor falls under the act. In the case, however, of liam Forbes and Company, a difficulty was started, whether, in a with a banker, and where the indorsations were made in the f trade, and as payments to account, they came under the statute? ciple, that case has been considered as extremely doubtful; but rt were satisfied that there was perfect bona fides, and that jus-

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ent under the bond, they had the real interest, and the effect of the payment was to em a preference. In such circumstances, and considering that the third instalment od was not payable for some months afterwards, the Lord Ordinary thinks it ques- f the transactions can be said to be so clearly in the usual course of trade, as to form tion to the rule of the statute. He has therefore thought it proper to report the t the opinion of the Court may be obtained.'

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tice was with them. Accordingly the Court went on the principle, tha as the indorsations and payments were in the course of trade, and wer entirely unconnected with, and had no reference to, a prior debt, the could not be brought under the statute. But the present case is ver different. Here there was a bond debt, of which one instalment was pas due, and the defenders refused to make further advances without a gua rantee. Then the bankrupt indorses to them bills at long dates.

LORD PRESIDENT.—But he got credit for them in the account-curren

Skene.—It is not, however, pretended that he paid cash; and it is im possible not to see that the object both of the guarantee and of these in dorsations was to accomplish the payment of the instalment which wa past due. In the next place, provisions are made for payment of the las instalment before it became due. This, at common law, is a proof c mala fides.

Dean of Faculty.—There is no allegation on the record to tha effect.

Skene.—But I am entitled to infer mala fides from the nature an course of the transaction.

LORD GILLIES.—You mean mala fides under the statute.

Skene.—A payment made before a debt falls due warrants a challeng by creditors at common law. It brings the case under that of Spier an Dunlop, (ante, Vol. V. No. 344,) where the Second Division, on a remi from the House of Lords, set aside a payment made as a provision for re tiring a bill not then due. In the present case there was a clear provisio for payment of a future debt, and in such a case it is not necessary t aver mala fides, because it is necessarily implied.

LORD PRESIDENT.—That may be true as to an isolated transaction.

Skene.—But, in point of principle, there can be no distinction wher the same object is obtained by a series of transactions.

Dean of Faculty in reply.—As there is no averment of mala fides o the record against Allan and Company, or any plea on the common law we must confine our attention to the statute. Now it appears (and ther is no averment to the contrary) that the bills came into their hands i their ordinary course of trade as bankers, till at last a balance stands i favour of the bankrupt, which is sufficient to extinguish the bond. H then makes a draft upon that balance, and it is applied to the extinctio of the bond, just as if he had got cash from any other banker, and the paid it over to Allan and Company. In that case it is clear that th transaction could not have been set aside.

LORD BALGRAY.—The difficulty of this case arises from Allan and Com pany holding two different characters,—one as ordinary creditors, and the othe as bankers. I entirely concur in the principles laid down by the Lord Ordi nary and by Mr. Bell in regard to payments. It appears to me impossible t go back upon the discounted bills. A banker is entitled, in the ordinary cours of his business, to discount a bill, either by means of cash, or giving credit t the last hour previous to a person's avowed bankruptcy, provided it is don

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d without reference to any unlawful object. So far, therefore, as re-
he discounting of the bills in question, and placing the proceeds to
t of the bankrupt, it is clear that no objection can be made. The
ot, however, is what creates the difficulty. The payment of the first
at is not challenged; but it is said that as the second was past due,
payment was made within sixty days of the bankruptcy, it is liable to
e. There was, however, nothing to prevent Blincow from paying it
much cash; and as Allan and Company, as his bankers, had money be-
to him, he was entitled to desire them to apply it in extinction of the
nt. Therefore, in regard to this instalment, I think they are entitled
ritor. But there is a great difficulty as to the last instalment; it was
and it is impossible to hold that the payment was made in the ordi-
rse of business, and that, as such, it falls under the exception. Sup-
t Blincow had given Allan and Company an order upon another banker
purpose of paying this debt, could we have sustained it as a lawful
ion? I apprehend not. Besides, we see that they suspected his credit,
c securities, so that we must hold that this was not a bonâ fide trans-
ut a contrivance on the part of the bankrupt to relieve his brothers
eir obligation under the bond. So far, therefore, as regards the
by virtue of which it was attempted to extinguish the last instalment,
be set aside. But we are not entitled to touch the indorsations, be-
e defenders received them in the ordinary course of trade.

GILLIES.—I am of the same opinion. When we speak of fraud or
es here, we do not intend to impute actual fraud, but merely that which
s considered fraud. Indeed I do not see what interest the defenders
resist the payment of the last instalment being set aside, because they
e security of Blincow's brothers, who are said to be good. Observe
s the state of matters. The bankrupt had granted a bond for bor-
oney. He holds bills which he discounts, and applies the proceeds
nt of the instalments which had become due. This surely cannot fall
e statute. Then he grants an order upon his cash-account for payment
maining instalment, which is not due. It is impossible to say that
s transaction in the ordinary course of business; at least we cannot
be so.

PRESIDENT.—I am of the same opinion. We cannot, however, set
acceptance by Valentine Blincow. The creditors of the bankrupt
nothing to do with that; and, besides, it was a London bill, and
t to so much cash.

.—We do not challenge the acceptance, but only the indorsation of
bankrupt.

BALGRAY.—We had better not decide any thing as to that bill at

COURT accordingly pronounced this interlocutor:—'Find that, in the
circumstances of the case, it was legal for the defenders Alexander Allan
nd Company to take from William Blincow the bond dated the 28th
ay of September 1825 years, comprehending therein the sum of £500
erling, being a debt acknowledged to have been formerly due by Henry
lincow; therefore sustain the same, and assoilzie the defenders from

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'the claim of £375 sterling made relative thereto: Also find that the 'payment, on the 7th day of May 1827, of the sum of £833: 6: 8 sterling, and £45: 8: 4 sterling of interest thereon, made to account of 'the second instalment of the foresaid bond, the same being past due 'from the 4th day of April preceding, and in the way and manner 'stated, was a legal and valid payment; therefore sustain the same, 'and assoilzie the defenders from the claim relative thereto, and decern; but, in the circumstances of the case, particularly the situation of William Blincow, and the third instalment of the bond not 'becoming due till the 4th day of October 1827, find that the payment 'of £833: 6: 8, and £5: 6: 8 sterling of interest accruing thereon, made, 'on the 12th day of May 1827 years, by means of a cheque or order, 'was not legal, and is to be considered as an evasion of the statute '1696: Therefore sustain the reasons of reduction quoad said payment, and reduce and set aside the said cheque or order, and find that 'the said sums are to be replaced to the account-current between the 'parties, in the same way and manner as if the said order or cheque 'had never been granted, and decerned and declared accordingly: 'Further find that the defenders, besides being common creditors by 'bond, were also the ordinary bankers of William Blincow and Company; that they transacted their business and discounted their bills 'in the ordinary way of trade, and that such transactions do not fall 'under the sanction of the statute 1696, and therefore assoilzie the 'defenders on that head, and decern; but find that they are bound 'to account to the trustee for the creditors of William Blincow and 'Company for their intromissions in the ordinary way, reserving the 'rights of the defenders as ordinary creditors, and also the rights of all 'parties interested, as accords of the law; and, for ascertaining the 'whole of said matters, remit to the Lord Ordinary to proceed and 'do further in the case as to his Lordship shall seem proper, reserving 'all questions of expenses until the final issue of the cause.'

Pursuers' Authorities.—Jenner, Feb. 15. 1822, (ante, Vol. I. No. 365); Arrol, Feb. 24. 1826, (ante, Vol. IV. No. 324); 2. Bell, 229, and cases there.

Defender's Authorities.—(1.)—2. Bell, 486; 1. Cook on B. L. c. 10. § 7; Whitmarsh on B. L. c. 16. § 10.—(2.)—1. Bell, 212; 2. Bell, 123, 124, and cases there; 2. Bell, 133.

J. Pattison Jun. W. S.—Allan and Bruce, W. S.—Agents.

No. 61.

Mrs. D. Finlay or Donaldson and Trustees, Pursuers.—*D. of F. Moncreiff—Skene—Cuninghame.*

J. Bannatyne and Others, Defenders.—*Fullerton—Cockburn.*

Process.—Court refused to allow a remit to an accountant to examine and report on accounts and vouchers prior to the record being closed, but granted diligence with a view to enable the party to employ a professional man to examine them, preparatory to his making his averments in his condescendence.

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2d Division.
Ld. Mackenzie.
F.

This was an action of count and reckoning raised by Mrs. Donaldson and her trustees against Bannatyne and others, whom she alleged to have intromitted with her property while she was in minority. The defenders generally denied intromission, and also pleaded certain defence

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in law. After condescendences and answers had been given in, but before they were revised, Mrs. Donaldson and her trustees craved a remit to an accountant to make up a state of accounts. This the Lord Ordinary granted, remitting to an accountant with power to hear parties, and to call for such documents as he might consider necessary.

The defenders reclaimed against his Lordship's interlocutor, and contended that it was contrary to the regular form of procedure, and inconsistent with the provisions of the Act of Sederunt under the Judicature Act, to allow a judicial remit to an accountant for the purpose of obtaining a report in modum probationis, as the report of the accountant here would necessarily be at the present stage of the cause, until the averments of parties were fully made, and the record closed; and that if it was necessary for the party to have the accounts investigated, in order to enable him to make his averments, he should employ an accountant for that purpose, but that this should not be done by a judicial remit.

The Court unanimously recalled the Lord Ordinary's interlocutor, and remitted to his Lordship to grant a diligence, previous to the revising of the condescendence and answers, to recover such accounts &c., and with such allowance of time, as to his Lordship should seem proper.

Lord Justice-Clerk.—The course adopted by the Lord Ordinary, if sanctioned, would tend to the embarrassment, rather than the explication of the cause; and I conceive that a remit with such powers to an accountant is a step in the way of proof which it is not competent to take at this stage of the cause. I am quite aware of the hardship to which parties would be subjected in such cases, if they were obliged to make up their averments, and close the record, without proper access to the accounts. But, then, if a diligence be granted to recover all documents and accounts from the opposite party, and they have an opportunity of employing a professional man to investigate these accounts, and enable them to shape their averments, we do every thing to prevent such hardship which can be demanded; while, if we were to make a remit now, when there are only loose averments by the parties, the case would be constantly embarrassed by a report in such circumstances, which must, to a certain extent at least, be authoritative in the decision of the case. I therefore think that ample justice will be done if, while we recall this interlocutor, we grant a diligence to enable the pursuers to recover the accounts &c., and get a report of their own, which will not enter the process, or be binding on the Court.

The other Judges concurred.

Scott and Ramsay, W. S.—Æ. Macbean, W. S.—Agents.

No. 62. DIXON, LANGDALE, and COMPANY, Petitioners.—*D. of F. Moncreiff—Rutherfurd—Gibson-Craig.*

A. COWAN, (CONSTABLE and COMPANY's Trustee,) Respondent.—*Fullerton.*

Bankrupt—1696, *c.* 5.—*Appropriation.*—1.—A bank bill payable at sight being remitted by a bankrupt, within 60 days of his sequestration, to brokers with whom he transacted business, and who were considerably in advance to him, with instructions to apply the proceeds to take up a bill granted by the bankrupt to a third party, and they having, instead thereof, applied it to the liquidation of their own general balance—Held that the transaction did not fall under the act 1696, and that, in a question with the bankrupts' creditors, the brokers were entitled to appropriate the proceeds of the bill as they had done.—2.—Question raised, but not decided, whether the act 1696 could affect a transaction, the completion of which took place in England.

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2D DIVISION. Lord Newton. F.

DIXON, LANGDALE, and COMPANY, brokers in London, had long been engaged in a course of money and bill transactions with Constable and Company, booksellers in Edinburgh,—Constable and Company depositing with Dixon and Company long-dated bills, upon the faith of which the latter accepted the drafts of the former; and when these drafts became due, they were provided for either by remittances from Constable and Company, or by Dixon and Company discounting part of the deposited bills. On the 11th of December 1825, the balance of cash, as actually paid and received, amounted to £126 : 6 : 1 in favour of Constable and Company; but, of the same date, Dixon and Company were under acceptances for Constable and Company to the extent of £13,780 : 16 : 6. The deposited bills then in their hands, due mostly at distant dates, amounted to £13,024 : 11 : 7. Between the 11th of December and the 10th of February following, (of which date Constable and Company were sequestrated,) Dixon and Company came under further acceptances for Constable and Company to the amount of £1500, and paid on their account £5196 : 2 : 5, amounting together to £6696 : 2 : 5. During the same period Constable and Company remitted to Dixon and Company cash and drafts upon London, principally long-dated bills, to the amount of £13,054 : 12 : 2. One of the bills so transmitted during this period (which was within 60 days of Constable and Company's bankruptcy) was a bank bill of the Royal Bank of Scotland, payable at sight in the Bank of England, for £750, and it was remitted with special instructions to Dixon and Company to retire with it a bill of Constable and Company to Sir Walter Scott, payable at the house of Dixon and Company of the date at which the bank bill would be received. Instead of applying the proceeds of this bank bill as directed, Dixon and Company put them to the credit of Constable and Company in their own account with that house, so as to diminish the general balance in their books against Constable and Company. From causes which did not appear, the holder of the bill to Sir Walter Scott did not challenge this application of the bill; but, after the sequestration of Constable and Company, Dixon and Company having claimed to be ranked on the estate for the balance still due them, the trustee insisted that he was entitled to restitution of the pro-

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f this bill, as having been a conveyance of part of the bankrupts' ty within 60 days, and not in the usual course of trade, and so cut by the act 1696. He accordingly pronounced a judgment on Dixon ompany's claim, setting aside as much of the dividend accruing to s would compensate this bill, with interest.

on and Company thereupon presented a petition and complaint t this judgment, which having been remitted to the Lord Ordinary, rties chiefly argued the point whether, assuming that the trans- n of the bill, if entirely completed in Scotland, would have fallen the operation of the act, that act could affect a transaction com- in England? A question was further argued as to the consequence, e law of England, of the misapplication of the proceeds of the bill xon and Company, as to which an opinion of English counsel was , which was quite explicit, that, in a question with Constable and any's trustee, Dixon and Company were entitled, according to the f England, to appropriate the proceeds in liquidation of their general ce.

e Lord Ordinary, in conformity with this opinion, and holding that t 1696 did not apply to an English transaction, found that Dixon ompany, in a question with the trustee, were entitled to apply the eds of this bill to their general balance,—repelled the trustee's for repetition, and ordained him to rectify the scheme of ranking dingly. In a note his Lordship entered fully into the consideration e question whether the act 1696 could affect a preference by a h bankrupt to an English creditor by a transference of English , and stated his opinion that it could not; and the trustee having ned, this point alone was argued at the Bar.

e Court, however, being of opinion that even if the transaction had wholly Scotch, it was not struck at by the act 1696, on this ground ed to the Lord Ordinary's interlocutor, without deciding the ques- f international law which had been raised.

D GLENLEE.—If I were satisfied that the transaction, supposing it had ed in Scotland, was struck at by the act 1696, the question would then whether that statute could operate when the transaction has been com in England, which has not yet been formally decided? The case of has a strong analogy; but the question is of very great moment, and s a vast variety of cases, and I would therefore rather abstain from giv- opinion upon it, for I cannot conceive how the act 1696 should apply se of this kind at all. It is said that it applies, because the bill was d for a special purpose, and that this made it not a bill in the ordinary of trade. But the purpose was to pay a bill due at the time, and the smitted was a bank bill payable at sight, which I cannot distinguish payment in cash. I am far from being satisfied that, if there had been ruptcy, Constable and Company themselves would have been entitled to restitution, or that, in a question with them, Dixon and Company might emerging circumstances, be warranted in applying the proceeds of

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this bill to their general balance. Then what difference does the bankruptcy make? The creditors have no interest; for, as the Lord Ordinary observes, 'it is the same thing to them whether Dixon and Company rank for £750 'more, which they would have been entitled to do, had they applied the pro- 'ceeds in taking up Sir Walter Scott's bill, instead of paying in so far their 'own debt, or the holder of Sir Walter's bill ranks for this sum, as he will do 'in consequence of its not being paid;' and there having been nothing taken out of the bankrupt funds by the misapplication complained of, I think the claim of the trustee good for nothing.

The other Judges concurred.

GIBSON-CRAIGS and WARDLAW, W. S.—W. DICKSON, W. S.—Agents.

No. 63.

SOCIETY of SOLICITORS before the SHERIFF and other COURTS of EDINBURGH.—*D. of F. Moncreiff—Keay—Skene—Robertson.*

M. SMILLIE and Others, Respondents.—*Sol.-Gen. Hope—Jeffrey—Forsyth.*

Exclusive Privilege.—Held that the Society of Solicitors before the Sheriff and other Inferior Courts of Edinburgh have no privilege to exclude others from being admitted to practise before the Sheriff Court of Leith.

Dec. 4. 1828.
1ST DIVISION.
Ld. Corehouse.
H.

ON the 27th of January 1707, articles of agreement were entered into among the procurators of the Commissary Court of Edinburgh, by which they formed themselves into a society, with the view of supporting poor members and their families, and regulating the mode of admission of intrants. These articles were approved of on the same day by an act of sederunt of the Commissaries of Edinburgh; and, on the 6th of March 1765, the Magistrates of Edinburgh, by an act of Council and a seal of cause, ratified the articles of agreement, erected the Society into a body corporate 'under the title and denomination of the Society of Procura- 'tors before the Inferior Courts of Edinburgh, and granted to them the 'sole and exclusive privilege of exercising the office and business of pro- 'curators before all the Courts held by the Magistrates of Edinburgh 'in all time coming.' In the course of the same year the Society presented a petition to the Sheriff of the county of Edinburgh, praying him to make an act of sederunt regulating the manner and method of admitting procurators before his Court in all time coming, in the same manner as they are admitted before the Commissary and Town Courts. The Sheriff accordingly, on the 16th of May, passed an act of sederunt, declaring that 'the method for admitting procurators to practise before the 'Sheriff Court of Edinburgh,' should be by serving an apprenticeship to a procurator, and complying with certain other requisites. At this time the Sheriff had not been in the practice, either by himself or his substitutes, of holding his Court at any other part of the county than the city of Edinburgh. On the 12th of April 1780, the Society obtained a royal charter, proceeding on the narrative of a petition by them, setting

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e articles of agreement, the acts of the Commissaries, of the Ma-
s, and of the Sheriff, and which, after mentioning that they had
on business exclusively before these Courts, and confirming these
rmed the Society into a corporate body, with all the usual pri-
; and particularly there was a clause in these terms :—' Et ulterius
olumus et declaramus, quod nemo jus habebit aut instructus erit
s agere et exercere coram Commissarii, Vicecomitis, et Civitatis
is Edinburgi, vel socius fieri dictæ Societatis et corporationis,
talis persona prius regularem indenturam inserviverit pro tribus
s cum uno ex sociis corporationis, attenderit illas curias tanquam
cus pro tribus annis alterius post expirationem talis indenturæ, et
nderit Collegium legum Scotiæ pro uno anno, et subiverit privatam
ninationem coram Societate, ac etiam publicam examinationem in
ıa nunc usitata de ejus notitia stilorum, forma processuum et prin-
um legum Scotiæ, tali persona semper existente bonæ famæ et de-
ationis, solvente feoda admissionis tunc usualia et præstabilia, et
ribuente ad fundos dict. corporationis cum aliis sociis. Et super
s personæ admissionem, post privatas et publicas examinationes, et
tionem feodorum admissionis commissionem, recipiet signatam per
sidentem corporationis sub sigillo ejusdem, et quæ commissio tem-
e futuro ordinata est per thesaurarium scribi super chartam sigilla-
, et qui recipiet ab intrante summam unius libræ sex solidorum
rlinensium tanquam feoda ejusdem, quæ commissio inscribetur
batim in registro libro per thesaurarium in hunc finem custodiend.
talis persona remanebit et continuabit socius dictæ corporationis
ndiu observabit et concordabit ad regula et regulationes factas et
ctas per corporationem apud eorum generales convocationes: De-
rando quod nihil in præsentibus intelligitur vel intenditur derogare
impugnare, vel afficere privilegia Juridicæ Facultatis.'

om the date of these different acts and of this charter, it was alleged
e Solicitors that no person who had not complied with the regula-
of them had been permitted to practise before the Sheriff Court.
the 15th of November 1825, the Court of Session, under the au-
ty of the Judicature Act 6th Geo. IV. c. 120, passed an Act of
runt relative to the form of process before the Sheriff Courts, by
h it was, inter alia, enacted, 'that no person shall be allowed to
ctise as a procurator, unless he has served three years as an ap-
ntice to a writer to the Signet, solicitor before the Supreme Courts,
to a procurator before any Sheriff Court in Sotland, be twenty-one
rs of age, and be regularly admitted by the Sheriff, without preju-
e to the legal rights of chartered bodies.' But a power was granted
e Sheriff to suggest to the Court of Session such new regulations
ght appear expediet

the mean while certain disputes having taken place between the in-
ants of Leith and the Magistrates of Edinburgh, and the former

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having insisted that they should have Magistrates independent of those of the city of Edinburgh, and this having been resisted, it was ultimately arranged that a Sheriff-substitute should be appointed to reside in Leith, and administer justice there, and in a certain district in its neighbourhood. Accordingly an Act of Parliament was obtained, by which it was enacted, that 'it shall and may be lawful for the Sheriff-depute of the 'county of Edinburgh, and he is hereby authorized and required, to 'nominate and appoint, and from time to time thereafter as any vacancy 'may occur, or pro tempore if necessary, a fit person qualified in law to 'be the Sheriff-substitute in and for the said town of Leith, and district 'adjoining thereto, as to the said Sheriff-depute shall seem proper, for 'the due administration of justice within the same.'

The district here mentioned is very extensive, including Portobello, Joppa, Abercorn Pans, Maitland Bridge, Wester and Easter Duddingston, Niddry, and Jock's Lodge. By this statute it was further declared, that the Sheriff-substitute should have all the powers of any other Sheriff-substitute; that it should also be competent to appoint him Depute Admiral; that his judgments should be subject to review in the same way as those of other Sheriff-substitutes, but that nothing should be implied so as to affect the right of the Sheriff-depute to decide in civil causes in the first instance, or to injure any privilege vested in the Magistrates of Edinburgh and their officers, or the 'Society of Solicitors before the 'Commissary, Sheriff, and City Courts of Edinburgh incorporated by 'royal charter:'—'Provided always, that nothing herein contained shall 'recognise or bestow any right or power on any persons or bodies cor-'porate herein before mentioned, that they do not already possess.'

In virtue of these powers, the Sheriff-depute, on the 11th of August 1827, appointed Duncan Matheson, Esq. advocate, to be Sheriff-substitute, not only of Leith, and of the district mentioned in the statute, but also for the whole sheriffdom of Edinburgh, with power 'to judge in all 'cases civil and criminal, except civil causes proceeding on a libelled 'summons, which, in terms of the 14th section of the statute, I reserve 'to myself to decide in the first instance; and, under the above exception, 'to exercise the said office of Sheriff-substitute for the said town and dis-'trict in all respects, and to do every thing relative to the said office, as 'fully and freely as I could do myself.' A clerk was also appointed by the principal Sheriff-clerk of the county.

For several years previously, Messrs. Smillie, Ross, Harvey, and Simpson, (besides several other persons,) had been established in Leith as writers, and had been in the practice of carrying on business before the local Courts there; and when this Court was established, they severally presented petitions to the Sheriff-depute, praying to be admitted as practitioners before it. None of them were members of the Society of Solicitors, nor had they served apprenticeships in terms of the Act of Sederunt; but they had either acted as clerks to regular practitioners for seve-

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The Solicitors having brought an advocation, the Lord Ordinary reported the question on Cases.

On the part of the Solicitors it was maintained,

1. That it was impossible, without a palpable misconstruction of the charter, to say that their privileges were confined to the Court held by the Sheriff within the city of Edinburgh; that the petition on which the act of Court was pronounced, and on which the charter proceeded, was addressed to him as Sheriff of the county, and the deliverance was recorded in the Sheriff Court books of the county; and therefore the privilege must be held to relate to the right of practising before the Sheriff, wherever he or his substitutes might hold Courts.

2. That if such were the fair interpretation of the charter, then, as the Court appointed to be held at Leith was truly not a new and independent Court, but a Court held by the authority of the Sheriff-depute, and by a Judge deriving his commission from him, it was impossible to regard it as a separate Court; and therefore the exclusive privilege applied to it equally as to a Court held within the city itself,—and this the more especially, as the Sheriff-substitute had jurisdiction over the whole county.

To this it was answered by the respondents,

1. That all privileges and monopolies must be strictly construed; and that as the charter had reference only to the Sheriff Court of Edinburgh, it could not be held to give an exclusive privilege to practise before any other Court, which the Legislature or the Sheriff might order to be held within any other town in the county; that in this there was nothing incongruous, nor was it any stretch of interpretation, because it was well known that where a county was divided into wards, as in that of Lanark, there were separate classes of procurators resident within the different wards; and it was never pretended that, because those of Lanark had the privilege of practising before the Sheriff Court of Lanark, no one could be admitted as a procurator of the Court held at Glasgow, without having the same privilege.

'county of Edinburgh, is inapplicable to the Court of the Commissaries of Edinburgh, the 'jurisdiction of which extends over the whole of Scotland. If the Commissaries were to hold 'a Court in Glasgow pro re natâ, could the respondents plead that they are the only procu- 'rators entitled to practise before the Court thus held in Glasgow? Every legal practitioner 'must reside or have chambers within the bounds of the jurisdiction within which he prac- 'tises, so that he may easily be made amenable to the orders of the Court. On this ground 'no person can be admitted a procurator in the Leith Court, unless he be either residing o 'have chambers within the jurisdiction of that Court.

'With regard to what is stated in page 51, and subsequent pages of the duplies, I have t 'observe, that any appeals from the interlocutors of Mr. Matheson in Leith district case 'must be entered in the Leith Court, and the process then sent to me, and that my interlo 'cutor will be entered in the books of the Leith Court, and not in the books of the Edinburg 'Court; and the whole proceedings, even after appeal, will be carried on by the Leith prac 'titioners.'

No. 65.

H. Rose, Pursuer.—*More.*
D. M'Leod, Defender.—*Skene—A. M'Neill.*

Process.—Held that a defence of prescription of a claim should be decided before remitting to an accountant to report on the state of accounts between the parties.

Dec. 4. 1828.
1st Division.
Lord Meadowbank.
S.

Rose raised an action against M'Leod, as representing his father, for a count and reckoning relative to certain claims which Rose alleged he had against him, arising out of a copartnery at Berbice. In defence, M'Leod stated several pleas in law; but, in particular, that the claim was prescribed, both according to the law of England, and that of Berbice, where it was alleged to have arisen. The Lord Ordinary having, before answer, remitted to Mr. David Paterson, accountant, to make up a state of accounts and report, M'Leod reclaimed, and contended that the question of prescription ought first to have been disposed of.

Lord President.—It is plain that if there is any thing in the plea of prescription, it must first be decided. In fact, the pursuer is just putting the cart before the horse.

More.—The remit was made without any motion on my part, and on the suggestion of the Lord Ordinary.

Lord President.—If the debt be extinguished, which is truly the plea of the defender, what can be the use of a remit to an accountant?

The other Judges having concurred, the Court recalled the interlocutor, and remitted to the Lord Ordinary to hear parties in the cause, and proceed accordingly.

Horne and Rose, W. S.—J. Gordon, W. S.—Agents.

No. 66.

J. Hamilton, Pursuer.—*Skene—Maitland.*
J. M'Ghie, Defender.—*Sol.-Gen. Hope—M'Neill.*

Process—Expenses.—A pursuer having unnecessarily libelled in his summons on a deed as being onerous, held entitled to proceed with his action without proving onerosity, but found liable in the expenses occasioned in consequence of this allegation.

Dec. 4. 1828.
2d Division.
Ld. Mackenzie.
F.

The cause mentioned ante, Vol. VI. No. 337, having returned to the Lord Ordinary, his Lordship found 'that it is not incumbent on the 'pursuer to prove the onerosity of the missive libelled on,' and reserved consideration of the question of expenses till the final issue of the cause. M'Ghie reclaimed, and contended that he was at least entitled to the expenses incurred relative to the allegation of onerosity contained in the summons and condescendence of the pursuer.

The Court found M'Ghie entitled to these expenses; but, quoad ultra, adhered to the Lord Ordinary's interlocutor.

J. Greig, W. S.—J. M'Laurin, W. S.—Agents.

No. 67.

SIR W. FETTES, Bart. Pursuer.—*Rutherfurd.*
D. S. BUCHANAN, Defender.—*D. of F. Moncreiff—Cuninghame.*

Feuds.—The Court refused to remit, pending the preparation of a cause, to valuators to inspect certain lands, and report on their value.

Dec. 4. 1828.
2D DIVISION.
Lord Medwyn.
F.

THE pursuer Sir William Fettes having, in the year 1825, purchased certain lands from the defender, raised, two years thereafter, the present action, setting forth that he had been misled as to the rental of the estate held out as an inducement for him to make the purchase, and concluding for restoration and repetition, and also for damages. The defender pleaded in defence, inter alia, that the purchase was a fair purchase, and at a reasonable price at the time; and, in the course of the preparation of the cause, he gave in a minute to the Lord Ordinary, craving a remit to valuators to report on the present value of the lands, and what would have been their value, according to the times, in 1825, but not alleging that there was any risk of evidence as to these matters being lost. To this Sir William objected as being irrelevant to the issue, and incompetent at this stage of the cause; and, on the Lord Ordinary granting a remit as craved, he reclaimed.

LORD GLENLEE.—It appeared to me that the application was altogether irregular at this stage of the cause. Even if the relevancy of the facts proposed to be investigated were admitted, I do not think the pursuer is bound to consent to their being settled in this way. It is not the relative *state* of the lands now, and in 1825, which the defender asks to have reported on, as to which it might be said the state was altering, and that it was necessary to ascertain the former state without loss of time. Even in that case, however, I should have doubted the propriety of allowing the investigation at this stage; but, considering what the object of the remit is, I think it quite ultra vires of the Court, without the consent of both parties.

LORD PITMILLY.—I agree. Two things must have concurred to make such a remit competent. 1. The pursuer must have consented that the case should depend on what was the value of the lands in 1825; and, 2. That it should be determined in this way. Now neither of these concur. The summons is not founded on the value in 1825, and the pursuer says he must have a trial by Jury. In these circumstances it is impossible to remit to valuators. The only ground for it is to preserve evidence. The party, however, may take his own valuators to inspect the lands, and then bring them forward as witnesses before the Jury; but this proceeding is quite irregular.

LORD JUSTICE-CLERK.—I am clearly of the same opinion. We enforced the rule of not allowing such investigations during the preparation of the cause in the case of Finlay yesterday, and I see no ground to depart from it here.

THE COURT accordingly recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to proceed with the preparation of the cause.

HUNTER, CAMPBELL, and CATHCART, W. S.—W. PATRICK, W. S.—Agents.

No. 68.

R. SPALDING, Suspender.—*Sol.-Gen. Hope.*
J. SKENE, Charger.—*Skene.*

Dec. 5. 1828.
1ST DIVISION.
Bill-Chamber.
Lord Newton.

THIS was a special case, in which the Lord Ordinary refused a bill of suspension, and the Court adhered.

C. F. DAVIDSON, W.S.—F. DAVIDSON, W.S.—Agents,

No. 69.

W. HENDERSON, Charger.—*Jeffrey—W. Bell.*
J. YOUNG, Cautioner in Suspension.—*Jardine.*

Process — Expenses. — The cautioner in a suspension, who has advanced part of the expenses of process, entitled, on decree suspending the letters, with expenses, having been obtained, to appear and obtain decree in his own name for the amount of expenses advanced by him.

Dec. 5. 1828.
2D DIVISION.
Ld. Cringletie.
F.

IN the suspension mentioned ante, Vol. VI. No. 83, at the instance of M'Ghie against Henderson, Young was cautioner; and in that character he, in the course of the process, advanced a considerable part of the expenses. The letters were ultimately suspended, and expenses awarded against Henderson. For a certain amount of these, the agent craved decree in his own name; but as to a balance of £34, certified by the agent to have been advanced by Young, the latter gave in a minute craving to be sisted as a party, and to have decree in his favour for this sum. To this Henderson objected as depriving him of a plea of compensation, which he alleged he had against the suspender M'Ghie; and he contended that although an agent in a cause was entitled to decree in his own name for the expenses which he had advanced, that principle could not be extended to any third party.

The Lord Ordinary having allowed Young 'to sist himself to the 'effect of obtaining the decree which he desires,' and decerned in his name for payment of the sum of expenses in question, Henderson reclaimed.

Jeffrey for the Charger.—This point is ruled by the decision in the case of Renny and Playfair v. Aitken,* which settles that a third party cannot obtain the benefit of a privilege competent only to the agent in a cause.

Jardine for the Cautioner.—That case has no application to the present. The principle of decision there was, that an agent is not entitled collusively to lend his name, so as to give the benefit of his hypothec to a stranger who may have advanced the money to carry on a suit. Here, however, Young was not a stranger, but the cautioner in the suspension, and had an interest in the suit, which would have entitled him to sist himself as a party at any time.

Jeffrey in reply.—I do not deny that if the suspender had retired, the cautioner might have sisted himself, and then he would have had a claim for decree for those expenses advanced while the process was carried on in his name; but he does not come forward till the final issue, and he

* June 8. 1811, (F. C.)

now asks to sist himself, only to claim this decree for expenses incurred while the suspender carried on the suit. No. 69. Dec. 5. 1828.

Lord Glenlee.—I think the interlocutor right. This is not at all like the case of Playfair. If decree had gone against the suspender, Young would have been liable; and is he not entitled to come forward and say, this process must be carried on for my behoof? He might have appeared ab origine; and though he did not, the agent carried on the cause for his behoof; and as it is not alleged that he did not truly advance the money, it is clear that he is entitled to decree in his own name.

Lord Pitmilly.—I am clearly of the same opinion. This is not the case of a friend advancing money. It is the cautioner, who is in fact dominus litis, who has done so; and it would be gross injustice to refuse decree in his name.

Lord Alloway.—I am entirely of the same opinion. The cautioner in a suspension is as much interested as the principal; and this is not at all the case of Playfair. The conduct of Mr. Fleming, the agent, has been extremely correct.

Lord Justice-Clerk.—I am satisfied that this case stands entirely clear of that of Playfair; or indeed that case is rather in favour of Young's plea, because it does that the agent could not have demanded decree for this sum in his own name, as in fact it had been already paid to him.

The Court accordingly adhered.

J. Whitehead,—A. Fleming, W. S.—Agents.

H. Grant and Others, Pursuers.—*Jeffrey—G. Napier.* No. 70.
D. Kennedy and Others, Defenders.—*Greenshields.*

Expenses.—In the case mentioned ante, Vol. VI. No. 365, the Court reserved to the Lord Ordinary the consideration of the question of expenses. His Lordship found the defenders liable, and the Court adhered. Dec. 5. 1828. 2d Division. Lord Medwyn. F.

W. and G. Napier, W. S.—J. Cullen, W. S.—Agents.

Mrs. Fergusson or Pollock and Husband, Pursuers and Suspenders. No. 71.
A. M'Neill.
Janet King and Others, Defenders and Chargers.—*Skene.*

This was the sequel of the case mentioned ante, Vol. VI. No. 373. On the case returning to the Lord Ordinary, his Lordship assoilzied generally from the conclusions of reduction, and repelled the reasons of suspension, except in so far as regarded summary diligence against Mrs. Pollock, a married woman, and found certain expenses due. The Court adhered. Dec. 5. 1828. 2d Division. Lord Newton. F.

J. Stuart, S. S. C.—R. and A. Kennedy, W. S.—Agents.

No. 72.

A. CARLAW, Pursuer.—*Cockburn—Whigham.*
J. BRUCE, Defender.—*Jardine.*

Cessio Bonorum.—It having been proved that the pursuer of a process of cessio had expended certain funds belonging to him in feuing a piece of ground and building a house, the titles to which he took in his son's name, though several years before incurring the debt for which he was incarcerated, (which was his only debt,) the Court refused the benefit of cessio hoc statu.

Dec. 6. 1828.
2D DIVISION.
B.

THE pursuer Carlaw, who had been for many years a tenant of the defender Mr. Bruce of Powfoulis, having been incarcerated at his instance for payment of £133, being the rent of his last year's possession of his farm (1825,) and a small arrear of a former year, raised a process of cessio bonorum. In this he was opposed by Bruce, his only creditor, on the allegation that he had possessed considerable funds, which he had expended in feuing a piece of ground, and erecting a house thereon, the titles to which he took in name of his son, a man of about forty years of age, but who had all his life been merely working with his father at servant's wages. Carlaw, on the other hand, averred that the feu was bonâ fide the property of his son, who, he alleged, had built the house with money to which he had succeeded on the death of a brother, and with the savings of his wages.

The Court allowed a proof, from which it appeared that Carlaw had possessed considerable funds in the hands of the Carron Company; that, in the year 1820, he had feued a piece of ground at Grangemouth from Lord Dundas, transacting with his Lordship's agents in his own name, but that, when the draft of the disposition was prepared in 1821, he had his own name delete, and his son's inserted instead, and that the titles were made out, in 1822, in his son's name accordingly; that, in the course of 1820, he contracted with tradesmen for the erection of the house, paid them himself, and took receipts in his own name, having, during the same period, drawn out, in different sums, the amount belonging to him in the hands of the Carron Company; and that he had thereafter let the several portions of the house as proprietor, and drawn the rents, taking receipts in his own name, till the year 1826, when he gave the receipts in his son's name; and one of the witnesses deponed, that, on the first occasion when he gave a receipt in his son's name, he had said 'that it was a mere form, and that it was subscribed the way 'it was, because he was plagued by Mr. Bruce.'

On the other hand, Carlaw led no proof to show that his son had been possessed of any funds; but he contended that the titles to the house having been taken to his son in 1822, three years before the defender's debt arose, even if it had been proved to have been erected with his money, this would afford no ground for refusing the cessio, especially considering that he had been seven months in jail.

The Court, however, unanimously refused the benefit of cessio hoc statu.

No. 72.
Dec. 6. 1828.

Lord Justice-Clerk.—This case depends on whether the pursuer has sufficiently accounted for the funds of which he was possessed; and I think he has not. If the titles had not been taken in the son's name, it would be a good answer, that the defender would get all his rights under the disposition omnium bonorum. But I am convinced by the proof that the pursuer was the true proprietor of the house; and I have seldom seen a more ugly feature in a cessio than the circumstance mentioned by one of the witnesses. This is just an attempt to pay Mr. Bruce by a process of cessio bonorum, and we can grant the benefit of it hoc statu.

The other Judges concurred.

J. Macandrew, S. S. C.—W. Dickson, W. S.—Agents.

No. 73.

Misses M. and J. Stewart and J. Ballendene, Objectors.—*Jameson.*
J. Stewart, Respondent.—*J. W. Dickson.*

Multiplepoinding.—A party having suspended a charge given him by his sisters on a bond; and having, on the letters being found orderly proceeded, paid the money to their agent, but immediately thereafter arrested the same in his hands on the dependence of a reduction and declarator against his sisters, and thereafter raised a summons of multiplepoinding in the name of the agent—the multiplepoinding dismissed as incompetent, on objections by his sisters and the agent.

Dec. 6. 1828.
2d Division.
Ld. Cringletie.
F.

Misses Margaret and Jean Stewart having given the respondent James Stewart, their brother, a charge on his bond to them for £2000, he brought a suspension, in which the letters were found orderly proceeded. He thereafter paid the amount charged for to Ballendene, the agent for Misses Stewart, for their behoof, and received from him a discharge. During the discussion of the process of suspension, he had raised a summons of declarator and reduction against the Misses Stewart, relative to some property which he alleged to belong to him, on the dependence of which he raised letters of arrestment; and as soon as he had paid the money to Ballandene, he arrested it in his hands in virtue of the letters so raised; and he thereupon raised a summons of multiplepoinding in Ballendene's name, calling himself and Misses Stewart as defenders. To this summons objections were given in by Misses Stewart, and by Ballendene, contending that in the circumstances of the case it was quite incompetent, as his proper remedy was a forthcoming, should he succeed in his action against his sisters.

The Lord Ordinary having dismissed the action as incompetent, with expenses, Stewart reclaimed, and contended that the Misses Stewart, not being the nominal raisers, had no title to give in objections under the Act of Sederunt. The Court, however, adhered to the Lord Ordinary's interlocutor.

J. Crawford, W. S. Agent.

No. 74.

MARY COWIE, Pursuer.—*Maidment—Welsh.*
J. FLEMING, Defender.—*J. W. Dickson—Brown.*

Proof—Witness.—It is competent, in an action of debt, to examine the father and mother of a party as witnesses against him.

*Dec. 9. 1828.
1st DIVISION.
Lord Newton.
S.

MARY COWIE, who had been several years a servant with Gavin Fleming, brought an action against his son John Fleming before the Sheriff of Stirlingshire, alleging that he was the father of a child of which she had been delivered in April 1825. A proof having been allowed, Cowie proposed to adduce Gavin Fleming, the father, and Mary Gourlay, the mother of the defender, as witnesses against him, and also her own father and mother. The Sheriff-substitute refused to admit them, 'in respect 'it appears repugnant to the principles of the law of Scotland to admit 'parents as witnesses for or against their children; and that although 'the present is a case to which the principle of penuria testium is ap-'plicable, there is no authority to sanction its extension, so far as con-'tended for by the pursuer.' A proof having been led, and the Sheriff having assoilzied the defender, Cowie brought an action of reduction of the decree, on the ground, inter alia, that the above witnesses ought to have been admitted, and particularly the defender's father and mother; and concluding for payment of aliment.

The Lord Ordinary ordered Cases to the Court 'upon the special 'point of the admissibility of the near relations of the defender as wit-'nesses in the cause for the pursuer; but which the Sheriff, whose decree 'is under reduction, refused to allow.'

In support of their admissibility, the pursuer contended,

1. That wherever testimony is not expressly prohibited, it must be admitted; and consequently the absence, at common law or by statute, of a rule to reject, must be held the same as if there were one to admit. But there is no statute nor precedent for excluding the evidence of the near relations of a party against him. It is true that Lord Stair says that husband and wife, parents and children, are 'commonly inhabile wit-'nesses;' but the qualifying word 'commonly' shows that he considered that they were not absolutely excluded. It is said that the principle on which the alleged exclusion rests, is the metus perjurii; but if such a principle were well founded, a reference to the oath of the defender himself should also be incompetent, which it is not; and,

2. That as this was a case in which there was necessarily a penuria testium, it formed an exception to the general rule, if it existed.

On the other hand, the defender maintained that, according to the doctrine of the law of Scotland, the father or mother of a party is not a competent witness against him—a rule established both ob reverentiam per-

* As inquiries have been made relative to the case of Sands v. the Procurators of Forfar, reported in the Fac. Coll., it is proper to mention that it is under review; the decision being that of the Lord Ordinary on a verbal report.

No. 74. Dec. 9. 1828.

them. We are not aware that this has been held to be law, even in criminal cases, except those of life and death; and we do not think it has been understood to be law in any Civil Court.

2. The answer to the first question renders it not necessary for us to answer the second; nor would it be easy to give it an answer hypothetically, because this might depend upon the ratio upon which the first question was answered in the affirmative. We can only say, that we rather incline to be of opinion that penuria testium is not sufficiently made out; and that if the father and mother be supposed as objectionable as they are when called by their child, that objection ought not to be set aside from penuria testium in the present case.

Lord Cringletie subjoined this opinion:—I fully concur in the answer to Query 1st, and therefore I consider that it also answers Query 2d, which inquires, whether, in the circumstances of the present case, the defender's father and mother can be examined as witnesses against him? I see no circumstances in this case which take it out of the general question. But, on the contrary, as the actions arises out of an illicit connexion betwixt the pursuer and defender, to which, from its nature, there must be few witnesses, it adds a reason, generally sustained by Courts of Justice, to admit witnesses otherwise exceptionable—namely, that there may be a penuria testium.

Lords Glenlee, Pitmilly, Corehouse, and Newton concurred.

Lord Justice-Clerk delivered this opinion:—Understanding the first query to imply that the proposed witnesses are to be left no option as to giving or withholding their evidence, I cannot, on consideration of the authorities, answer it in the affirmative.

The law of Scotland, whether wisely or not it is unnecessary to inquire, has in general rejected the evidence of those who stand in the near degrees of relationship of parents and children to a pursuer or a defender in an ordinary action of debt, either in support of or in defence against a claim. It also appears from the authority of Lord Stair, that a regard to the peculiar situation in which parents and children stand to each other, and the risk of perjury, have been held sufficient to prevent them from being compelled to give evidence against each other,—it being expressly laid down by him in the passage quoted in the Case for the defender, that husband and wife, and parents and children, though parties would consent, are not obliged to depone against one other. It is no doubt true, that, in reporting the case of Cameron v. Lawson, 18th July 1744, Lord Elchies states, that though the Court had there rejected the evidence of a wife offered against her husband, they found that a son beyond pupillarity could be compelled to give evidence against his father. But this solitary instance is certainly contrary to the authority both of Stair and Erskine, as the case of Cummin, noticed by the latter as a qualification of his opinion, can hardly be considered as an impeachment of the general rule.

In the Criminal Court, the practice, however anomalous it may appear, has been to allow an option to children when offered as witnesses against their parents accused of crimes; and though some instances have occurred where children beyond the years of pupillarity have been adduced as witnesses against their parents, there is a variety of cases of late in which children within the years of puberty have been rejected, as being incapable of exercising the option competent to them, when offered as witnesses against their parents, either upon oath or declaration

No. 75. MAGISTRATES of KIRKWALL, Pursuers.—*Cockburn—Marshall.*
H. ELRICK, Defender.—*Murray—G. Napier.*

Dec. 9. 1828.
1st DIVISION.
Lord Meadowbank.
H.

THIS was a question of property depending upon the titles of the parties, and a proof on which the Lord Ordinary pronounced a special judgment, and the Court adhered.

J. and C. NAIRNE, W. S.—G. and W. NAPIER, W. S.—Agents.

No. 76. CAMPBELL'S TRUSTEES, Pursuers.—*D. of F. Moncreiff—Cuninghame.*
J. THOMSON, W. S. Defender.—*Skéne—Ivory.*

Process—Jury Court.—A Question having been raised, whether a Lord Ordinary can competently find that a case must be remitted to the Jury Court in respect of certain rationes, without actually remitting it; and whether it be competent to reclaim against such an interlocutor; a remit made to his Lordship either to report the case, or remit it to the Jury Court.

Dec. 9. 1828.
1st DIVISION.
Lord-Meadowbank.
D.

THE trustees of the late Archibald Campbell, W. S. brought an action against Mr. Thomson, W. S., alleging that from 1798 till January 1813 Mr. Campbell had acted as the clerk of Mr. Thomson, and that from that period till the 28th of January 1823, (when he died,) he had been his partner; and therefore concluding against him for salary prior to 1813, and one half of the profits subsequent to that date. In defence Mr. Thomson stated that although, previous to April 1813, Mr. Campbell had been his clerk, yet he had been regularly paid for his writings; and that although from the 20th of April 1813 he had been admitted as a partner, yet it was only to the extent of one third of the profits, for which he was ready to account.

The Lord Ordinary, after closing a record, in which the parties went into a number of minute statements relative to the business on which they were at variance, pronounced this interlocutor:—'In respect of its being 'admitted, not generally, but under different qualifications which are de- 'nied, that Mr. Campbell was assumed as a partner by Mr. Thomson, and 'the evidence to establish a copartnery being otherwise incomplete and de- 'fective, while (assuming that there was a partnership betwixt the parties) 'there is no evidence whatever of any agreement as to the extent of the 'interest of the parties respectively in the profit and loss of the alleged 'concern; and it being necessary that all these different points should, 'before further procedure, be fixed and determined, finds that this case 'must be remitted to the Jury Court, in order that issues exhausting 'the said matters may be prepared and sent for the determination of a 'Jury; and, with this view, appoints the case to be put to the roll of mo- 'tions in the Lord Ordinary's hand-roll of Tuesday next.'

The pursuers having reclaimed, and prayed that as it was admitted that Campbell had been a partner from 1813, and no written agreement was produced, he was entitled in law to one half of the profits:—

Skene, for the Defender, submitted a doubt to the Court, whether the reclaiming note was competent. The Lord Ordinary had found that the

No. 77. W. GRAHAM and J. SINCLAIR, Suspenders.—*Skene—Wilson.*
D. CUTHBERTSON, Charger.—*D. of F. Moncreiff—More.*

Composition-Contract—Discharge—Condition.—The creditors of a bankrupt having, by an extrajudicial composition-contract, agreed to discharge him on payment of a composition; and having received bills for the composition, with security to their satisfaction, and thereupon executed a full and absolute discharge—Held that this discharge was not clogged with the implied condition that the composition-bills should be paid; and the creditors accordingly found entitled, in a subsequent sequestration, to rank for the unpaid balance only of the composition.

Dec. 9. 1828.
2D DIVISION.
Lord Medwyn.
B.

ROBERT GRAHAM, manufacturer in Glasgow, having become insolvent in the year 1818, proposed to pay a composition of 5s. in the pound by two instalments, the last of which, in consideration of his creditors granting him a discharge in full, was to be guaranteed to their satisfaction. This having been agreed to by a meeting of creditors, a minute was drawn up to that effect, and thereafter Graham delivered to the several creditors his own bills for the first instalment; and, for the second, acceptances indorsed to the satisfaction of the creditors, who thereupon granted him a discharge in these terms:—'We, the subscribers, '&c. considering that the affairs of the said Robert Graham having 'some time ago become embarrassed, he called a meeting of us his cre-'ditors upon the day of March last, and laid before them a state 'of his affairs, and proposed paying them a composition at the rate of '5s. per pound, payable by two equal instalments, at the distance of six 'and twelve months from the 1st of July then next, now last past,—the 'last instalment to be guaranteed to our satisfaction, in consideration of 'our granting him a discharge in full, as the said minute, to which re-'ference is here made, in itself more fully bears:'—'And considering 'that the whole of us have acceded to the said arrangement, and that the 'said Robert Graham has, in implement of his part of the said agree-'ment, delivered to us his own bills for the first instalment of the said 'composition, and has also delivered to us his own acceptances, indorsed 'to our satisfaction, for the second instalment thereof; the receipt of 'which said bills we do hereby acknowledge, renouncing every objection 'to the contrary: Therefore wit ye us the said creditors, &c. to have 'exonered and discharged, as we do by these presents exoner, quit claim, 'and for ever simpliciter discharge the said Robert Graham of all the 'debts, claims, and demands of whatever nature owing by him to us prior 'to the date of the said last meeting; which discharge we the said cre-'ditors &c. bind and oblige us to warrant to the said Robert Graham 'at all hands, and against all mortals, as law will.' This discharge was signed, inter alios, by James Sword of Annfield, a creditor of Graham to the extent of £2458, each of the instalments of the composition on which amounted to £286: 19: 9. Before either of the instalments fell

No. 77.
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Trustees, (ante, Vol. 1V. No. 26.) and in that of Horsefall v. Virtue and Company, (ante, Vol. V. No. 23,) effect was given to this plea.

Shene in reply.—The case of the Duke of Argyll has no application here; and in that of Horsefall it does not appear from the reports or the session papers what were the terms of the discharge, or whether any discharge had been granted, so that probably there was nothing more than an agreement to discharge on payment of the composition.

Lord Glenlee.—From the report of the case of Horsefall, I should imagine that there was no discharge granted at all on the bills being handed over, but that it stood altogether on the minute of agreement. It came rather peculiarly before the Court. The two first instalments-bills were paid; and when the third fell due, it was renewed. The creditor then claimed for his full debt, under deduction of the two first instalments; and he was met with a defence of novatio, in consequence of the renewal of the third bill. The Sheriff held that there had been novatio, but the Court thought there had not; and the decision was right. But this case is very different; for it does not rest on the original agreement of the creditors to accept the bills, but on the terms of a specific discharge granted on receiving them. Now I admit that the mere receiving the bills does not make the discharge absolute. But there is nothing absurd in supposing the creditors granting an absolute discharge, on getting the bills; and indeed it would be rather odd if the statute has established for all sequestrations what the creditors cannot do privately at all. Now, if an absolute discharge was intended on getting the bills with security, what other words than those here could have been used? The discharge narrates that the bankrupt has given bills for the security of the creditors, and therefore they discharge him; and unless it could be said that it is impossible for the creditors to be satisfied with less than the real debt, we must alter the interlocutor.

Lord Pitmilly.—I agree. This is an important case, and there is no authority on the point, as the case of Horsefall is different. I think that the question depends on the contract, by the terms of which we must decide; and words more fit for an absolute discharge than those here cannot, I think, be found; and so I conceive that there is nothing due on which this party can now claim, except the composition-bills. The case of the Duke of Argyll has nothing to do with this; and as to that of Horsefall, it is clear, both from the report and the observations in Mr. Bell's last edition, that there was no discharge, but only an agreement. In regard to the particular point before us, Mr. Bell says, it has not been decided in Scotland, but it would probably be decided as in England, that the party can only prove for the composition. I agree in this, and hold that when the words of the discharge are explicit and absolute, we cannot go beyond them.

Lord Alloway.—My views are entirely the same. There may be implied conditions in compositions; but that is not the case at present. No implied agreement can be allowed to operate against a positive stipulation; and I never saw a more explicit discharge than the one granted here on getting this man's bills with security, and therefore we cannot allow the creditors afterwards to get rid of their discharge.

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Dec. 9. 1828.

object to it; and that the case of a drawer signing by procuration wa very different from that of an acceptor, where it was necessary to establis by an action that the party was truly the acceptor.

The Lord Ordinary pronounced this interlocutor:—'The Lord Or 'dinary having heard parties at the Bar, finds that the bill charge 'on is signed by a ⋈, designated to be meant for the name of Donal 'Macdonald the charger, by his name being written at the cross: Find 'that on the back of the bill, which is accepted by the suspender an 'Angus Mackintosh, there is a receipt for a bill for £21 : 9 : 6, given i 'security of the first-mentioned bill, which receipt is signed by a ⋈, de 'signated to be the charger's mark, by a subscription D. ⋈ Macdonald 'Finds that when the charge was given on the first-mentioned bill, the 'present suspension was offered, wherein the bill charged on is admitted 'to have been granted to Donald Macdonald; that the foresaid second 'bill was given to him; that a payment of £13 had been made to him 'by the other acceptor Angus Mackintosh, and it was said that £5 : 10 : 6 'only remained due, which was offered in the suspension to be paid: 'Finds, therefore, that said first-mentioned bill, though only signed by 'a ⋈, was recognised and acknowledged to be a bill due to the charger, 'and no objection was made to the summary charge, more than if the 'bill had been truly subscribed by Donald Macdonald, with his name at 'length: Finds, therefore, that it is incompetent for the suspender, after 'such acknowledgment of the bill and procedure thereon, to turn round 'and object to the bill and the diligence done thereon; and that he is 'barred from so doing, although otherwise it might have been a compe- 'petent objection to summary diligence that it proceeded on a bill signed 'by a mark: Finds that as the second bill for £21 : 9 : 6 was expressly 'said to have been given in security of part of the first bill, and has not 'been paid, the suspender is not entitled to be relieved of the obligation 'in the first bill: Finds the letters and charge thereon orderly pro- 'ceeded: Finds expenses due to the charger, remits to the auditor to 'tax the same, and decerns.'

The suspender Mackintosh having reclaimed,—

Murray for the Suspender.—There is no allegation by the charger that he signed the bill by a cross, although there is such a mark on the bill apparently superinduced afterwards. The Lord Ordinary, however, proceeds on the assumption, which we had no opportunity of obviating, that the bill was signed with a cross by the charger; but, as this is not alleged, the case must stand on the ground that the bill was signed by procuration. Now it has been decided that a bill signed by a mark, or by procuration, cannot be the ground of summary diligence. It is said, however, that there have been proceedings on the part of the suspender amounting to homologation; but that cannot affect the question as to the competency of the diligence, whatever weight might be given to it in an ordinary action; and besides, the payment of the £21 bill was not by Mackintosh, but by the other co-acceptor.

No. 78. Dec. 9. 1828.

but that is a very different matter from withdrawing admissions, or indeed a judicial agreement to stand on certain grounds.

Lord Alloway.—This is clearly a special case. No doubt a bill signed by a mark cannot be the ground of summary diligence; but, in the circumstances, we cannot allow the party now to plead the objection.

Lord Pitmilly concurred.

The Court, accordingly, while they recalled the findings in the interlocutor as to the bill being signed by a cross, quoad ultra adhered.

Suspender's Authorities.—1. Bell, 303; Watson, June 3. 1823, (ante, Vol. II. No. 342); Robertson, May 27. 1825, (ante, Vol. IV. No. 34); Cowie, Nov. 26. 1825, (ante, Vol. IV. No. 183); Cockburn v. Gibson, Dec. 12. 1815, (F. C.); Kennedy v. Watson, May 25. 1816, (F. C.); Jackson, Dec. 9. 1825, (ante, Vol. IV. No. 214.)

Charger's Authority.—M'Ilreoch, Dec. 2. 1826, (F. C.)

C. M'Donald, W. S.—C. Fisher,—Agents.

No. 79.

W. Thom, Suspender.—*D. of F. Moncreiff.*
A. Black, Charger.—*Sol.-Gen. Hope.—Bain.*

Meditatione Fugæ Warrant.—It is competent for the drawer of a bill, who has discounted it with and indorsed it to a third party, to apply for a warrant against the acceptor, as being in meditatione fugæ.

Dec. 10. 1828. 1st Division. Bill-Chamber. Lord Newton. H.

On the 9th of June, William Thom and Adam Smith accepted a bill drawn upon them by the charger Black for £140, payable six months after date—that is, upon the 9th and 12th of December. Black indorsed this bill to John Cochrane for value; and thereafter, and while the bill was in Cochrane's hands, Black, on 8th November, presented a petition to the Sheriff of Renfrewshire, setting forth, that Thom 'owes the petitioner the sum of £140 sterling, contained in a bill drawn by the petitioner upon, and accepted by the said William Thom and Mr. Adam Smith, writer in Paisley, jointly and severally, of date the 9th day of June last, payable six months after date; which bill has been indorsed away by the petitioner to other parties, and is now held by John Cochrane, silk-merchant in Paisley, for value, and it will fall due on the 9th and 12th days of next month, viz. December 1828;' and he stated that he was credibly informed that Thom meant to leave Scotland, and go first to Liverpool, and then to Aberdeen, or elsewhere abroad; and he therefore prayed for warrant to incarcerate Thom, as in meditatione fugæ, 'until he should make payment of the aforesaid sum, or find caution acted in his Lordship's Court books that he would either pay the same when the aforesaid bill falls due, or abide the raising and execution of any diligence which might be adopted against him, for payment of the said sum and interest, within the space of six months from the date of said bail-bond.' He then appeared, and deponed 'that the debt claimed by the petitioner is justly and truly due by the said William Thom, as stated in the petition.' Thom was then apprehended, and, on being examined, admitted that he had been in England, whence he

No. 79. Dec. 10. 1828.

person. It is true that a contingent creditor may be entitled to diligence against the property, but not one of the institutional writers say that he can seize upon the person. Here a novel attempt is made by a party who is not a creditor, and who, at the best, can only be called a contingent creditor, to avail himself of a diligence, of a very extraordinary and delicate nature, against the person. There is no instance, nor is there any principle, for authorizing any one in his situation to demand such a warrant.

The Court, after taking time to consider, announced that the question

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'mony puir creatures to bide in the tolbooth o' Fairport yonder?—they a' say they were put 'there by their creditors—Odd! they maun like it better than I do, if they're there o' free will.' 'A very natural observation, Edie, and many of your betters would make the same; but it is 'founded entirely upon ignorance of the feudal system.—Hector, be so good as to attend, unless 'you are looking out for another—Ahem!—(Hector compelled himself to give attention at this 'hint.)—And you, Edie, it may be useful to you rerum cognoscere causas. The nature and 'origin of warrant for caption is a thing haud alienum a Scævolæ studiis. You must know 'then once more, that nobody can be arrested in Scotland for debt.' 'I hae na muckle 'concern wi' that, Monkbarns,' said the old man, 'for naebody wad trust a bodle to a 'gaberlunzie.' 'I pr'ythee peace, man—As a compulsitor, therefore, of payment,—that being 'a thing to which no debtor is naturally inclined, as I have too much reason to warrant from 'the experience I have had with my own,—we had first the letters of four forms, a sort of 'gentle invitation, by which our sovereign lord the king, interesting himself as a monarch, 'should, in the regulation of his subjects' private affairs, at first by mild exhortation, and 'afterwards by letters of more strict enjoinment and more hard compulsion—What do you 'see at that bird, Hector?—it's but a sea maw.' 'It's a pictarnie, sir,' said Hector. 'Well, 'what an' if it were—what does that signify at present?—But I see you're impatient; so I 'will waive the letters of four forms, and come to the modern process of diligence.— You sup- 'pose, now, a man's committed to prison because he cannot pay his debt? Quite otherwise; 'the truth is, the king is so good as to interfere at the request of the creditor, and to send the 'debtor his royal command to do him justice within a certain time—fifteen days, or six, as 'the case may be. Well, the man resists and disobeys—what follows? Why, that he be 'lawfully and rightfully declared a rebel to our gracious sovereign, whose command he has 'disobeyed, and that by three blasts of a horn at the market-place of Edinburgh, the metropolis 'of Scotland; and he is then legally imprisoned, not on account of any civil debt, but be- 'cause of his ungrateful contempt of the royal mandate. What say you to that, Hector?— 'there's something you never knew before.' 'No, uncle; but I own, if I wanted money to 'pay my debts, I would rather thank the king to send me some, than to declare me a rebel 'for not doing what I could not do.' 'Your education has not led you to consider these 'things,' replied his uncle; 'you are incapable of estimating the elegance of the legal fiction, 'and the manner in which it reconciles that duress which, for the protection of commerce, it 'has been found necessary to extend towards refractory debtors, with the most scrupulous 'attention to the liberty of the subject.' 'I don't know, sir; but if a man must pay his 'debt or go to jail, it signifies but little whether he goes as a debtor or a rebel, I should think. 'But you say this command of the king's gives a license of so many days—now, egad, were I 'in the scrape, I would beat a march, and leave the king and the creditor to settle it among 'themselves before they came to extremities.' 'So wad I,' said Edie, 'I wad gie them leg- 'bail to a certainty.' 'True; but those whom the law suspects of being unwilling to abide 'her formal visit, she proceeds with by means of a shorter and more unceremonious call, as 'dealing with persons on whom patience and favour would be utterly thrown away.' 'Aye, 'said Ochiltree, 'that will be what they ca' the fugie warrants—I hae some skeel in them.— 'There's Border warrants too in the south country—unco rash uncanny things; I was ta'en 'up on ane at St. James's Fair, and keepit in the auld kirk at Kelso the haill day and night, 'and a cauld goustie place it was, I'se assure ye.'

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was of so much importance, that they intended to consult the other Judges; and accordingly it was appointed to be argued before the whole Court.

Dean of Faculty for the Suspender.—The point for the consideration of the Court is, whether Black, under the circumstances of this case, has a title to make the application for the warrant. It is necessary to attend to the peculiar nature of the document. It is a bill accepted by two parties, and we admit that the presumption is, that value was given by the drawer to the acceptors; but it is well known that the presumption is not always consistent with the fact—an observation which is material in this question of summary apprehension. The drawer in this case does not keep the bill in his own possession, but indorses it away for value to a third party. In this way he has got the money into his pocket, bating the discounted interest—has assigned away both the debt, and the document by which it is constituted—has vested them in a third party, and put him in titulo to demand payment, and use all the remedies originally competent to himself. The question therefore is, whether, under these circumstances, a drawer can demand the remedy of a meditatio fugæ warrant? This diligence is of recent introduction into the law of Scotland, and is not authorized by statute. In the earliest case in which it is noticed, 5th November 1665, Mason, it was considered to be a stretch, and the Court doubted of their powers. Yet that was a case between a proper debtor and creditor. The law of Scotland is most anxious and jealous as to the protection of the person. It lays open the goods of a debtor freely, but it only permits his person to be seized after various forms and notices; and in principle it does not allow him to be attached for the debt, but only for rebellion. There must first be a decree of a Court, either actual or by registration; then letters of horning, a charge with a certain number of days of notice,—a denunciation of the debtor as rebel,—and then, but not till then, his person may be laid hold of by caption. But, according to the doctrine attempted to be maintained on the opposite side, a party may be seized suddenly and thrown into jail at the instance of a person who is not a creditor, or at least who can only represent himself to be so contingently. For this there is no precedent; and, on the contrary, the Court have been anxious to confine the warrant to those cases for which examples have already occurred. All the institutional writers state, either expressly or by assumption, that it is a remedy only as between a proper creditor and debtor. Lord Stair so states the law; and Bankton, vol. i. p. 402, is quite express on the point. See also Hutchison, vol. i. p. 445, note. The production of a document of debt may not be essential; but the party must make oath that he is creditor in his own right. It is impossible, however, for the charger to do so, and accordingly he has not made oath to that effect. To bring the matter to the test—could he raise an action either for payment or relief? Clearly not. To found a claim of relief, he must show that the party is vergens ad inopiam. But this application does not and

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cannot proceed on any such allegation, because it assumes that he has sufficient funds, and the averment is, that he is about to carry them out of the country. Besides, if such a rule were sanctioned, the consequences would be most injurious, and give rise to great oppression in numerous cases—as, for example, in accommodation-bills, where the drawer, although the proper debtor, might avail himself of it for oppressive purposes.

Solicitor-General for the Charger.—The suspender is, ex facie of the bill, the debtor of the charger, and that must be assumed to be the undoubted fact. If a party, in the full knowledge that a bill is an accommodation to himself, chooses to resort to this diligence, he must do so at his own peril; but, provided he has the bill in his possession, it is not disputed that it is competent for him to apply for the warrant, and consequently that he has a title. The observation, therefore, as to accommodation-bills in this question of title may be thrown aside; first, because it is inapplicable to this case; and, second, because it cannot be denied that the party has a title. We come then to consider whether, by the drawer having indorsed the bill, he is deprived of the benefit of this means of protecting himself against the fraudulent attempt of the acceptor to escape from the country, and so leave the drawer to pay the amount to the holder? From the nature of the document, it is a negotiable and discountable instrument. It proves that the acceptor has the money of the drawer in his possession, and the purpose of giving the bill is to enable the drawer to go into the market and get the money. But by the drawer availing himself of that power, there is no extinction of the obligation of the acceptor towards him. That obligation is, that he shall pay the bill when it falls due; and so far from the drawer's interest in the performance of this obligation being diminished by having discounted the bill, it is strengthened, because he now stands in the situation of cautioner to the holder for the acceptor. Such being the relative position of the parties, attend to the object of this diligence. It is not to operate payment, but merely security. It proceeds on the assumption that the debtor fraudulently proposes to leave the country to evade performance of his obligation, and therefore he is required to find security to abide the issue of any action or diligence which may be raised against him for payment of the debt. So far from the object of it being to compel payment, it is proved by its very nature, and from its history, that it is intended as a remedy to parties who are not in a condition to enforce payment—as, for example, where the debt stands on open account. Now, although the charger may not be in a situation to compel payment, he has an undoubted right to insist that the suspender shall pay the bill when due, and remain in this country to implement that obligation. In Mason's case, some of the Judges merely doubted whether the Court had jurisdiction to grant the warrant, and whether the application should not be made to the Judge Ordinary as the proper Magistrate; but it shows that this obligation was then well known. Standing, therefore, not only in the situation of cautioner for

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opinion that the present application is competent. I hold it to be clear that where one is bound as a cautioner for another to pay a certain sum, and the principal obligant is about to fly the country, the cautioner may avail himself of this remedy, on the ground that he has a claim of debt in relief against him. In like manner, a similar claim exists here by the charger against the suspender; and therefore we cannot deny this remedy in regard to it, any more than we could for a claim of damages or recompense set up, even before any action is raised.

With regard to the objection of the charger being unable to raise an action for payment of the debt, it is manifest that it would exist even if he had the bill in his hands, and were not yet due, in which case it is not disputed he would be entitled to this remedy. And as to the difficulties relative to bills which have been accepted for the accommodation of the drawer, and as to his attempting to avail himself of this species of diligence, the answer is, that while they apply to all bills, whether indorsed or not, it is open for the acceptor to state the fact to the magistrate; and it is the duty of the magistrate to satisfy himself as to the justice and correctness of the claim and of the warrant in all respects.

Lord Corehouse.—I have the misfortune to differ from the opinion just given. Personal liberty is sacred. This is not a mere theme. It is a principle of the law of Scotland. The person of a debtor is not to be touched, except under the express authority of either written or consuetudinary law. I consider the absence of all authority as decisive against the legality of the application in this case. Not a single instance is produced or referred to, in which a meditatio fugæ warrant has been granted at the suit of a contingent creditor—that is, a person not actually a creditor at the date of the application, but who may afterwards become so. Bills of exchange have been in constant use in this country for more than a century, not only in mercantile affairs, but in all transactions, and among persons of every description. They are often resorted to by people in embarrassed circumstances, and most likely to abscond. But it is not pretended that a single case ever occurred in which a meditatio fugæ warrant was granted to any person whose name appeared on a bill, except the holder. This is the strongest negative evidence of the understanding of the country, and negative evidence is a sufficient foundation for consuetudinary law. Here I might stop; but I go further.

A meditatio fugæ warrant is stated by all our writers to be a remedium extraordinarium, and to have been introduced with difficulty, and contrary to the genius of the law of Scotland. I differ from the Solicitor-General with regard to the construction which he has put upon the case of Mason. He seemed to say that the Court were unanimous in that case—that a meditatio fugæ warrant was competent—and that they only differed as to whether the application ought to have been made to the Court of Session, or to an Inferior Judge. But the report expressly bears that the doubt entertained was, whether the practice in the Admiralty Court in maritime cases, and the privilege of royal burghs with regard to debts of a particular description contracted by strangers, (both of which have existed from time immemorial,) could be extended to civil causes of every description. Some of the Judges thought this a stretch which a Court of Law was not entitled to make, and that the thing was fitter for the cognisance of the Privy Council. A majority of the Court held otherwise. But although it is to be regretted that the remedy of meditatio fugæ warrant has been introduced, and that it is now part of the customary law of Scotland, your Lordships, who have more correct notions of the duty of this Court than prevailed in the reign of

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George Mackenzie, but from the report of the case of Mason in 1665, that the Court had the greatest difficulty in sustaining their own jurisdiction in granting a warrant de meditatione fugæ, for the first time, contra debitorem suspectum et fugitivum. It is impossible to apply the Roman law, (which our ancestors were chiefly inclined to follow,) because the whole system of arrestment of the person for civil debt rests upon an opposite principle from what has been uniformly adopted in the common law of Scotland; and the reasoning for its adoption in the case of Mason was founded chiefly upon Border warrants—upon the practice of the Court of Admiralty—and upon acts of warding in royal burghs. And I think it is clear that where that procedure was adopted with such hesitation, and upon such doubtful authority, it could not be the inclination of the Court to extend those powers, which had not been conferred by statute, but had been created by a decision which even the Court that pronounced it held to be most questionable. But if it is now to be extended to all persons having contingent claims, after they have indorsed away the bills, or assigned away the right which they had to another, it is impossible to say how far these anomalous warrants may be extended, or how severely it may press upon the liberty of the subject, and the personal liberty of debtors. I am therefore most decidedly against allowing any of those warrants, except upon application from the true creditor in whom the debt is vested; and I cannot discover that since 1665, when these warrants were first introduced, this Court has ever given the least countenance to such an application as the present. Nay, I find that by the statute 1672, c. 8, some years after warrants de meditatione fugæ had been introduced, chiefly from the analogy of acts of warding in burghs, the power of exercising that right in burghs is expressly limited and restricted, and that the present case, if it had occurred in a royal burgh, was actually excluded. For by that statute it is enacted, that in case the debt was assigned to another, the privilege was lost; and that if bond or other security had be n given for the debt, and more especially if that bond or bill had been assigned to another, the burgesses could not claim the privilege of arrestment of the person under such an application. So that although this anomalous right of arrestment de meditatione fugæ was chiefly supported from the analogy of acts of warding in royal burghs, yet here it is declared by the Legislature that such a warrant, under circumstances similar to those in the present case, would be incompetent.

Both parties in their pleadings rested this matter upon a question of title, in which it was said, that although Black had indorsed away his right to Cochrane for value, and Cochrane, having the absolute power over the bill, might have indorsed it to twenty others, and Thom could not pay Black, who had no right to discharge it, and who might never again have any right to the bill till he had paid Cochrane and got back the bill, yet nevertheless that he had a sufficient title to apply for the warrant, seeing that if the bill was not paid by Thom and the other acceptor, he would be responsible for it. But this Court found in the case of Black against Kennedy, June 29. 1825, reported by Shaw and Dunlop, Vol. IV. No. 104, that a person standing in that situation had no such title. Indeed that case is precisely in point, as the applicant there had a much stronger title and interest than the charger in the present case. In that case Black, alleging himself to be a creditor of Kennedy in virtue of a decree for expenses in an action against him, applied for a recall of Kennedy's sequestration, upon the ground that the concurring creditor had been under sentence of fugitation. But an objection was taken to his title. No doubt

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tion of the charger would have been entitled to apply for this warrant? Could you have done so upon the interpretation of such a statute the year after it had passed? I apprehend not. But if not, and if, after 150 years, during which the words 'just and lawful creditors' had received one, and only one interpretation, are you prepared to find that this warrant can be granted to a person who is not a lawful creditor, but who is only a contingent creditor? How does the case stand? This is not the creature of statute; but you have meditatio fugæ warrants granted for 150 years to just and lawful creditors. One invariable system has been followed out for a century and a half, without a single authority to show that it has ever been granted to any but a just and lawful creditor.

I was much impressed with the justice and the equity of this case, that the charger should have this remedy; but I agree with Lord Corehouse in thinking that it is not this Court, but the Legislature, that must give the remedy.

Lord Pitmilly.—I concur in the opinion which was first delivered, and upon the grounds expressed by the Lord Justice-Clerk. The question depends entirely on this, whether the drawer of a bill which he has indorsed has such a title and interest remaining in the bill as to warrant his taking this step for his security? The object of the law is to prevent actions from becoming useless by the escape of the debtor. That object would be defeated, if it were confined solely to cases where a party had a clear and liquid claim of debt. It must be extended to claims of debt, such as the creditor believes to be well founded. It may turn out to be no debt; but still, if the creditor gives his oath of verity, the warrant may be granted, and security obtained. This was argued in the case of Wright v. Gammel, 6th February 1782 (Mor. 8553), where a party had a claim against another, who had been his factor in America, for the proceeds of two ships and their cargoes, or for the sum of £5000 as the amount of the profits on that transaction. The debtor was a foreigner, and was apprehended as in meditatione fugæ. The debt there was illiquid, and the oath of the creditor was the same as in this case. It was a qualified oath to this amount—if the debt is due, then I am the creditor; and this must always be the nature of the oath where the debt is illiquid. The difficulty was not greater in that case than in the present, although it was of a different kind. There might be no debt in that case, and of course no creditor; but here there is no doubt as to the debt; that a debt is due, is established by the bill; and the only question is, whether the charger has such an interest in this bill as to allow him to resort to this remedy?

His interest is quite clear. If the bill is not paid by the acceptor, the drawer must pay it. The oath which says the debtor was in meditatione fugæ, raises the interest. His interest is stronger than that of the holder of the bill, because the holder may not take this step of security against the acceptor, if the drawer is sufficient for the debt; so really the drawer has an obvious and clear interest, more even than the holder of the bill.

When the drawer has so clear an interest, can you refuse him this remedy, merely because he is not holder of the bill at the moment? I think the interest in this case creates the title, which should be good to the extent of securing his eventual right. It has been found that interest does create a sufficient title for security; Lord Elibank v. Bailie, July 1767 (Mor. 16130.) I observe one case to which I would draw your Lordships' attention on the question of title—the case of Ross v. Rose, 3d June 1752 (Mor. 17071.) It was a case of this description. A clerk in a banking company at Aberdeen was suspected of embezzling the funds

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debtor braves the law by telling the magistrate that his pockets are full of money. But let it be remembered that the law itself presumes that every man has funds to pay his debts; and the principle of imprisonment is, that the squalor carceris will make him produce these funds. Nay, the law carries this so far, that it will not liberate a debtor from jail, unless he prove in a cessio bonorum that he is lapsus bonis, and gives up all he has. Since, then, the law holds this presumption, it has the same effect as if the debtor avowed that his pockets are full of money which he means to carry off, and it must equally interpose to prevent such a fraud. It is on this principle that the sanctuary affords no protection against a warrant de meditatione fugæ.

I observe that the suspender admits that a cautioner in a bond could use diligence against the debtor in it; and I cannot distinguish between a man who is cautioner for another in a bond, and a drawer of a bill who has indorsed it away. It is admitted that if the charger in this case had not indorsed the bill, he would have been entitled to obtain the warrant; but the objection is, that having indorsed the bill, he has not the jus exigendi; he cannot discharge it, if the debtor were to offer payment. All this is very specious, but it has no solidity. The self-same argument might be used, if the warrant had been applied for by a cautioner in a bond, who cannot discharge the bond which is in the hands of a creditor. Yet it is not disputed that such warrant may be obtained by a cautioner. Let the suspender offer the money—let him consign it, and there will be no fear of his not finding caution de judicio sisti. But it was well observed by Mr. Solicitor-General, that the very purpose of the suspender granting the bill was to enable the charger to raise money in the mean time by indorsing away the bill, and that the suspender is therefore not entitled to object to that being done, to the effect of denying himself to be debtor to the charger. He is debtor to him and to the indorsee, both before and after the term of payment; and the only difference is, that, before the term of payment, neither of them is entitled to demand the money from him; neither is the indorsee entitled to demand payment from the indorser; but, notwithstanding thereof, both the indorser and acceptor are debtors to the indorsee, and the acceptor is debtor to the drawer. The debt is constituted. It is, no doubt, a conditional one; but still it is a debt. It is precisely of the same nature as that of a principal to a cautioner, a debt depending on the self-same condition that he do not pay to the creditors of both. It being admitted, therefore, that a cautioner may obtain such a warrant, I cannot see any reason why the charger in this case may not also obtain the warrant.

Let me put the case that a person grants a bond for presenting another in a Court of Justice. This is a conditional obligation, depending on the debtor not appearing when called for. It may never be a debt at all. But if a cautioner de judicio sisti were to be in meditatione fugæ himself, can there be any doubt that a warrant could be obtained against him to prevent his fuga, just as much as it was granted against the person whom he was bound to present? I apprehend that such warrant would be granted, which proves that it may be granted on a conditional debt.

It was said that there may be twenty indorsations, and of course that there may be twenty applications for warrants at the instance of the indorsers. But this makes no alteration upon the argument. If one indorser were to obtain such a warrant, and the debtor were not to find caution, he would be detained in prison, which would satisfy all the other indorsers; and if he found caution, the right

No. 80. J. MORTON, (BROWN'S Trustee,) Pursuer.—*D. of F. Moncreiff—More.* HUNTERS and COMPANY, Defenders.—*Jameson—Cowan.*

Sasine—Heritable Security—Stat. 54th Geo. III. c. 137—Proof.—Held.—1.—That a sasine for £5000, and three years interest thereon, in security of advances by a banker on a cash-credit, without specifying the cumulo sum, is a sufficient compliance with the 54th Geo. III. c. 137.—2.—That the omission of the christian name of the bailie in a sasine is not a nullity, and that parole evidence is competent to identify him; and,—3.—That it is no objection to a sasine that the name of one of the witnesses is written on an erasure in the body of the instrument, it being duly signed by him, and there being no allegation that he was not present.

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1ST DIVISION. Lord Newton. H.

HUNTERS and COMPANY, bankers in Ayr, having agreed to allow William Brown of Lawhill a cash-credit of £5000, obtained an heritable bond over his lands, by which it was declared that the security was to be for the principal sum of £5000, and interest thereon; but that 'the 'whole sum to be recovered in virtue of the said bond shall not exceed 'the sum of £5000, and three years interest thereon at the rate of five 'per cent., conform to the 14th section of the act 54th Geo. III. c. 137;' and the precept was in the same terms. Sasine was then taken, the instrument of which set forth that there 'compeared personally, upon the 'ground of the subjects after mentioned, Hugh Brown, merchant in Salt-'coats, as attorney for Messrs. Hunters and Company after designed, 'and passed with us and Brown in Dubbs, parish of Steven-'ston, bailie in that part specially constituted by virtue of the precept 'of sasine after inserted.' The name of one of the witnesses was written upon an erasure in the body of the instrument; but it was subscribed by him, and it was not alleged that he had not been present.

The estates of Brown having been sequestrated, Morton, as trustee, brought an action of reduction of the sasine, on the grounds, 1. That the christian name of the bailie was not mentioned; 2. That no definite and specified sum was expressed, as required by the above statute; and, 3. That as the name of one of the witnesses was written on an erasure, the instrument was, quoad hoc, not probative, and therefore it did not appear that there had been two witnesses present. Hunters and Company having pleaded in defence that it was not essential in point of solemnity that the christian name of the bailie be mentioned in the instrument, provided he be otherwise so described and identified as to point out the person who officiated; and having alleged that there was only one person in the parish of Stevenston who was known by the designation of Brown in Dubbs; and Morton having, on the contrary, averred that there were several persons of that description, the Lord Ordinary, before answer, allowed a proof. After the proof had been taken, he reported the case to the Court.

When it came to be advised, their Lordships, with the exception of Lord Craigie, were of opinion that the Act of Parliament had been complied with, the maximum having been set forth, and they disregarded the objection as to the witness; but, considering the objection as to the bailie to be attended with difficulty, they directed the following query 'to

opinion of the Lords of the Second Division, and the
manent Lords Ordinary, viz. Whether the omission of the
stian name of the bailie in the sasine in question renders the said
sasine null and void?"

LORDS JUSTICE-CLERK, GLENLEE, ALLOWAY, PITMILLY, CRINGLETIE, MEADOWBANK, MACKENZIE, MEDWYN, COREHOUSE, and NEWTON returned their opinion:—"We have considered the Revised Cases, and have examined the instrument of sasine in question, and are of opinion that the omission of the christian name of the bailie in the sasine does not render the instrument null and void. The authority to infeft flows from the command of the superior or granter of the precept, and no general powers, however ample, will suffice; but the precept must contain a special ...me of the bailie in the precept of sasine. The precept, Mr. W... alter ...ed, as expressed in the sasine, possessor of the charter con- ...ndate to this effect, and no general powers, however ample, will suffice; but the ...e of the person to whom the mandate is committed is left blank in the precept, ...l never filled up. Any person can execute the precept as bailie. Mr. Ross's ...s thus describes the manner in which this business is accomplished:—'The ...st movement is made by the party or his attorney, possessor of the charter, ...ining the precept. He requires the attendance of a notary public to certify the ...t. They next, in virtue of the blank left in the precept for the bailie, choose ...person to fill that office, and get witnesses to attest the whole fact;' for ...tures, vol. ii. p. 178. It seems sufficient, therefore, first, for validating the act ...e bailie, that the precept of sasine should be delivered to a particular person, ...natter whom, different from the attorney and witnesses, and handed over by ...individual, whoever he may be, to the person who acts as attorney, in presence ...e witnesses, and that, after the precept has been read by the attorney, secondly, for ...n acting as bailie delivers the symbols; and it seems sufficient, secondly, the ...ering these acts authentic, that the notary in the instrument and docquet attest ...to have been done by a certain person officiating as bailie. The name of this ...must indeed be given, and it is no doubt usual and proper to insert the ...an name as well as surname; but this does not appear to be indi-pensable, if ...serted on the face of the instrument, and attested in the docquet, that a certain ...officiated as bailie in giving sasine, and if this individual is so described ...may be known and distinguished from others. There is a case reported ...eton which illustrates these principles by proving that even a mistake com- ...by the notary in mentioning the name of the person who actually gave sa- ...ailie, and confounding him with the attorney, will not invalidate the in- ...if it appear from other parts of the sasine that there were actually two ...persons employed, one as attorney, and the other as bailie. 'The Lady ...s being infeft in an annual rent upon a right granted by her husband, her ...as questioned upon these grounds; 1st, That it was null, in so far as the ...d the attorney in the sasine were one person, who could not give and take ...e,' &c. 'The Lords, in respect it did appear evidently that it was a ...of the notary that the sasine did bear the same person to be both bailie ...ney in the clause of tradition, and seeing, by the first part of the sasine it ...that there was a distinct attorney who did present the sasine to the bailie, ...fore incline to sustain the sasine,' &c. &c. Dirleton's Decisions, p. 165. ...esent case a parole proof has been rendered competent and necessary, ...purpose of it is not to contradict the written instrument, but to explain ...in it, and because one of the reasons of reduction libels 'that the

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'bailie is not so designed as to point out the person, or give any information who 'the bailie was, there being in the parish of Stevenston two places called Dubbs,' &c. Now it appears from the proof that the person who is said to have acted as bailie in giving infeftment was little known by his christian name; but that in order, in all probability, to distinguish him from others of the same surname who lived at no great distance from him, (though not on the same farm, nor in the same parish,) he was generally designated 'Old Brown in Dubbs,' or 'Old Dubbs,' or 'Brown of Dubbs, in the parish of Stevenston,' or 'Brown in Dubbs;' defender's proof, p. 29, D; pursuer's proof, p. 16, C, &c. It may have been from this cause, joined to the circumstance of the notary filling up the blanks at an interval of time (and not having very perfectly fulfilled the duty, as expressed in these words in his docquet, et in notam cepi,) when he only recollected the bailie by the name which was usually given to him in the country, and when the christian name had either slipped from his memory, or had never been known to him, that the omission in question has occurred.

LORD CRAIGIE.—We have here the unanimous opinion of the consulted Judges against the objection to the instrument of sasine, founded on the omission in the christian name of the bailie; but I own I am not convinced by their opinion. There are some things in it to which I cannot assent. I cannot agree to the doctrine that the name of the attorney or procurator of the disponee need not be specially mentioned, or that it is indifferent whether he be confounded with the person officiating as bailie. Neither can I agree to the doctrine that it is competent to support a private instrument by parole proof. An instrument ought to be complete in itself. In this way, the validity of the instrument will, in such a case, greatly depend upon the time when the challenge is brought. For, suppose this case had not occurred till twenty years after this, could proof have then been allowed? I think this mode of supporting the instrument is quite incompetent, and that it is a very serious thing to overlook such objections as these. I think it would be much better to say at once that no instrument of sasine at all is necessary, and that a mere notandum on the back of the disposition, that infeftment was given, should be held sufficient. So long, however, as instruments of sasine are required, they ought to be in every respect formal and complete documents.

LORD PRESIDENT.—It appears to me that the consulted Judges, in giving their opinion against the objection, have overlooked this important consideration, that, by requiring strict correctness in the instrument of sasine, there is afforded great security against forgery. I cannot but think that if the omission of the bailie's christian name be of no consequence, the christian name of the party disponing the property might as well be omitted. In reference to what fell from Lord Craigie, I think that a proof may in some cases be necessary and competent, demonstrandi gratiâ, where the question is one merely of identity.

LORD GILLIES.—I am of the same opinion.

LORD BALGRAY remained of his former opinion, which was in support of the sasine, and for repelling the objections.

THE COURT accordingly repelled the reasons of reduction, and assoilzied the defenders.

Pursuer's Authorities.—2. Stair, 17, 18, 19; 2. Ersk. 3. 35. and 37.

Defenders' Authorities.—3. Craig, 2. 2; 2. Ersk. 3. 33; 2. Craig, 7; Hilton, Feb. 24. 1676, (14331); Henderson, March 8. 1786, (5. Sup. 586.); Gordon, June 21. 1765, (16818.)

W. COOK, W. S.—J. DONALDSON, W. S.—Agents.

D. WIGHT, Suspender.—*Sol.-Gen. Hope—Shaw.*
A. FORMAN, Respondent.—*Skene—A. M'Neill.*

No. 81.

e landlord of a distillery, who was also proprietor of the distillery utensils, hav- a missive assigning and disponing the utensils to the tenant, and stipulating cent. on the purchase-money while he had possessed them; and further bearing, declared and understood that you are to be obliged to take the said utensils, the term of Martinmas 1824, at the amount of what I paid for the same, at which payment of eight per cent. will cease upon said amount'; held to be a conditional ent on the tenant paying the price at Martinmas 1824; and he having been se- ubsequent to that time, without payment of the price, held, in a question with his at the utensils were still the property of the landlord.

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M'K.

spender Wight was principal tacksman of a distillery held in by the Ormiston Distillery Company. In consequence of ar- duties to the Crown, they became unable in 1822 to carry on whereupon the sublease was terminated by mutual consent, and the company's effects by auction was announced by the officers . On the 2d of July, and prior to the sale, Wight entered into ment with one Foote, by which he let to him the distillery for ars from Martinmas 1822, the terms of which were contained ive-letter by Foote to Wight, and which, after stating the rent eeded as follows:—'This offer to be binding on me, provided tillery utensils &c., as advertised by the Crown, and are to be s day, are bought by me; or if you shall pu chase the same, I ay you at the rate of eight per cent. per annum for the use of the uring the currency of the lease; it being understood that I shall e same in a working condition, and leave the same as such at the of the sublease.' It not being convenient for Foote to purchase ensils, they were bought by Wight, who, on the 10th of February r, granted to Foote the following missive:—'Sir, I hereby assign ke over to you the utensils &c. belonging to me in the distillery iston, conform to the inventory thereof, which I purchased and at the Excise sale upon the 2d day of July last, amounting to of £130, for the use of which you are to pay me at the rate of r cent. per annum during the period you retain the same; and to be obliged to keep the same in use, and leave the same in good order and condition at the sight of two neutral-people, e chosen by you, and the other by me, with power to them to their oversman, and to make such repairs as may be found and necessary by said arbiters; and it is further hereby de- nd understood that you are to be obliged to take the said uten- wixt the term of Martinmas 1824, at the amount of what I paid same, at which period the payment of eight per cent. will cease id amounts.'

e law stood at the date of this missive, distillers, in order to obtain , were obliged to swear that the utensils used by them in their es were their own property; but, before Foote took out a license, he only did in October 1823,) an alteration had been made in the

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law which rendered this no longer necessary. Foote, having entered into possession of the distillery with the utensils, paid, under decree of the Sheriff, the eight per cent. stipulated for their use down to Martinmas 1824; but, on the arrival of that term, he was unable to pay the price at which they had been purchased by Wight, who, understanding that he was vergens ad inopiam obtained in December 1824, warrant of sequestration for the current year's rent to become due at Martinmas 1825. The object of this sequestration was, as Wight stated, to attach certain effects which had been brought by Foote to the distillery, and, in the inventory of sequestration, none of the utensils which had been originally purchased by Wight himself were entered. Shortly thereafter Foote was sequestrated; and the respondent Forman, having been appointed trustee on his sequestrated estate, intimated in the newspapers an intended sale by public roup of the whole distillery utensils as belonging to the bankrupt. Thereupon Wight brought a suspension and interdict, in which he contended that the true import of the missive of 10th February 1823 was, that Foote should have the use merely of the utensils, paying eight per cent. therefor, with the privilege of acquiring the property at Martinmas 1824, but only on condition of his then paying the price at which they had been bought by Wight; and that although, at the date of the missive, distillers were obliged to swear that the utensils used by them were their own property, the alteration of the law made shortly afterwards was then in contemplation; that, at any rate, this state of the law could not affect the real nature of the transaction between the parties, which was a sale conditional on the payment of the price at or before Martinmas 1824; that the creditors could only take any right belonging to Foote by the missive, subject to the same conditions under which he held it; and as to the possession by Foote, that it was in virtue of the use let to him by the missive in consideration of the eight per cent., and so could not affect the question.

On the other hand, it was maintained by Forman, that the missive by which Wight expressly 'assigned and made over' the utensils, effected an absolute sale for a price payable at Martinmas 1824, whereby the transference was complete, and Wight remained merely a creditor for the price,—the more especially as Foote had completed the transaction by possession after Martinmas, when the payment of eight per cent. for use ceased; and that it was evident that this must have been the meaning of the parties, not only from the unconditional disponing words in the missive, but from the circumstance of Foote being obliged, as the law stood, to make oath that the utensils were his own property, which rendered it necessary that the sale to him should be absolute; and, at all events, that the sale became absolute by the lapse of the term of Martinmas 1824, at which period the payment for the use of the utensils was to cease, Foote having continued to possess them after that term.

The Lord Ordinary, holding that the missive constituted a sale to take effect at Martinmas 1824, without any condition suspensive of the sale

t on the price being then paid, but that it became effectual by tinuing to possess after that term, found the letters orderly pro- eserving to Wight to claim in the sequestration for the price; Court altered, suspended the letters, and made perpetual the in- hich had been granted ad interim by the Lord Ordinary.

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LLOWAY.—The difficulty here is as to the meaning of the letter. But the bargain to have been this:—Foote was to pay for the use of the ith power to acquire the property by paying the price at Martinmas t as might be the case, if a furnished house were let with the privilege ing at a certain time. Foote, however, becomes bankrupt, and does not can we allow the trustee to take the whole articles without paying the The trustee is in the same situation with the tenant; and if the tenant take the utensils without paying the price, neither can he; and then f Cowan applies. If, however, it can be held to have been a sale from ing, I am wrong; but I cannot put that construction on the missives.

GLENLEE.—The Lord Ordinary's notion is, that this is an agreement for ate sale, but that the transfer was not to take place till Martinmas 1824. the question comes to be, whether it infers a stipulation that the price aid before the goods became Foote's property? It may be argued that ht have taken the goods at any time before 1824 by paying the price, nen they were to become his, though nothing was said; and thus the es under the rule that the obligation to pay the price is not a condition . I thought there was a sort of analogy between this and the case of goods; but I do not know whether a landlord has a preference as to them The case is attended with some difficulty; but I cannot hold that the inary is wrong.

JUSTICE-CLERK.—My difficulty is, that it was not enough for Foote to and I think it was a condition of the sale that the price should be paid.

PITMILLY.—I concur.

Suspender's Authority.—Cowan, May 21. 1824. (ante, Vol. III. No. 30.)

C. C. STEWART, W. S.—R. KENNEDY, W. S.—Agents.

J. WATT, Pursuer and Charger.—*Jeffrey—A. Connell.*
ON and SHAW, Defenders and Suspenders.—*Skene—Jameson.*

No. 82.

Client—Meditatio Fugæ—Reparation.—A party having brought an action against rging that he had employed him to obtain and execute a meditatio fugæ warrant rson whose bill he held, payable some months thereafter, but that he had neglected concluding simply that the agent should be found liable for the debt; and the agent ling the process, and before the bill fell due, intimated to the pursuer where the o be found, but he having taken no steps to apprehend him—Held that, supposing s averments to be proved, still the agent could only be held to be under the same a cautioner de judicio sisti; and consequently that the conclusion to have him in the debt was incompetent, and that he had implemented his obligation by in- ere the debtor might be found.

, a manufacturer in Dundee, having become bankrupt, and it spected that he had an intention of leaving the country in order id his creditors, an application was made by one of them, named ch, to have him apprehended as in meditatione fugæ. Couper was

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apprehended accordingly; and, pending his examination, some of tl other creditors came to a resolution to make a second application. Wi this view, a request was made (according to the statement of the d fenders) to the pursuer Watt who held a bill of Couper's payable sever months thereafter, to allow a petition for a meditatio fugæ warrant to l made in his name for the joint behoof and at the joint expense of the cre tors, but only to be used in the event of Pendreich's application proving i sufficient. A paper to be signed by the creditors was accordingly dra up by the defender Shaw, a partner of the firm of Adamson and Sha writers in Dundee, requesting Watt to allow the application to be ma in his name for their joint behoof, and at their joint expense. This pap was, however, only signed by one creditor, and it was retained by Sha Watt denied that he had consented to allow his name to be used for t general behoof; but alleged that, on an application which he averred h been made to him by Shaw, without reference to the other creditors, had specially employed him and his partner Adamson to apply for meditatio fugæ warrant against Couper for his own behoof, and n subject to any condition that it was not to be executed in the event Pendreich's application being successful; but this statement was denied l the defenders. However this might be, an application for a meditat fugæ warrant was presented to the Magistrates of Dundee in name Watt, who made the necessary oath, and a warrant for examination & was thereupon granted. In the mean time a warrant was obtained Pendreich's application, and Couper was incarcerated; and, in consequen of this, Adamson and Shaw took no further steps in the application name of Watt. After remaining a few days in prison, however, Coup paid Pendreich's debt, and was liberated, and he immediately took refu in the sanctuary. On this Watt (whose bill was not due for three month raised an action against Adamson and Shaw before the Magistrates Dundee, concluding, not that they should produce the person of Coup but that they should be found liable in the amount of the bill, on t ground of their having neglected to obtain and execute a warrant again him. Adamson and Shaw pleaded in defence, that they had not bee employed by Watt, but by the general body of the creditors, and th they were instructed only to use the warrant in the event of Pendreich application being unsuccessful; and besides, that their failure, even they had been acting on the employment of Watt, and for his speci behoof, could only subject them in the obligation which would have be incumbent on cautioners de judicio sisti, viz. to present the person Couper, but that they could not thereby become liable for the debt. the course of the process also, and before Watt's bill fell due, they i timated to him twice that Couper was in the sanctuary, once in detenti in the jail there at their instance on the employment of another credit and also that he had returned to his own house near Dundee, where was residing when the process came to an end, without Watt taking a steps to have him apprehended, he having been by this time sequestrat

having assoilzied Adamson and Shaw with expenses, suspension of a reduction of the decree, and at the same time brought a charge for the expenses. The Lord Ordinary conjoined these processes, and assoilzied in the reduction, and in the suspension found the letters orderly proceeded, for the reasons stated in the subjoined note.*

Watt having reclaimed—

Jeffrey for *Pursuer.*—We are only as yet on a question of relevancy, and I am entitled here to assume that our averments will be proved. The Lord Ordinary, however, has refused to send the cause to a Jury, on two grounds expressed in his note:—1. In respect of the objection to the original libel that my client does not conclude to be placed in the situation he would have been in, if sufficient caution de judicio sisti had been found; and, 2. That the answer is good on the admitted fact that the debtor was brought within the power of my client. Now the legal principle is very clearly laid down by his Lordship; and we grapple with it once, and contend that it is quite contrary to the established doctrine

* The ground of the original action, the decree in which is the subject of the conjoined processes of reduction and suspension, is, that the defenders having been employed by the pursuer to obtain a meditatione fugæ warrant, and to detain Couper, his debtor, in jail upon it, and to do so, in consequence of which the pursuer was deprived of the means of recovering debt when it became due; and it concludes that the defenders should be found liable, not damages generally, but in payment of the pursuer's debt, (though not payable for several ths to come,) with interest from the time when it should become due, together with the uses of process.

e defenders deny the employment; but, as this is averred, the question of relevancy must r state, be considered on the supposition that it existed. Holding this, therefore, for to een the case, it is still to be observed, that as the pursuer's debt was not payable for s, the effect of detention on a meditatione fugæ warrant could have been nothing more ensure the debtor's appearance when the debt should be demanded, or to obtain caution sisti. The defenders, therefore, supposing them to have failed in their duty, could n liable no further than to put the pursuer in the same situation as if sufficient o this effect had been found; or, which comes to the same thing, they could have e no further than to be held as cautioners judicio sisti. The conclusion of the refore, which was that they should be decerned to pay the debt, was plainly the ir- nd on this ground alone the Inferior Court was justified in assoilzieing the de

further, however, from evidence in process, that though the debtor did leave go to the sanctuary, he was immediately afterwards detained in jail there by on a meditatione fugæ warrant at the instance of another creditor, of which tantly given to the pursuer, that he might take the necessary steps, if he chose, debtor on a warrant at his instance. There is also evidence that they gave the more than two months before his bill became due, that the debtor had return- ir Dundee; and it is stated in the assessor's notes in process, which bear ter the bill had become payable, that it was not denied by the pursuer that on a resident at his usual domicile. The pursuer, therefore, had ample op- attached his debtor's person, either previously to the bill becoming due by warrant, or by ordinary diligence after it was payable. He took no such defenders, supposing them guilty of a neglect, were bound to warrant ew, therefore, it appears to the Lord Ordinary that the decree of the founded.'

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in the law of Scotland, viz. That when an agent employed neglects something by which a debt might have been recovered, he becomes liable for the amount; and that it is no answer, that owing to other circumstances, it could not actually have been recovered, or that it could not have been so recovered by the means neglected to be used, a strong instance of which occurred in the case of Lilly v. M'Donald, Dec. 15. 1816, (F. C.) It is true that apprehension on a meditatio fugæ warrant is not the immediate means of obtaining payment; yet, as it leads to it, if an agent neglect this, it is competent to bring an action against him for payment of the whole debt; and it is of no consequence that the debtor afterwards may have come within the creditor's power, any more than if a messenger let a prisoner apprehended on a caption escape, to whom it would be no defence to say that the creditor might have apprehended him again. But, besides, I deny that my client might not have got immediate payment of his debt by the execution of this warrant, as Pendreich obtained payment of his; and there would have been nothing illegal in this, or subject to the challenge of the other creditors. I do not need, however, to found on that. The question whether the debt might have been recovered, may perhaps be a consideration as to the amount of damage, but is no answer on the point of relevancy.

Skene for the Defenders.—I grant that this is a question of relevancy; but of course we are entitled to state the circumstances admitted here and in the Inferior Court, the decree of which is sought to be reduced. I shall assume at present that my clients were employed by Watt to get a meditatio fugæ warrant against Couper, and that they neglected to do it; but it is admitted that he was repeatedly told, 'Here is your 'debtor.' Now, all that can be asked under a meditatio fugæ warrant is, that caution should be found de judicio sisti, and the cautioner may at any time get rid of his obligation by presenting the debtor at the bar; so that there is a complete distinction between apprehension on such a warrant and incarceration for payment, where the cessation of the squalor carceris even for an hour is sufficient to make Magistrates liable; while, in regard to imprisonment under a meditatio fugæ warrant, Magistrates have been found not to be rendered liable by indulgence to a person confined, as all which the creditors can ask is, that his person should be produced; Gordon, Jan. 4. 1786, and cases mentioned in Bell, vol. ii. p. 565, (5th edit.) Then the summons concluding for payment of the debt was inept, for, to warrant such a conclusion, the party ought to be able to aver that the debtor escaped out of the country in consequence of the neglect. Besides, Watt fails in properly averring employment, for he does not say that he applied to the defenders, but that they applied to him. But then we come to the next part of the case, that the defenders intimated to Watt where Couper was to be found, and, on one occasion, that he was in jail in the sanctuary under a meditatio fugæ warrant by another creditor. None of these intimations are denied. As, therefore, the only responsibility which

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to the defenders was to produce the debtor's per-
ented it by putting it in Watt's power to apprehend
, however, that imprisonment might have produced pay-
not a legal object of imprisonment on a meditatio fugæ
warrant to produce payment, and the pursuer cannot legally assume that
this effect would have taken place.

Jeffrey in reply.—This is a question of considerable nicety and im-
portance; but it is the first time it ever has been argued that an
agent may elide an action for neglect by alleging that no actual damage
was sustained, or that no benefit would have arisen from due performance. It is true that all the pursuer could obtain immediately by
apprehension was caution de judicio sisti; but is he not entitled to
pursue for any resulting damage from neglect, which he will qualify
n due time? The debtor may, in the interim afforded by the neglect
f the defenders, have had an opportunity of dissipating or concealing
is funds, so as to have rendered it useless for the pursuer afterwards
apprehend him; it is enough, however, to aver that he has suffered
amage in order to entitle him to be allowed to establish it.

LORD GLENLEE.—I think the interlocutor right, and on the grounds stated by
e Lord Ordinary. Neither in the original libel, in the summons of reduction,
in the letters of suspension, is there a word said of damages; but the pursuer
ts solely on the ground that the defenders eo ipso, by not prosecuting the ap-
ation, became liable for the debt. Now that is not relevant. Such failure
d only make the agent cautioner de judicio sisti, and he cannot be made
onsible for any thing which the cautioner would not have been liable for.
if there had been a conclusion for damages, I should have been scrupulous
allowing any claim to be founded on the expectation of compelling payment
ompromise by imprisonment on the meditatio fugæ warrant.

D PITMILLY.—I also think the interlocutor right. If there had been a
conclusion for damages, there might have been some difficulty. But this
quite different; and it is clear that whatever neglect there might have been
part of the agent, it could only place him in the situation of a cautioner
isti, and within the six months the defenders gave intimation where
as to be found; and I am therefore clear, on the grounds stated by the
inary, that the interlocutor is right.

JUSTICE-CLERK and ALLOWAY concurred.

COURT accordingly adhered.

Authorities.—Gilchrist, July 19. 1776, Lilly, Dec. 13. 1816, (F. C.); Duncan,
F. C.); Currie, June 17. 1823, (ante, Vol. II. No. 382.); Struthers, Feb. 2. 1826,
No. 281.)

WORDLAW and MACK, W. S.—D. and A. THOMSON, W. S.—Agents.

No. 83.

W. NEILSON, Advocator.—*Sol.-Gen. Hope—W. Bell.*
J. VALLANCE, Respondent.—*Skene—Shaw.*

Jurisdiction—Possessory Judgment—Process.—1.—Magistrates of a burgh of regality held entitled, in respect of immemorial usage, to exercise a jurisdiction of lining boundaries, similar to that of the Dean of Guild in royal burghs.—2.—Possession for 15 years without a title not a sufficient ground for a possessory judgment.—3.—A party having allowed a cause to go to judgment before the Lord Ordinary, on a plan produced in process relative to premises in dispute, not allowed in the Inner House to ask for a new plan.

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F.

NEILSON was proprietor of a house and garden, 'with parts and pertinents' in the town of Paisley, which is a burgh of regality, and the Magistrates of which have been in immemorial use to exercise a jurisdiction as to lining of boundaries, similar to that of the Dean of Guild in royal burghs, by means of liners, who are annually chosen for that purpose. The respondent Vallance was proprietor of a contiguous tenement, and between the two tenements there stood a garden-wall, which had been built in 1813, consisting of two separate parts. Some disputes having arisen with reference to this boundary, the respondent Vallance presented a petition to the Magistrates, craving a visitation of the liners of the burgh, who were prayed to find and report, as to one part of the wall, that it stood 'one half of it upon their respective properties;' as to another, that it was entirely on Vallance's ground, and that he was entitled to build upon it accordingly; and as to a parapet-wall, (which was marked K on a relative plan,) that it was an encroachment on his ground, and ought to be removed. The Magistrates, on this, appointed a visitation of the liners, who reported that the first part of the garden-wall stood wholly on Vallance's ground, that the second was neutral, or stood equally on the ground of both parties, and that the wall K ought to be taken down, and built in a particular line pointed out as the true boundary. Neilson was then allowed to give in answers to the petition, in which he maintained as to the garden-wall that it was entirely mutual, on grounds which it is unnecessary to advert to; and as to the wall K, which he admitted to have been built on Vallance's ground, that this had been done 15 years before, on an agreement with a former proprietor of Vallance's house, and that he was at least entitled to a possessory judgment. No written agreement, however, was produced; and Vallance offered to prove, if necessary, that before erecting the wall with the view of getting rid of a nuisance to both properties, Neilson's predecessors had granted a letter, 'undertaking to remove it when required.' The Magistrates having approved of the liners' report, and decerned accordingly, Neilson brought an advocation, in which he contended, inter alia,

1. That the Magistrates of Paisley and their liners had no jurisdiction to settle questions of boundaries, such as a Dean of Guild has in royal burghs; and, at any rate, that the present was not a mere question of disputed boundaries, but a declarator of property as to heritage, which was not competent before an Inferior Court; and,

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2. That as to the wall K, ordained to be removed, he was entitled to a possessory judgment, having been in possession for 15 years, and the titles to his property bearing to be with parts and pertinents.

To this it was answered,

1. That this was purely a question as to lining of boundaries within burgh, such as would undoubtedly have been competent before the Dean of Guild in a royal burgh; and that the immemorial usage of the Magistrates of Paisley to exercise this jurisdiction was sufficient to warrant their proceedings in this case; and,

2. That as Neilson had confessedly no title to the ground on which the wall K encroached, and did not pretend that it was part and pertinent of his tenement, but admitted that it belonged to Vallance, he could not be entitled to a possessory judgment, notwithstanding his possession for 15 years.

The Lord Ordinary having repelled the reasons of advocation, and remitted simpliciter with expenses, Neilson reclaimed, and in limine objected to the plan in process (with reference to which, judgment had been pronounced, and which had been prepared by remit from the Lord Ordinary,) as not being correct, and he craved a remit to have a new plan prepared. This, however, was refused by the Court, on the ground that the cause having been allowed to go to judgment before the Lord Ordinary on this plan, it would be extremely irregular to allow a new plan at this stage of the process; and, on the merits, their Lordships unanimously adhered to the Lord Ordinary's interlocutor.

Lord Ordinary.—It is not denied that the Magistrates of Paisley have, by long and immemorial custom, exercised a jurisdiction equivalent to that of Dean of Guild in a royal burgh, and that liners are annually elected to assist in explicating this branch of their jurisdiction; and notwithstanding all that was said as to the present being a declarator of property, and a competition of real rights, the Lord Ordinary can only view it as a question of neighbourhood within burgh, a branch of public police, which falls within the province of a Dean of Guild to decide; Magistrates of Stirling against the Sheriff, November 1752, Kames. Nor is it founded on the act 1669, as was pleaded on the other side, which applies solely to rural tenements. The question as to removing the wall K seems one of greater difficulty, so far as regards the jurisdiction of the Inferior Court. It is not a recent encroachment, as was stated in the petition, for the wall was erected 15 years ago; and at first, notwithstanding the very inconsiderable size of the subject, the Ordinary entertained doubts whether the Magistrates could order it to be removed. But he is now satisfied that the advocator cannot claim the benefit of a possessory judgment; for while it is not contained within his titles, he does not claim it as a part and pertinent of his property. He distinctly admits it was previously the property of the respondent's author, and that his brother built the wall, and took the angle into his own possession, 'under an agreement with 'the then proprietor of the respondent's property.' He does not state what the nature of the agreement was, whether it was a transfer of the property; nor does he say what the consideration paid for it was; nor did he offer any evidence to instruct the agreement or its conditions. But such an agreement (and probably

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it would have further required to have been reduced into writing) could alone have afforded a title for a possessory judgment. The respondent on his part offered to prove, that, before erecting the wall, with the view of getting free of a nuisance to both properties, James Neilson granted a letter, 'undertaking to remove it when required.' But while the advocator did not offer a proof of an unlimited title, it was unnecessary to require the respondent to prove the limitation, which, in the absence of any allegations of a valuable consideration, had every presumption in its favour; and the Inferior Judge was warranted in removing an encroachment, when the person making it could not show any title, nor claim right to a possessory judgment.

The Judges concurred.

J. Malcolm,—J. Stuart,—Agents.

No. 84.

J. Lawson, Advocator.—*Pyper.*
Mrs. Halyburton, Respondent.—*Graham Bell.*

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This was a special case as to the right of the advocator to plead compensation, on alleged counter claims, against a debt due to the respondent constituted by bills. The Sheriff of Forfarshire repelled the plea; and the Lord Ordinary and the Court, in the particular circumstances, adhered.

Macmillan and Grant, W. S.—A. Howden, W. S.—Agents.

No. 85.

Mrs. Jean Campbell or Stewart and Husband, Pursuers.—*Jeffrey.*
Campbell's Trustees, Defenders.—*M'Neill.*

Dec. 11. 1828. 2d Division. Ld. Cringletie. B.

Interlocutor in terms of a concerted minute.

J. Crawford, W. S.—A. Stevenson, W. S.—Agents.

No. 86.

Lady Fairfax and Others, Suspenders.—*Skene—Russell.*
J. B. Greenshields, Charger.—*Jeffrey—Graham.*

Interdict—Process—Expenses.—Circumstances in which a landlord was found liable in the expenses of discussing a question, whether he ought to have been made a party to a suspension and interdict against his tenants for a use of his property complained of as a nuisance.

Dec. 11. 1828. 2d Division. Lord Medwyn. M'K.

Mr. Greenshields was proprietor of certain premises in Nelson street, Edinburgh, which he let to Messrs. Gibson and Dodds, plumbers, who, without his sanction or authority, erected a smelting furnace, where they began to smelt lead. This having created in the neighbourhood an immediate alarm of danger from fire, Lady Fairfax and others presented a bill of suspension and interdict, directed both against the tenants and against Mr. Greenshields as landlord, praying to have them prohibited from making such use of the premises in all time to come. The tenants allowed interdict to be pronounced against them; and Mr. Greenshields, on his part, gave in answers, merely pleading that as he

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had not authorized the wrong complained of, it was incompetent to make him a party; and he made up a record on this point.

The Lord Ordinary, 'in respect it was competent in this case to make 'the landlord a party where an interdict was craved against certain oper- 'ations of his tenants, and that the tenants have allowed interdict to be 'pronounced against them, and that the landlord does not insist upon 'showing that what they did was not a nuisance of which the suspenders 'were entitled to complain,' suspended the letters, declared the interdict perpetual, and found the suspenders entitled to their expenses.

Against this interlocutor Mr. Greenshields presented a reclaiming note, praying to have it found that the suspenders were not entitled to make him a party, and to have the process dismissed quoad him, with expenses.

Jeffrey for the Charger.—The only point is one of expenses, and it depends on whether Mr. Greenshields should have been made a party. Now, he had let his property for lawful uses only, and it was his tenants alone who had done the wrong; and it would be very intolerable, if a landlord was liable to be called into Court for every wrong done by his tenants. In the case of Ure, where the landlord was called, he had let the premises for the use complained of, and the interdict was craved against his setting his property for that particular use.

Skene for the Suspenders.—The first question here is, whether we were entitled to call Mr. Greenshields? and the second, whether he has not conducted the cause so, as to make himself liable in expenses? Now, we were entitled to get a perpetual interdict, which we could only do by calling the landlord. If he had come forward and said, I have not authorized the proceedings of my tenants, and I do not oppose an interdict, he might have got his expenses from the suspenders; but, instead of this, he leaves all to the tenants in regard to the interdict, makes up a record on the right of the suspenders to call him, and argues the question of competency, thereby creating an unnecessary expense, in which he has been properly subjected by the Lord Ordinary. As to the question of competency, it not only was competent to call the landlord, but it might have been objected against the suspenders that they had not called him. We limit, however, our claim of expenses to the proceedings in regard to this point of competency.

Jeffrey in reply.—We do not dispute the competency, strictly speaking. No such question was raised by the landlord, but only that in this case he ought not to have been made a party, as he had let the premises for lawful purposes only; the more especially, as no previous communication (making it unnecessary to call him) was made to him.

The Court, 'in respect that the claim for expenses as against Mr. 'Greenshields is limited to those occasioned by the pleadings on the 'competency of the original application against the landlord,' adhered to the Lord Ordinary's interlocutor.

Charger's Authority.—Woodfall's Landlord and Tenant, p. 76.

R. and A. Kennedy, W. S.—A. Bathgate, S. S. C.—Agents.

No. 87.

LORD MELVILLE, Pursuer.—*Sol.-Gen. Hope—Robertson.*
DOUGLAS'S TRUSTEES, Defenders.—*Jeffrey—More.*
ST. ANN'S DISTILLERY CO., Defenders.—*D. of F. Moncreiff—Skene.*

Property—Acquiescence—Process.—1.—Question raised, but not decided, whether a proprietor can be barred by implied acquiescence from vindicating property in which he is feudally vested, but on which other parties have erected buildings on the supposition that it belonged to them;—and,—2.—Competent to open up a closed record, so as to put a case in proper shape for judgment.

Dec. 12. 1828.
1ST DIVISION.
Lord Meadowbank.
H.

LORD MELVILLE raised an action setting forth that he was the superior of certain lands in the immediate vicinity of Lasswade;—that, in 1739, Lord Rosse granted a feu-charter to James Douglas of a dwelling-house and piece of ground on the north side of the road leading from the High Street of Lasswade to the river North Esk, and which was described as being bounded 'by the foresaid road leading from the said High 'Street of Lasswade to the said river upon the south;'—that, in 1781, the late Lord Melville granted another feu-charter to Robert Douglas, the son and heir of James, whereby he of new disponed to him the said subjects, and also another piece of ground, which was described as being bounded by 'the road upon the river-side upon the east,' in virtue of which charter Robert was infeft;—that, by his deed of settlement, Robert had conveyed the subjects to trustees, by whom they were sold to the St. Ann's Distillery Company; and that although Lord Melville was proprietor of the ground on which the roads forming the above boundaries were situated, yet either Robert Douglas or his trustees, 'or all or one 'or other of them, have, contrary to the terms, tenor, and import of the 'feu-right and charter above recited, and also of the feu-right and char-'ter granted by George Lord Rosse as aforesaid, presumed to erect 'buildings on the whole of the foresaid road or open space of ground 'expressly saved and reserved to the said Henry Lord Viscount Melville, 'his heirs and successors, and for their use, by the foresaid feu-charter, 'leading from the High Street of Lasswade to the river North Esk above 'mentioned, and also upon the whole of the foresaid road or open space 'of ground running alongst the west side of the river North Esk, and 'constituting the east boundary of the foresaid grounds and premises 'feued to the said James and Robert Douglas as above specified; and 'that all of the said persons above named, or one or other of them, have 'likewise presumed to erect buildings upon a part of the pursuer's 'grounds towards the east end of the north boundary of the said feu, as 'well as to throw or lay down a considerable quantity of earth, stones, 'and other rubbish, upon the east side of the pursuer's grounds on the 'north of said feu, and to form and strike out a door in the north bound-'ary wall to the pursuer's grounds, whereby the same is made an intoler-'able nuisance from filth and nastiness put thereon by the defenders and

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eir servants—all to the great detriment, prejudice, and damage of the rsuer and his property;'—and therefore concluding that it should be d that these were encroachments, and that the defenders should be ined forthwith to take down and remove the whole of the foresaid ildings above specified and complained of, as well as the foresaid rth, stones, and other rubbish, and the foresaid door; and in general restore the boundaries of the foresaid feu and premises on all sides the situation delineated in a plan or sketch thereof made out and pared by William Crawford, land-surveyor, upon the 19th day of tober 1807 years, with the exception of the grounds then excambed the pursuer and the said deceased Robert Douglas, as appearing on d sketch or plan.'

n defence it was stated, that, prior to 1807, the access from Lasswade he lands of Melville was by means of these roads;—that a verbal exbion was then made, by which Lord Melville ceded the solum of these ds to Douglas, who, in consideration thereof, gave to his Lordship ther piece of ground;—that, accordingly, immediately thereafter, uglas proceeded to build partly upon the roads, and to exercise other s of ownership, and Lord Melville formed a new gate to his property; hat, on the death of Douglas, the subjects were sold to the St. Ann's stillery Company, who immediately began to erect a distillery upon, em, including the roads, to the value of at least £3000; and that buildings both by Douglas and by them were erected with the full owledge of Lord Melville, and without objection, his place of residnce being immediately adjacent to them. They, therefore, pleaded,

1. That they had right to the ground in question under the excamon; and as the terms of it had not been reduced to writing, they could ly be ascertained from the acts and deeds of the parties; and,

2. That, on the supposition that an encroachment had inadvertently en made, Lord Melville was bound to have challenged it at the time, d so have put the defenders on their guard; and as he did not do so, t, in the full knowledge of their erection, permitted the works to oceed, he was barred by homologation, or at least by acquiescence, om the present claim; and at all events could not insist on pulling wn the buildings, without indemnifying the defenders for the large ns expended on the faith of his acquiescence.

A record having been prepared and closed, the Lord Ordinary reported the question to the Court upon Cases, and at the same time issued the joined note, in so far as related to the question of acquiescence.*

* The Lord Ordinary is therefore inclined to be of opinion that the road aforesaid, in the r 1807, continued to be the property of the pursuer, and that there is nothing condescendupon from which it can be held that it was legally transferred to Robert Douglas. But re can be no doubt that, many years ago, certain buildings were erected by the defenders their author upon the road in question, and other operations executed by them, without llenge or interruption from the pursuer. On the legal effect of these proceedings, there, the result of the present action must depend; and as it appears to the Lord Ordinary there is some novelty in the question, it appears expedient that it should be brought at

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When the case came to be advised, their Lordships expressed a strong and unanimous opinion, that if the decisions of Ayton and others were to be held as giving any sanction to the application of the doctrine of acquiescence to a case such as the present, where the property was vested by proper titles in Lord Melville, and which, therefore, could only be taken out of them by a feudal conveyance, or by an excambion, they would require to be very deliberately reconsidered; but that these decisions did not apply to such a case; that that of Lord Cathcart was one of a very peculiar nature, and which could not otherwise be extricated than by the mode adopted by the Court, and therefore could not be held as establishing a general rule; that, however, in the present case, the plea founded upon the excambion was relevant, although the terms of it had not been reduced to writing; but that the acts and deeds of the parties consequent upon it had not been sufficiently explained upon the record, so as to prepare the case either for judgment, or for a remit to the Jury Court; and therefore that the record must be opened up, and the case sent back to the Lord Ordinary to prepare it of new. The Court accordingly 'opened 'up the record declared to be closed by the Lord Ordinary, and, before 'answer, remitted to his Lordship to order a pointed condescendence to be 'given in by the defenders of their averments, and what they will under-'take to prove in regard to the extent of the excambion founded on in 'process; and to proceed accordingly.'

Defenders' Authorities.— Geddes, (2. Bligh's Reports, 295); Shaw, July 28. 1814, (2. Dow, 519); Goldie, June 1. 1814, (2. Dow, 534); Aytoun, May 19. 1801, (No. 6. App. Property); M. of Abercorn, May 20. 1820, (F. C.); M'Nair v. Lord Cathcart, May 18. 1802, (12832.)

A. Wishart, W. S.—W. Allester,—J. Greig, W. S.—Agents.

'once under the consideration of the Court. It may be a subject of regret that the doctrine 'of acquiescence has ever been carried so far as it was in the case of Ayton (1801,) and 'many others. But the Lord Ordinary apprehends that the principle recognised in these cases 'ought not to be carried further, which it would, if the doctrine of the defenders were entertained or sanctioned. There the Court has only determined that the extension of rights or 'servitude or the like may not be challenged, if the party entitled to object has suffered that 'extension to be made, and operations attended with expense to be carried on, with his knowledge and approbation, without question. But here it must be maintained, if the view above 'taken of the case be correct, that a property in which one is feudally vested, and from which 'by the terms of his charter, the other is excluded from having any right, may be carried on 'by the latter, in virtue of his having made encroachments thereupon without interruption or 'challenge. No doubt, at first sight, the case of Lord Cathcart, in 1802, would seem to have 'proceeded on some such principle. But, after considering it attentively, the Lord Ordinary 'is of opinion that the judgment proceeded upon specialties, and cannot be taken as a decisive precedent by which a general question like the present must be regulated. But as this 'may not be deemed clear, the Lord Ordinary thinks it advisable to have the whole matter 'deliberately argued in writing.'

POLLOCK and DICKSON, Advocators.—*D. of F. Moncreiff—Monteith.*
W. M'ANDREW, Respondent.—*Bell—Shaw.*

No. 88.

Proof, Parole — Writ. — A party having agreed, by written missive, to furnish cast iron pipes of a certain size and price, payable on delivery, but without specification of the quantity —Held incompetent to prove the quantity by parole.

Dec. 12. 1828.
2D DIVISION.
Ld. Cringletie.
F.

POLLOCK and DICKSON, engineers in Glasgow, entered into an agreement with M'Andrew, also an engineer, by the following missive addressed by M'Andrew to, and accepted by them :—'Gentlemen, I hereby 'make offer to furnish you with cast iron pipes, nine inches in diameter, 'at the rate of 18s. per yard, or at 12s. per cwt. The pipes to be nine 'feet long, and to weigh about 4½ cwt. The money to be paid cash, 'without any discount.' M'Andrew furnished a certain number of pipes to Pollock and Dickson; but they having failed to pay the price, he refused to furnish more. Pollock and Dickson then presented a petition to the Sheriff of Lanarkshire, libelling on the missive above mentioned, and setting forth that they had contracted with Mr. M'Gregor of Kelvinhaugh Printfield to lay 240 yards of iron pipes, with reference to which contract they had made the agreement with M'Andrew, and that he knew of this contract, and had agreed to furnish them with the 240 yards of pipes required by them to implement it; and they prayed to have him ordained to furnish that extent of pipes at the price specified in the missive offer. M'Andrew having denied that he had agreed to furnish any definite extent of pipes, or that he knew any thing of the contract with M'Gregor, Pollock and Dickson craved to be allowed a proof by parole that this was truly the contract between the parties. They did not, however, aver that there had been a special separate agreement to that effect previous to the written offer, or that the offer was for the mere purpose of specifying the size and price, but only that the agreement entered into by the missive was to furnish 240 yards of pipes. To this it was objected by M'Andrew, that when a contract was constituted by writing, it was incompetent to alter its terms by parole; and the Sheriff, on this ground, refused to allow a proof, and found 'that the defender 'was not bound to deliver, nor the pursuer to receive, any specific num-'ber of pipes;' and assoilzied M'Andrew, with expenses. Pollock and Dickson thereupon brought an advocation, in which the Lord Ordinary advocated, and assoilzied M'Andrew with expenses, stating his opinion, 'that as the agreement libelled on is only for pipes of a certain descrip-'tion, and for a certain price, yet, as there is no specification as to the 'number to be furnished, and, what is of equal importance, the time 'within which they were to be furnished, that to allow a parole proof 'would be to raise up an agreement which was not in contemplation of 'parties, and is not actually said to have been made, the allegation of the 'advocators being quite silent as to the time within which the pipes were 'to be furnished.'

No. 88. Pollock and Dickson reclaimed.

Dec. 12. 1828. *Dean of Faculty and Monteith for the Advocators.*—This is a matter of mercantile dealing, in which writing is not essential. Parole proof has always been admitted to supply a defect in a written agreement, as in the cases of Norvel, June 22. 1763 (12290), Pollock, Feb. 27. 1777, (App. Legacy, No. 1,) and several others. The same rule holds in the law of England, as is laid down by Mr. Phillips, vol. i. p. 546. Now here the writing is defective in not specifying the quantity to be furnished, and we only wish to supply the defect. We do not ask to contradict a written contract by parole, but merely to explain it, and show the extent to which it goes—to show the thing to which the contract related. The agreement must necessarily have related to something else; and it is that which we wish to point out. The writing does not constitute the bargain, but was only necessary to specify the quality of the goods previously agreed to be furnished; and the cases quoted on the other side do not apply, as we are not attempting either to contradict a written agreement, or to carry the contract beyond any thing in it which is specific. The cases quoted on our side, again, are much more applicable; and the dictum of Phillips shows the rule of the English law to be the same with what we contend for, viz. That, in a written contract indefinite as to quantity, the quantity may be proved by parole. If it had been indefinite as to time, we would have been allowed to prove by the practice of trade, or otherwise that there must be delivery within a certain time; and the same thing applies to the cases where the writing is indefinite in quantity.

Bell and Shaw for Respondent.—There are two material distinctions to be attended to,—the one as to fact, the other as to law. 1. As to the fact. It is said this contract is defective; but that is not the case. It is a very common contract in this country, where, without any specification as to quantity, the quality and price are fixed, leaving each party free to stop when they choose. Bakers in this way often contract for flour, and manufacturers for coals, the quantity being purposely left indefinite; but the contract is nevertheless complete, and is a well-known contract in every day use. Then as to the law: Wherever there is an ambiguity as to the identity of a person or subject intended in a written contract, parole proof may be allowed, but not to qualify the agreement. As for example, if a party dispone a house, and there be a doubt as to what house is meant, a proof may be allowed by parole to ascertain what house is meant; but if the allegation be, that he disponed the house under the burden of £500, a proof by parole is incompetent because that would be to qualify the writ. Accordingly the established rule is, that where a written agreement is expressed in clear, definite, and intelligible terms, it is not to be departed from, or altered by parole, as otherwise this would be making a contract for the parties. The agreement here is clear and specific; and it is asked to be altered i

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an important particular, which would change the subject, and materially affect the value of the contract. This cannot be allowed to be done by parole. The exceptions from the general rule are fraud and ambiguity; but neither of these occurs here.

Lord Glenlee.—I would wish to have seen more specifically stated the precise facts which Pollock and Company offer to prove, as something may depend on their nature. As I understand it, they now aver that ab ante the respondent had come under an obligation to furnish the same extent of pipes which the other party was bound to supply by his agreement with M'Gregor; and this missive was not to make the obligation, but to specify the particulars of the size of the pipes and the price. Now, if the libel could be construed to aver a prior contract, then I think we might perhaps admit proof by parole, so as to connect it with that contract. But if, on the other hand, this missive is the ultimate result of the bargain, and was intended to fix the whole terms of it, the question becomes one of considerable difficulty, whether we can allow it to be extended by parole? In that view, I rather think the Lord Ordinary's interlocutor right; and there is something in the libel as if it were said that every thing was settled by the missive.

Lord Pitmilly.—There is certainly some nicety in this case, and it has been very ill attended to in the Inferior Court. There is no condescendence, and I should have wished a very particular condescendence from the advocators, and also to have seen the contract of the Kelvinhaugh Printfield produced, to see if the pipes thereby contracted for were of the same description with those agreed to be furnished by the missive. Still we must dispose of this case as it stands, and I concur with the Lord Ordinary. The general rule is, that it is not competent to constitute an obligation by parole where the agreement has been reduced to writing; and I do not think this falls under the exception, which is only allowed where there is something palpably defective. But there is no obvious defect re. It is said to be a common mercantile contract, and we cannot alter it. If we could not carry it into effect without explanation, we might allow parole; but, when it is intelligible in itself, we cannot allow a new bargain to be established by parole; and therefore I come to the same result with the Lord Ordinary, though I do not exactly concur in his views.

Lord Alloway.—I have taken the same view of this case, and I think in substance the interlocutor should be adhered to. There cannot be a clearer contract than this; but the advocators say this is not the contract we made. We cannot, however, make a new contract for the parties.

Lord Justice-Clerk.—I am of the same opinion. It would be very dangerous to grant what is asked in this case. Where the contract is ambiguous, parole proof may be allowed to explain it, but not to the effect of making a new contract. This is a general obligation, in which both parties are free; and if we were to allow the one party to prove that the other was bound to a particular extent, it would be making a new bargain for the parties, who have their original one reduced into writing. And as cash was to be paid on delivery of each part, it is clear that it was intended to be indefinite, so that each party might stop when he chose.

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THE COURT accordingly adhered to the Lord Ordinary's interlocutor in so far as it assoilzied the respondent, and found him entitled to expenses.

Advocators' Authorities.—1. Phillips, 546-554-8-9; Norvel, June 22. 1763, (12290); Pollock, Feb. 27. 1777, (App. Legacy, No. 1.); Sim, Jan. 22. 1674, (12321); Crawford, Jan. 24. 1755, (12452); Davidson, Jan. 22. 1684, (12327).
Respondent's Authorities.—Tait, p. 330, and cases there quoted.

J. HAMILTON, W. S.—BOWIE and CAMPBELL, W. S.—Agents.

No. 89.

W. SCOTT, Pursuer.—*Jameson.*
J. BROWN, Defender.—*More.*

Bill of Exchange—Sexennial Prescription—Adjudication.—1.—Adjudication held inept, being led on a bill of exchange after the lapse of the six years, without a decree of constitution of the debt;—and,—2.—Prescription not interrupted by the protest being registered.

Dec. 12. 1828.
2D DIVISION.
Lord Newton.
F.

SCOTT pursued a reduction of an adjudication led by Brown, on the ground that it had proceeded on a bill of exchange after the sexennial prescription had run, and without any decree constituting the debt. Brown pleaded in defence that the bill was duly protested, and the protest recorded in the Sheriff books of Perth, with the usual warrant of execution subjoined thereto; and he contended that this was equivalent to a decree, so as to save the bill from prescription, and validate the adjudication; and that in the case of Douglas, Heron, and Company, Nov. 26. 1784, (11127), the only one on the subject, this point had not actually been decided.

The Lord Ordinary found 'that the adjudication under reduction 'being led on a bill long after the sexennial prescription had run, and 'without any previous decree constituting the debt having been obtained, 'is not effectual;' and he decerned in the reduction accordingly. The Court unanimously adhered.

LORD JUSTICE-CLERK.—We can have no difficulty whatever in adhering. It is clear that an adjudication on a prescribed bill is good for nothing; and the only attempt to obviate the objection is, that a registered protest interrupts prescription; but I cannot doubt for a moment that it has no such effect. This has never been maintained since the case of Douglas, Heron, and Company. The Act of Parliament says, action must be raised or diligence done; but it is impossible to hold the registering a protest to be either action or diligence.

The other Judges concurred.

DONALDSON and RAMSAY, W. S.—J. BROWN,—Agents.

HOUSTON, Pursuer.—*A. M'Neill.*
His CREDITORS, Defenders.—*D. M'Neill.*

No. 90.

essio.—Although the general rule is, that where the father of a natural child is incarcerated by the mother for payment of aliment, he is not entitled to the benefit of the cessio; yet, where he is alimented in prison by her, he is entitled to it.

HOUSTON, having been incarcerated by the mother of his natural child for payment of aliment, brought a process of cessio, which was opposed by the mother, on the ground that, agreeably to the case of Baird, 2d March 1827, (ante, Vol. V. No. 255,) and other cases, he was not entitled to the benefit of the cessio. To this it was answered, that the pursuer was alimented by the mother in prison; and that in the case of Baird it had been subsequently found, on the 7th of July 1827, that such was the case, the pursuer was entitled to the benefit of the cessio; and that, accordingly, the interlocutor in that case proceeded on the ground, that 'in particular it appears that the woman mentioned in the process is alimenting the pursuer while in prison.'

Dec. 13. 1828
1st DIVISION.

LORD PRESIDENT.—Our first judgment in that case went upon the general rule that he was not entitled; but, in respect of the specialty, we have afterwards altered. Effect must therefore be given to the same specialty as occurs here.

The other Judges having concurred, the Court, in respect of the specialty, granted the cessio.

W. RAMSAY, Suspender.—*M'Neill.*
M. PETTIGREW, Charger.—*Cuninghame.*

No. 91.

Charger's Execution.—Not competent, in a suspension of diligence, to contradict a messenger's execution, ex facie regular, by production of an alleged defective service copy.

RAMSAY, having been charged on a precept and decree of the Sheriff of Clackmannanshire, presented a bill of suspension, without caution, on the ground that the copy charge served upon him did not set forth the day on which it had been delivered, the words being, 'This I do upon the 8th of November 1828, before these witnesses.' The charger, however, produced a regular execution by the officer, dated the 8th of November, and bearing that he had 'left a just copy of charge signed by me and bearing the above date,' the Lord Ordinary refused the bill, as to expenses, 'in respect no caution is offered; and further, that the execution by the Sheriff officer, which is ex facie correct, can only be challenged by way of reduction;' and the Court unanimously adhered.

Dec. 13. 1828.
1st DIVISION.
Bill-Chamber.
Lord Newton.

Charger's Authorities.—4. Ersk. 2. 5; M'Donald, Jan. 11. 1726, (3765); Dun, March 11. (ante, Vol. II. No. 739); Calder, Dec. 20. 1825, (ante, Vol. IV. No. 237.)

C. C. STEWART, W. S.—CAMPBELL and MACK, W. S.—Agents.

No. 92. H. BURN and MANDATORY, Advocators.—*R. Bell—A. Murray jun.*
W. PURVIS and MANDATORY, Respondents.—*H. J. Robertson.*

Jurisdiction—Sheriff—Foreigner—Arrestment jurisdict. fund. causâ.—Arrestment, juri dictionis fundandæ causâ, of goods belonging to a foreigner, upon a Sheriff's precept, do not create a jurisdiction against the foreigner in the Sheriff Court.

Dec. 13. 1828.
2D DIVISION.
Lord Medwyn.
F.

THE respondent Purvis, tenant of Aberwick Mill in the county Northumberland, was the holder of a bill granted by the advocator Bur baker in Newcastle in the same county; and being desirous to sue hi for payment before the Sheriff of Roxburgh, where certain debtors Burn resided, he obtained from the Sheriff of that county warrant arrestment jurisdictionis fundandæ causâ, in virtue of which he arreste a sum due to Burn by a person residing there. He thereafter sued o letters of supplement for citing Burn to appear before the Sheriff, an executed an edictal citation accordingly. Decree at first passed in a sence; but Burn, having been subsequently reponed, gave in defence declining the jurisdiction of the Sheriff, on the ground that the Court Session, as the commune forum, was the only competent Court into whic to call foreigners. The Sheriff sustained his jurisdiction, and decerned whereupon Burn brought an advocation, in which the Lord Ordinar for the reasons stated in the subjoined note *, advocated the cause, foun

* 'This, like many other questions of jurisdiction, being of importance, and as it does n 'appear that there has ever been any decision on the point, the Lord Ordinary wished to ha 'reported it on Cases; but as the question does not involve a high patrimonial interest, and 'the parties pressed for a decision in the Outer House, it has been given, and it may be sati 'factory to the parties to know the grounds of that decision.

'It must be recollected that this is neither a *real* action, nor one proceeding on a Bord 'warrant, although, in the circumstances of the parties, the latter form might have been adop 'ed. Practice has authorized a jurisdiction in the Inferior Judge who issues such a warra 'on this ground, that the original form of a Border warrant was to arrest the person of t 'Englishman within the territory of the Judge, and he was either liberated upon caution j 'dicio sisti, the bond of caution fixing a domicile for citation, or, failing to find caution, 'was committed to prison, where he was personally cited; Potts, 20th July 1705. This pr 'bably has introduced the practice, that where effects only are arrested on such a warra 'jurisdiction is founded, and the defender is cited before the Judge granting the warrant 'letters of supplement from the Court of Session; Hardie, 4th January 1759.

'In a real action, where no personal conclusions are sought, the proprietor of land must 'amenable to the jurisdiction of the Inferior Court ratione rei sitæ, at least in cases where t 'Sheriff has a privative jurisdiction in the first instance, as actions for straighting marche 'building a march-dike, &c. This, however, cannot go far, as no alien not naturalized c 'hold real property in this country.

'The present case, however, is a personal action against a stranger, whose personal effec 'have been arrested in this country, to found jurisdiction in the Courts of this country, 'which he is not otherwise subject; and it must be viewed as if it were a Dutchman or 'Frenchman whose effects have been arrested by warrant of the Sheriff of Aberdeenshire 'Inverness-shire—not an Englishman by a Border Sheriff. The general rule unquestionab 'is, actor sequitur forum rei; but an innovation of this rule, founded on expediency, has bee 'adopted from the laws of some of the continental states; Voet, b. 2. t. 4. sect. 22. Kilke 'ran, in 1755, says (Supplement to Dictionary, vol. v. p. 295) it was first known in Scotlan in the case of Captain Hamilton against the East India Company, but does not give the da

'that it was not competent to cite the advocator, a foreigner, before t
'Inferior Court, on the ground of an arrestment jurisdictionis fundand
'causâ,' and dismissed the action, but without expenses.

Purvis reclaimed.

H. J. Robertson in support of the Reclaiming Note.—The first notic
of arrestment jurisdictionis fundandæ causâ occurs in the case of Youn
v. Arnold in 1683, (4833-4.) A new forum was thus introduced. Law-
yers have differed as to the principle of this jurisdiction. Some hold
that it is the situation of the fund within the Judge's territory which con-

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'of that case. The earliest reported case we have, in which the point is mentioned, is Ford '21st November 1758. The recent introduction of this departure from the established prin- 'ciples of law, and its foundation in expediency, not necessity, imports that it ought to be ex- 'tended no further than practice founded on expediency authorizes, and in consistency with 'our other rules of law. Hence it was rejected as the foundation of an action regarding per- 'sonal status; Scrutton, 1st December 1772; and as 'the Court of Session is the commune 'forum to all persons residing abroad,' Ersk. b. 1. t. 2. sect. 11, smaller work, and b. 1. t. 2. 'sect. 18, larger work, it does not seem either necessary or expedient to get over this rule 'also, although the stranger may be made liable to be sued here, by having his personal effects 'arrested within Scotland. (Even a Scotsman domiciled abroad, dying there, must have his 'effects in this country confirmed, not within the Commissariot where they lie, but at Edin- 'burgh, as the commune forum for all strangers.) On the contrary, if a stranger is to be 'made liable to the Courts of this country, who perhaps never was within its territory in his 'life, and this merely because a debt due to him has been arrested within it, it seems but rea- 'sonable that he should be compelled to appear only before the Supreme Court, where it may 'be presumed justice will be best administered, and should not be forced to go before those 'subordinate and local courts which have been established solely for the sake of the subjects 'of this country as inhabitants of its local districts, and to which they are sometimes compel- 'led to resort, to relieve the Supreme Court of small causes. As to these, the Act of Regula- 'tions 1672 would certainly not be applicable to strangers, who would fall under the exception 'of sect. 16; see M'Eachern, 3d July 1824. If a stranger be bound to appear in the Sheriff 'Court, it might happen, by arresting debts in different parts of the country, that he might be 'sued in various Sheriff Courts at the same time, which even a native could not be; for letters 'of supplement never are granted to compel a principal defender to appear in a Sheriff Court 'where he has no domicile, except in the case of a real action; Williamson, 28th November '1635. As to personal actions, see Supplement to Dictionary, vol. v. p. 278 and p. 820. 'This is another difficulty, how letters of supplement from the Court of Session can give the 'Sheriff a jurisdiction over the stranger, who is in the action of constitution a principal de- 'fender, when he is not locally within his jurisdiction, nor, as in the Border warrants, has fixed 'a domicile for citation, or has a constructive domicile in virtue of the arrestment on that 'warrant. When a forthcoming is raised on an arrestment, the arrestee is the principal de- 'fender, the debtor being only called for his interest, and may therefore be cited on letters of 'supplement; but the decree is against the arrestee. The case is different when the decerni- 'ture is directly against the stranger.

'It appears that strangers always had the privilege of being heard before the Supreme 'Court. Prior to the institution of the present Court, their causes were peculiar to the King 'and his Council, St. 1487, c. 105; and when the present Court of Session was instituted, who 'were to have jurisdiction in all civil causes, the causes of strangers are, in the Regulation 'specially appointed to be called on Friday weekly, 'quhilk is assignit for the King's matter 'and the materis of strangearis;' see Acts of Sederunt by Sir Ilay Campbell, p. 3. The Ad 'miral Court, as being peculiarly conversant with strangers, has acquired a similar jurisdiction 'by long practice; and if practice had also extended this jurisdiction to Sheriff or Burgh 'Courts, it might have been supported; but the Lord Ordinary knows of no such practice 'and, at the best, it could not be of any long standing. Since the cause was heard, he has taken 'some pains to inform himself as to the practice.'

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fers the jurisdiction, the act of arrestment being held to be merely a nexus, since, if the jurisdiction did not previously exist, the Judge could not lay on the nexus, Kames's Tr. 376, and Eluc. 143. Others, again, hold that it is the nexus which creates the jurisdiction. Either view will support my argument; but I incline to adopt the latter. Whichever view be taken, the jurisdiction must belong to the Judge in whose territory the fund is arrested; and so, if funds be arrested on an Admiralty precept jurisdictionis fundandæ causâ, a personal action for debt may be brought before the Admiralty Court, although in regard to matters of debt it is an inferior jurisdiction, Cole &c., 4th Aug. 1772, (4820.) Arrestment jurisdictionis fundandæ causâ was originally connected with Border warrants, and they are analogous; Ford, 21st Nov. 1758, (4835.) The stranger was apprehended till he should find caution judicio sisti et judicatum solvi, and the Border warrant was always accompanied with a warrant to arrest. In the case of Hardie, Jan. 4. 1759, (4830), the party was not found; but moveables belonging to him were arrested on the Border warrant, and an action was brought against him in the Court of Session, where it was maintained that the Sheriff's jurisdiction was privative, as he had granted the warrant. The jurisdiction of the Court of Session was sustained; but it was there admitted that the Sheriff would have been a competent Judge, though his jurisdiction was not privative. Suppose a party arrested on a Border warrant grants caution judicio sisti in any competent Court, and leaves the country, it is decided that it would be competent to bring the action before the Judge on whose warrant he was arrested, though the argument used on the other side would apply equally here; Potts, July 20. 1785, (4829.) It is said to be a maxim, as stated by Erskine, that the Court of Session is the commune forum of all persons residing abroad—not of foreigners merely, but of all persons residing abroad. In one sense this is indisputable, viz. that the Court of Session is a supplementary forum, where there is no peculiar forum in which the party can be called; that is the sense in which it is commune forum; but it will give way to a peculiar forum, as one ratione rei sitæ. An illustration of this occurs in the case of confirmation. If there be no domicile in Scotland, Edinburgh is held to be communis patria. The opposite party, to succeed here, must maintain that the Court of Session is the exclusive forum of all foreigners; but that is not Mr. Erskine's meaning, (1. Ersk. 2. 19.) The cases of arrestments on Admiralty precepts—Border warrants by Sheriffs—real actions—forthcomings in arrestments—are all exceptions; and in the case of v. Gray it was not disputed, that if it had not been a question of status, the jurisdiction of the Commissary Court would have been sustained on arrestments. This is the only sense in which Erskine's doctrine is confirmed by the decisions, and in that sense it is quite reconcileable with our argument.

R. Bell in answer.—The general rule is laid down by Erskine, (1. 2. 18,) that 'when the party sued resides out of the kingdom, and hath an

'estate in this, the Session is the only competent Court in questions concerning such estate, since that Court is the commune forum of all who reside abroad.' It is true there has been a relaxation from our older practice, which did not admit actions against foreigners; but it has gone no further than to admit the jurisdiction of the Court of Session, when moveables are attached by arrestment. The exceptions were slowly admitted. The first was of actions as to real estate, Lamb, March 11. 1624 (4812); and the report of this case by Durie shows that, down to this time, actions against foreigners, even in the Court of Session, were confined to those regarding real estate. The next exception was that of personal actions against foreigners, proprietors of real estate, recognised in the case of Haldane, December 29. 1724 (4818.) Jurisdiction arising from the situation of moveables was admitted very slowly indeed. A step was taken towards it in Young v. Arnold in 1683; but it was not actually found competent till the case of Ford, November 21. 1758 (4835), though I do not say but that it was practised sooner. There is no direct authority on either side on the point here at issue, though views have been thrown out regarding it; but the general principle recognised that this sort of jurisdiction is not to be extended beyond the intention introducing it. There is no case in which the jurisdiction of the Sheriff has been sustained against foreigners, except in real actions, or in which it has been sustained on the ground of arrestments. Sheriffs undoubtedly have no jurisdiction over inhabitants of Scotland domiciled in other counties, in virtue of arrestments used within their bounds. Nor are letters of supplement ever granted against the principal party to call him before the Sheriff in whose county he does not reside; and there cannot be a greater jurisdiction in a Sheriff over foreigners than over natives. As to the opinions of our law writers, Kames confesses that he proceeds on speculation; but he speaks directly to the point in my favour, Elucts, voce Courts, 269. Erskine, in his Principles, says that arrestment jurisdictionis fundandæ causâ may be laid on by an Inferior Judge, but does not say that such Judge has jurisdiction in the action; and Lord Gardenstone of course could say nothing on the subject which was unknown in his day.

LORD GLENLEE.—I should not wish to do any thing without seeing how the practice stands. If it be habitual, and if there be no instance of refusing letters of supplement to cite foreigners before the Sheriff on these warrant arrestment has been used, and if proceedings have followed, it would be very rash, without investigating, to decide that the Sheriff has no jurisdiction, as this would just be finding that the Court have been in granting letters of supplement without authority. I am not in the least affected by the argument that natives cannot be made subject to another Sheriff's jurisdiction by arrestment. There is no analogy between the cases. The native has always a domicile before one Sheriff or another, and the maxim 'actor sequitur forum rei' can always be applied to him, though it cannot in the case of a foreigner.

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Lord Justice-Clerk.—Unless the practice be inveterate and general, I would give no countenance to this mode of proceeding; but I have no objection to an investigation as to the practice.

The other Judges concurring, the Court (Nov. 30. 1827) appointed a condescendence, with answers, as to the practice.

From the investigation made by the parties it appeared, 1. That it was the invariable practice in the Bill-Chamber to issue warrant for letters of supplement for citing foreigners before Sheriff Courts, where arrestments jurisdictionis fundandæ causâ had been previously used on the Sheriff's precept. 2. That in the counties of Edinburgh, Lanark, Renfrew, Fife, Haddington, Kirkcudbright, Roxburgh, and Dumfries, it was the practice to bring actions against foreigners on a jurisdiction founded by arrestment, and to give decree therein; but that, except in Dumfries, all the cases were of decrees pronounced in absence, and there did not appear any case where an objection to the jurisdiction had been taken and repelled, except in that county; and, 3. That one instance of such actions had occurred in the counties of Aberdeen and Berwick, but that in the other counties of Scotland there was no appearance of similar actions being brought.

On the condescendence and answers, containing these statements as to the practice, being lodged, the Court resolved to consult the whole Judges; and, on the cause being again put out, it was announced from the Chair that the Judges were unanimously of opinion that the action was incompetent. The reclaiming note for Purvis was accordingly refused, and their Lordships at the same time refused a counter note for Burn as to expenses.

A. Douglas, W. S.—Mackenzie and Innes, W. S.—Agents.

No. 93.

J. Bell, Pursuer.—*Graham—Bell.*

J. H. Maxwell and Others, Defenders.—*Rutherfurd.*

Process—Trust.—A party having raised an action against trustees, concluding not merely that they should be ordained to execute a discharge of an heritable bond granted by him, but also to have it declared that the debt was extinguished, and his lands disburdened—Held that he was bound to call the party, granter of the trust, who had the real interest in the fund.

Dec. 13. 1828.
2d Division.
Lord Medwyn.
F.

The pursuer Bell having borrowed £400 from John Syme of Ryedale, granted him a bond and disposition in security over his lands of Milton &c. Syme thereafter executed an absolute conveyance in favour of his eldest son William Ireland Syme, of his whole means and estate, including, inter alia, this bond,—the son at the same time granting an obligation to pay his father a yearly sum of £500, and to make payment to Mr. Herries Maxwell of Munshes, and Mr. Armstrong and Mr. Martin, writers in Dumfries, or any two of them accepting, or the survivor, as trustees, £8000, for the purpose of being applied by them in payment of certain provisions to the younger children of John Syme, payable at a future period, and on certain events which had not yet occurred. In

security of this sum of £3000 provided to the younger children, William Ireland Syme, in the year 1824, executed a disposition and assignation to Mr. Herries Maxwell and Messrs. Armstrong and Martin, or any two of them accepting, or the survivor, as trustees, of the whole property contained in the previous conveyance by his father, and, inter alia, of the above-mentioned bond, in which the trustees were infeft. This disposition contained all the clauses usual in an absolute conveyance, and empowered the trustees to receive payment of heritable debts, and discharge the same; but it was expressly stipulated that the rents of the properties, and the interest of the heritable bonds, should be paid exclusively to William Ireland Syme till the provisions to the younger children became exigible. In the beginning of the present year, Bell, the granter of the heritable bond above mentioned raised an action against Mr. Herries Maxwell, Messrs. Armstrong and Martin, and two other trustees who had been assumed in virtue of powers contained in the disposition, setting forth that he had paid the amount of his bond to Martin, (who had shortly thereafter absconded,) one of the trustees, and, along with Armstrong, (who was his partner,) the agents and managers of the trust; but that the trustees nevertheless refused to grant a discharge, and concluding to have it declared that this payment was a legal payment; and further, that the trustees should be ordained to deliver to him a valid discharge; or, failing their doing so, that it should be declared that the debt was extinguished, and the lands freed and disburdened from the disposition in security and infeftment. Besides the defences on the merits, to which it is unnecessary at present to advert, the trustees pleaded that all the parties interested were not in the field, and that it was necessary to make William Ireland Syme a party, as having the most material interest in the subject-matter of the action.

To this it was answered, that where property was vested in trustees, it was sufficient to call them in any action relative thereto; and that it was noways necessary to call all the parties who might have an ultimate interest in the trust-funds.

The Lord Ordinary having repelled this preliminary defence, the trustees reclaimed.—

Lord Glenlee.—The summons does not simply ask to have trustees ordained to grant a discharge. It asks a great deal more, and concludes to have it declared that the debt is actually and completely extinguished, because the trustees had power to discharge; and who is the proper party with whom to try this, but Mr. Ireland Syme? The trustees are naturally entitled to have him made a party, that they may be safe in case of a decree. They, however, cannot compel him to appear by intimation; and therefore, if the pursuer is to insist in the conclusion that, in consequence of the trustees' powers of discharge, the debt is extinguished, I think he must call him.

Lord Alloway concurred.

Lord Justice-Clerk.—I think there would be no harm in having this man brought into the field; but still the pursuer may suffer a prejudice by being

No. 93. obliged to call him as a party, and I would therefore insert a qualification to
Dec. 13. 1828. prevent that.

THE COURT recalled the Lord Ordinary's interlocutor; and 'in respect it 'appears to be expedient and proper that William Ireland Syme should 'be made a party to this cause, appointed the pursuer to call him as a 'party, but without prejudice to any interest of the pursuer connected 'with the merits of the cause.'

W. STEWART, W. S.—RENNY and HUNTER, W. S.—Agents.

No. 94. SIR J. COLQUHOUN, Pursuer and Suspender.—*Sol. Gen.-Hope—Forsyth.*
R. COLQUHOUN, Charger.—*Fullerton—Sandford.*
Miss COLQUHOUN &c., Defenders.—*Greenshields—D. Macfarlane jun.*

Service—Entail—Homologation.—1.—A proprietor having executed an entail of his estate in favour of his eldest son—whom failing, a series of substitutes, reserving his own liferent, and power to alter, sell, and burden the estate; and his eldest son having predeceased him, and no infeftment taken, and the reserved powers never having been exercised—Held that a service, not to the eldest son, but to the entailer, was inept.—2.—Circumstances under which a plea of homologation of an entail was repelled.

Dec. 16. 1828.
1ST DIVISION.
Lord Newton.
D.

ROBERT COLQUHOUN, proprietor in fee-simple of the estate of Camstraddan, (of which Colquhoun of Luss was superior,) situated in the county of Dumbarton, entered into a postnuptial contract of marriage with Helen Johnstone on the 30th of September 1741, by which he bound himself to resign the lands in his own favour, 'and the heir-male of his body 'of this marriage, which failing, his heirs and assignees whatsomever in 'fee,' under burden of an annuity to his wife, and subject to a power of creating heritable securities to a limited extent; and sasine was taken. Of this marriage he had two sons, James and Walter. After it had been dissolved by the death of his wife, he executed an entail of the estate on the 28th of January 1774, by which he disponed the lands 'to James 'Colquhoun, my eldest son, and the heirs whatsomever of his body, whom 'failing, to my other heirs of tailzie and provision after named.' He then granted precept of sasine and procuratory of resignation for 'new infeft-'ments of the same to be made, given, and granted to the said James 'Colquhoun, my eldest son and the heirs whatsomever, and the heirs to be 'procreated of his body; whom failing, to any other son or sons to be 'procreated of my body, the elder always succeeding before the younger 'and the heirs whomsoever respectively to be procreated of their bodies 'successively; whom failing,' &c. At the same time he reserved to himself 'not only my own liferent of the lands and others before dis-'poned, but also full power and liberty to me to sell, alienate, and im-'pignorate, or dispone the said lands and others, or any part thereof, and 'to revoke, alter, innovate, or change these presents, in whole or in part 'at any time of my life, even upon deathbed; and all which revocation 'or alterations so to be made by me shall be understood to be a part of 'the present tailzie, and shall be held to be as effectual as if engrossed 'herein.'

is deed was fortified by the usual clauses in entails. No sasine was, No. 94.
ver, taken upon it. His son James died without issue; and thereafter, Dec. 16. 1823.
ptember 1781, the entailer executed a trust-disposition of the rents
our of trustees, for paying off his debts, and recording the entail. He
in 1787; and the trustees, having accepted and taken possession,
d the entail to be recorded on the 7th of October 1788. The second
Walter (who was entitled to succeed to the estate) was a West
n merchant; but although he obtained a precept of clare constat, he
made up titles to the estate, nor took possession; and having be-
bankrupt, his assignees conveyed any right which he had, for oner-
auses, to a trustee for behoof of his family. He died in 1802;
is eldest son Robert Colquhoun, the present defender, was then in
West Indies. He immediately came to this country, and was ap-
ed by the trustees factor on the estate. Being about to depart, in
, for the West Indies, he granted a factory and commission to seve-
entlemen, (two of whom were trustees of the entailer,) proceeding
he narrative, that 'as I have not yet made up proper titles in my
n person to the said lands and estate of Camstraddan,' therefore he
ted 'full power to my said commissioners to make up and establish
ch titles in my person, by general or special service or otherwise, as
ir to my said grandfather, as shall be thought necessary to vest and
mplete a full right to the said lands in my person.' No specific orders
e given to make up his titles under the entail; but his commissioners
e authorized to uplift the rents, and apply the same 'in terms of the
ed of entail and bond of provision, as relative hereto, executed by the
ceased Robert Colquhoun of Camstraddan, my grandfather;' and
er was given 'to set tacks consistently with the said entail.' He then
t to the West Indies; and in 1806, while he was absent, his commis-
ers expede a general service in his favour as heir of tailzie and pro-
on of his grandfather, the entailer; and, in September of the same
, an instrument of sasine was expede on the precept of sasine con-
ed in the entail, and recorded in October thereafter. He returned to
land several years thereafter, and in 1820 obtained a precept of clare
tat from the superior, Sir James Colquhoun, (the suspender,) author-
g him to be infeft as nearest and lawful heir of his grandfather, with-
reference to the entail. In March and April 1826, a minute of sale
executed between him and Sir James, by which he sold to Sir James's
estate at the price of £32,000, (of which £6,500 were paid); and au-
ity was granted to Sir James to set aside the previous titles made up
er the entail. In virtue of the precept of clare, Robert was infeft
he 29th of April, and in the mean while the trustees of the entailer
been judicially exonered and discharged. Two questions then arose——
Whether the titles made up by Robert under the general service in
were effectual? and, 2. Whether, on the supposition that they
not so, he had not homologated the entail, and so was barred from
garding it, and availing himself of his rights under the contract of

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marriage? To try these questions, two processes were brought, both at the instance of Sir James Colquhoun,—the one being a suspension as of a threatened charge on the minute of sale, and the other an action of reduction of the service and sasine in 1806 against the heirs of entail, raised in virtue of the power conferred on Sir James by the minute of sale.

In support of the proposition that the titles made up under the entail were inept, it was maintained, That as the entailer had disponed directly to his eldest son James, he had divested himself of the fee, which, therefore, immediately became vested in the person of James; that although there was a reservation by the entailer of a power to alter, and to sell and dispose of the estate, and although, if this power had been exercised, James's right might have been defeated, yet, as it had not been so, the personal fee remained vested in him, and consequently was still in his hæreditas jacens; that the circumstance of his predeceasing the entailer could not affect the question of vesting; and therefore, as the fee was in him, and not in the entailer, a service to the latter was inept; that if so, then it followed as a necessary consequence that the sasine taken in virtue of that service was ineffectual; and that such being the case, and there being no valid infeftment, an onerous purchaser could not be affected by the entail.

On the other hand it was contended, That as the entailer was the fee-simple proprietor, the reservation was sufficiently broad to qualify the disposition to his son, so as to keep the fee vested in his own person, the more especially, as the deed was never delivered to the son, and he had predeceased the entailer; and therefore the service (which, it was stated, was expede agreeably to the advice of Solicitor-General Blair,) was perfectly correct.

In regard to the plea of homologation, Sir James maintained, That even supposing it were pleadable, it truly amounted only to a personal bar against Robert, and could not be pleaded against an onerous third party; that, however, there were no termini habiles for homologation, because Robert had never abandoned his rights under the contract of marriage, or as heir of line to his grandfather; that no authority was given by the commission to make up titles under the entail; that he was at the time in the West Indies; and so far from approving of this act, he, immediately on his return, made up titles to the estate in fee-simple.

To this it was answered, That the contract of marriage was extinguished by the negative, and the entail rendered the standing title of the estate by the positive prescription; that Robert had acted as factor under the entailer's trustees; that his commission was granted to two of them, and expressly recognised the entail; that it was impossible that he could pretend that he was ignorant of the titles which had been made up in his favour, and he had acquiesced in them for at least fourteen years; that Sir James could not plead ignorance of the existence of the entail, because a sasine proceeding upon it was publicly recorded, and he was liable to the same objections as his cedent.

The Lord Ordinary having reported the case to the Court, their Lordships in the suspension found the letters orderly proceeded, and in the reduction decerned in terms of the libel, reserving the rights of the heir of entail in regard to any claim which they might have against Robert as to the application of the price.

LORD BALGRAY.—The title is quite inept. The eldest son was the disponee and institute, and therefore a personal fee was vested in him. The service ought consequently to have been to him, and not to the entailer; and therefore that which has been expede, is not worth the paper on which it is written.

LORD CRAIGIE concurred, and observed that he did not think there was any weight in the plea of homologation, as the titles had been made up by mistake. Besides, it was not available against an onerous purchaser.

LORD PRESIDENT.—I am of the same opinion. Robert, the entailer, no doubt, remained liar to the effect of having reserved rights which he might have exercised; but he did not exercise them; and as he disponed the estate to his son, the fee was vested in him. The heirs-substitutes will of course be heard in regard to the application of the price.

Pursuer's Authorities.—(1.)—Maconochie, Jan. 12. 1780, (13040); Baillie, Feb. 23. 1809 (F. C.); Turnbulls, Nov. 12. 1822, (ante, Vol. II. No. 1.*); Donaldson, March 11. 1786 (8689); Campbell, Dec. 14. 1790, (8652); Lockhart, Feb. 19. 1819, (F. C.); Mackenzie Nov. 24. 1818, (F. C.†); Hamilton, March 3. 1815, (F. C.); 3. Ersk. 8. 23. and 38; Hepburn, June 6. 1814, (2. Dow, 342); Russel, Jan. 31. 1792, (10300); Douglas, Feb. 22. 1765 (15616); 3. Ersk. 8. 73; Hay, June 30. 1758, (14,369); Campbell, Nov. 28. 1770, (14,949) Sandford on Entails, 323.—(2.)—M'Gill, Nov. 22. 1664, (5696); Chalmers, Feb. 27. 1668 (5695.)

Defenders' Authorities.—3. Stair, 5. 4; 3. Ersk. 8. 38. and 73; Routledge, May 19. 1815 (F. C.); Majendie, Dec. 16. 1819, (F. C., and 2. Bligh, 693); 1. Bell, 57. 59.

D. FISHER, S. S. C.—G. DUNLOP, W. S.—GIBSON and HECTOR, W. S.—Agents.

R. BUTCHARD, Advocator.—*Anderson.*

A. WALKER and R. WEST, Respondents.—*M'Neill.*

Process—Lis Alibi Pendens—Contingency.—A landlord who was liable in an unascertained amount of indemnification to a tenant about to quit his farm, and to whom, on the other hand, a year's rent was due, having presented a petition to the Sheriff, praying for a remit to reporters to estimate the indemnification, and stating his willingness to allow the amount to be deducted from the year's rent; and the tenant having thereafter raised an action before this Court concluding for indemnification, which he libelled at four years' rent, and having also brought an advocation of the Sheriff's process—*Held* that the latter was not a lis alibi to exclude the action in this Court; and *Observed*, that the question of contingency was not affected by the action in this Court having been brought subsequently to that in the Sheriff Court.

THE advocator Butchard held a lease of certain lands, at a rent of £102, for nine years from Martinmas 1826, but under the condition that the proprietor might resume possession as at Martinmas 1826, on indemnifying him for such improvements as he might have made thereon

* The above case was reversed on the 15th of April 1825. See 1. Wilson and Shaw, p. 80

† See 1. Shaw's Appeal Cases, p. 150.

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and not reaped the benefit of—to be ascertained by two persons to be mutually chosen. The respondents Walker and West afterwards bought the lands, and intimated that they were to resume possession at Martinmas 1826. They were entitled, by the terms of their purchase, to the rent for crop 1826; and after some ineffectual attempts at an arrangement with Butchard for the indemnification to be paid him, they presented a summary petition to the Sheriff of Fife, setting forth that they were willing to allow deduction from the year's rent of whatever sum might be due to Butchard as a compensation for their resuming possession; and praying for a remit to valuators to inspect the lands, and report on the amount Butchard should be entitled to receive, but containing no other conclusion. In answer to this, Butchard pleaded that the petition was incompetent, both as a summary application, and because it would not exhaust the points in dispute, as his claims greatly exceeded the year's rent; and he also contended that he was entitled to a regular proof of his claims, and was not bound to submit to the valuation of reporters. He raised, at the same time, an action before this Court, concluding for £440 as the amount of indemnification due him; and the Sheriff having, in the application before him, repelled Butchard's objections, and remitted to valuators to report, he brought an advocation, under the 40th section of the Judicature Act, concluding that the process should be advocated, 'that 'the cause may be tried by a jury, and be conjoined, ob contingentiam,' with the ordinary action raised by him in this Court.

The respondents having objected to the competency of this advocation that a previously depending cause in an Inferior Court could not be advocated ob contingentiam of one subsequently raised in the Supreme Court, and having pleaded at the same time in defence against the ordinary action that the process before the Sheriff formed a lis alibi pendens, the Lord Ordinary pronounced this interlocutor:—'The Lord Ordinary 'having heard parties' procurators, and being of opinion that the proceed- 'ings in the Inferior Court at the instance of the respondents in this ad- 'vocation having commenced prior to the summons which was brought 'into this Court by the advocator, it is not competent to advocate, on the 'ground of contingency with a previous process in this Court, and that 'the respondents are entitled to have the subsequent process dismissed, 'with expenses, on the ground of lis alibi pendens,—more especially as 'the advocator has now adopted the previous process by bringing an ad- 'vocation of it, under the 40th section of the Judicature Act, to have the 'facts stated in the order for proving in the Inferior Court established 'by the verdict of a jury; but as it would be competent, and perhaps ne- 'cessary, for the advocator to raise a new summons in this Court, to b 'conjoined with the advocation, with a view of making good his counte 'claims, the Lord Ordinary is further of opinion that it is not necessar 'to put him to the expense of raising this new summons, (provided th 'defenders called by that summons the respondents in the advocatio 'are reimbursed of the expenses occasioned by the institution of sai

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ction) the advocator at the time he did; appoints the respondents put in an account of said expenses, and remits the same to the audir to tax and to report, in order that, on payment of said expenses, the dinary action may be conjoined with the advocation.'

Butchard reclaimed.

ORD JUSTICE-CLERK.—I do not think this interlocutor can be sustained. if the application to the Sheriff were competent, it is necessarily limited to mount of one year's rent, while the tenant claims a sum equal to four years' There was no lis alibi to prevent the summons being raised in this Court, am clear there is no reason for saddling the advocator with expenses, as ondition of conjoining the processes; though, if it turn out that his claim nts to only one year's rent, it may be a consideration in determining the ion of expenses at the issue of the cause.

RD GLENLEE.—I do not think the question of contingency is affected by tion in this Court being last in date, so that there be a contingency; and, same time, the process in the Sheriff Court was not a lis alibi, though con- l with the action here.

RD PITMILLY.—The whole seems to turn on this, whether the summons of nant is to be dismissed on the ground of lis alibi in consequence of the land- action, which concludes for nothing but a remit? It is no lis pendens at all, irregular application to ascertain the amount of the tenant's claims, and could permit him bringing an action here to have his claim decerned for. It n that the advocation and the action must be conjoined.

RD ALLOWAY.—I concur entirely.

THE COURT accordingly recalled the Lord Ordinary's interlocutor, advocated the Sheriff Court process, and remitted to his Lordship to conjoin it with the ordinary action, and proceed accordingly, reserving all questions of expenses.

J. M'LAURIN, W. S.—T. LEBURN,—Agents.

ROBERT FRAZER, Petitioner.—*Baird.*

No. 96.

Dec. 18. 1828.
1st Division.
D.

cess.—Intimation of a petition for recall of a judicial factory dispensed with, where the had applied for a sequestration of his estates under the Bankrupt Act.

HIS was an application for a recall of a judicial factory in favour of . Fraser, writer in Edinburgh, for whom a petition of sequestration er the Bankrupt Act had been presented, and for an accounting. Court, without requiring intimation quoad him, recalled the fac- ; but, as to the cautioners, appointed it to be intimated in common n.

H. FRAZER, W. S. Agent.

No. 97. J. INNES, W. S. Complainer.—*D. of F. Moncreiff—Maitland.*
W. INNES, Respondent.—*Skene—Rutherfurd.*

Trustee.—A trustee with powers of sale for payment of the truster's debts (for which he had to a great extent become personally bound) not obliged to postpone a sale on a mere intimation that the truster was to put an end to the trust in terms of the trust-deed, by relieving him of his obligations, he showing no means whereby he was to accomplish this; and not obliged to part with the titles to enable the truster to transact a loan, free access being given to them in the hands of the trustee's agent.

Dec. 18. 1828.
2D DIVISION.
Bill-Chamber.
Lord Newton.
B.

IN the year 1827 the complainer conveyed to his brother the respondent, in trust, his whole property, with full powers of sale, for the purpose of paying his debts, and reconveying the reversion to him. The respondent undertook the management of the trust gratuitously, and it was declared that, till the lapse of 18 months from Martinmas 1827, the respondent should not proceed to bring the complainer's lands of Ratho Hall to sale; and that, till a sale should be effected, the complainer should continue to possess and manage these lands. It was further declared that it should at any time be competent to the complainer to demand an extinction of the trust, on relieving the trustee of all obligations which he might be under at the time. On this trust-conveyance the respondent was infeft; and having entered into the management, he made considerable advances, and came under obligations for the payment of his brother's debts. In January 1828 the complainer executed a supplementary deed, by which he discharged the restriction as to the period when Ratho Hall might be brought to sale; and the respondent thereafter made further advances, and in particular he became bound to pay to the Bank of Scotland a debt of £5000 within twelve months. Having, in the course of the summer, advertised Ratho Hall for sale, the complainer intimated that he was to put an end to the trust. On this the suspender agreed to postpone the sale, which had been fixed for the 12th of September, to give the suspender time to relieve him from his obligations; but the latter not being able to give him reasonable grounds for believing that he could relieve him of his obligations, the lands were again advertised for the 12th November. The complainer still intimated that he was to put an end to the trust, and demanded possession of the title-deeds, in order to effect a loan on the lands for this purpose. The respondent refused to part with the title-deeds, but offered to allow every access to them in his agent's hands for the purpose of enabling the complainer to transact a loan, and stated his willingness to postpone the sale, if the charger would point out to him any means by which he was to relieve him of his obligations, or even if he would advance or find immediate security to the extent of £5000; but that otherwise the sale must proceed. On this the complainer presented a bill of suspension and interdict, which the Lord Ordinary appointed to be answered, and he granted interdict in the mean time. Upon advising the bill with answers, however, his Lordship pronounced this interlocutor:—'In respect the complainer, though he has intimated generally

No. 97.
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'his intention to terminate the trust by repaying the respondent's advances, and relieving him from all his engagements and obligations as 'trustee, has hitherto given no information as to the means he has of 'doing so, or shown that he has any reasonable expectation of procuring 'the necessary loans or security, finds that the respondent is not bound 'to stop short in the exercise of the powers competent to him under the 'trust for relieving himself of his advances and managements; therefore refuses the bill, recalls the interdict, and finds the respondent entitled to his expenses.'

The Court unanimously adhered.

Lord Ordinary.—There can be no doubt that the respondent is, under the trust-deed, and subsequent deed discharging the restriction as to the time of selling, entitled to bring the lands to a public sale. It is equally clear, and admitted on all hands, that the complainer may at any time put an end to the trust by repaying the respondent's advances, and relieving him of the obligations he has undertaken in its exercise. It is also undisputed that the respondent, who acts gratuitously, has advanced a large sum in paying debts, and has become bound for others to a large amount. In particular it appears that, immediately on obtaining a discharge of the restriction, he became bound to pay to the Bank of Scotland a debt exceeding £5000 within twelve months, which he must be presumed to have done in the prospect of selling the lands before that time expired. It may be supposed, therefore, that the proceeding with the sale is highly necessary for his own relief. In such circumstances, it does not appear to the Lord Ordinary that a mere notice from the complainer that he intends to terminate the trust, ought to put a stop to the trustee's powers; and if it is not necessary to this effect that the money be actually repaid, and the security found, that at least such information should be given as to the mode in which the funds are to be raised, and the persons who are to lend or become security, so as to show that there is a reasonable prospect of accomplishing what is proposed. But no information of this kind has hitherto been furnished, though one object of the Lord Ordinary's meeting with the parties was to signify that he thought it necessary. He does not think, that with the information furnished by the respondent, and the complainer's knowledge of his own debts, the latter would have any difficulty in calculating what he had to provide for; and as to the title-deeds, he does not conceive that the respondent was bound to give them up. Free access to them was offered in the hands of the respondent's agent; and if the sale were to proceed, it was necessary to retain them, to satisfy intending offerers.

The Judges concurred.

P. Daniel, W.S.—P. Crooks, W.S.—Agents.

No. 98.

A. KELTIE, Petitioner.—*Cuninghame—Neaves.*
R. WILSON, Respondent.—*Skene—Thomson.*

Legal Diligence.—1.—A sist on a bill of suspension stays the execution of poinding as well as personal diligence.—2.—Circumstances held to form a sufficient excuse to save a party from being subjected in penalties for proceeding with diligence, notwithstanding a sist.

Dec. 18. 1828.
2D DIVISION.
Lord Newton.
F.

KELTIE having been charged by Wilson, a writer in Edinburgh, on letters of horning proceeding upon a registered bond, presented a bill of suspension, with or without caution, which did not pray specially for interdict against proceeding with poinding on other diligence. On this bill the Lord Ordinary pronounced the following interlocutor:—'To see 'and answer within fourteen days; meantime sists execution, and to be 'intimated, but on caution only, and not otherwise.' The sist was intimated, but without caution having been previously found; and Wilson proceeded to execute a poinding of Keltie's effects under the letters of horning. The bill was ultimately refused in respect of no caution, and the poinded goods were consequently sold; but Keltie presented a petition and complaint against Wilson, and contended that his execution of the poinding, notwithstanding the intimated sist, was a contempt of Court, and prayed to have him subjected in punishment or censure, and also in damages, and to have the poinding recalled, and found not to be a legal attachment of his effects. This petition having been remitted to the Lord Ordinary for preparation, his Lordship ordered Cases to the Court.

Pleaded for Wilson.—The conclusion for damages is incompetent in a petition and complaint, and besides no damage was suffered, as the bill was ultimately refused. As to the other matters, a sist on a bill of suspension, which does not specially pray for staying poinding, can only stop personal diligence. It has been decided that a sist does not not prevent the execution of arrestment or inhibition; Miller, Feb. 19 1749, (15148); and poinding, if it be not carried on to a sale, is merely a preliminary step, (especially since the late Bankrupt Act,) which does not in itself carry the property, but only establishes a nexus, and so is analogous to the case of arrestment. At any rate, the poinding was executed in the bonâ fide belief that it was competent to proceed, notwithstanding the interlocutor of the Lord Ordinary, which should protect the respondent from any punishment or censure, as guilty of a wilful violation of the sist.

Pleaded for Keltie.—Arrestment and inhibition are not acts of execution, but merely preliminary steps which may be taken on a citation, without any decree at all. Poinding is a diligence of execution whereby the creditor takes possession of the debtor's goods, which cannot be done till the expiry of the charge, and the running of the charge is stopped by the sist. The respondent, therefore, who is a writer, and must be presumed to know the law in regard to matters of diligence, having violated the sist, ought to be subjected in penalties.

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A few days before these cases came to be advised, a decision had been pronounced in the case of Tait v. Gordon, (ante, Vol. VI. No. 404, which see.) In consequence of this, the Court allowed Wilson to put in an amended note of pleas, in which he specially founded on the terms of the Lord Ordinary's interlocutor as implying that the sist was only to have effect in the event of caution being previously found; and he pleaded that, according to the report of that case in the Faculty Collection, the Court had held this to be the meaning of a similar interlocutor, where, however, the words were not so strong as in the present case.

To this it was answered, That it appeared from the report by Messrs. Law and Dunlop that the Court had not decided this point, but only that, in the circumstances of the case, there was a sufficient excuse made there for the party, who was a country gentleman; while the respondent here was a writer, who could not plead the same excuse, especially as he had not, in the previous stages of the cause, pretended to have put this construction on the Lord Ordinary's interlocutor; and, at all events, that he ought not to be allowed to avail himself of this plea without payment of previous expenses.

LORD JUSTICE-CLERK.—I am satisfied from my notes and recollection of the case that Mr. Dunlop's report of the case of Gordon v. Tait is the correct one. The Court did not mean to lay down a general rule there. The case was this: After the Sheriff did proceed with the ejection of a tenant, he was found right in subsequently; and being a country gentleman, and the words being ambiguous, we thought his excuse sufficient to save him from any penalty, as guilty of a wilful contempt; and though this interlocutor is more strongly worded, still I would adopt the same course, and would not sanction immediate execution in the face of a sist. There must be some time allowed to find caution; but, according to the argument of the respondent, there could be no sist at all. The late Act of Parliament provides that the Lord Ordinary may prohibit issuing the intimation until caution is found; and therefore, without giving any sanction to the extreme doctrine maintained here by the respondent, as there is an ambiguity in the interlocutor, I would not subject him in the penalty. But if it stood on the other plea, as to finding being competent notwithstanding a sist, it is clear he could not poind after the sist was granted; and, in the whole circumstances, I would dismiss the complaint without costs.

LORD GLENLEE.—There are two things quite different—whether there be contempt of Court, and whether the diligence be effectual; and we might assoilzie on the conclusion on contempt, and yet recall the diligence, which cannot here be done, the sale having taken place; and I would therefore dismiss the complaint, without prejudice to any action which the party may bring.

LORD PITMILLY.—This case is very different under the new plea; for I am satisfied the party could not execute a poinding in the face of a sist. There is no room for distinction between poinding and personal diligence; and this is plain on the act 1669, c. 14. A passage of Stair, quoted by the respondent (4. 2. 9.) refers to a poinding of the ground, which is a totally different process. This is the first attempt to distinguish poinding from personal diligence; and I find two cases where it was expressly decided to be illegal to execute poinding after a

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sist had been granted; Stewart, Jan. 4. 1751, (10535); 1715, (2. Bruce, 51,) where a practitioner was found should have had no hesitation on that point. But the case the question into a new situation; for there is a degree locutor, and bona fides on the part of the petitioner; and tition and complaint, we might listen to the excuse, so penal consequences, though we should mark the sense of ing as to expenses.

Lord Alloway.—I agree, and am happy to find th runt has put an end to all questions of this kind, by pr given out till caution is found, where it is considered n stood before this new plea was brought forward, I co the complaint; for although I hold that a poinding is not property since 33d Geo. III., but only an inchoate diligen tioned by Lord Pitmilly were before that act, still I am o be executed while sist is granted.

Cuninghame, for the complainer, having now moved for that it was only in virtue of the plea brought forward at th the complaint was dismissed—

Lord Glenlee.—I am clear that no expenses should be tal ground of the complaint is, that the respondent has bee tempt of Court, and the complainer has failed to make that

Lord Justice-Clerk.—I am also of the same opinion. plea of bona fides is raised in the original papers, though we specifically stated with reference to the case of Tait v. Gord

The other Judges concurred.

The Court accordingly found, 'that, under the partic 'this case, there are no sufficient grounds for holding 'of a contempt of Court;' and therefore dismisse without expenses to either party, 'and without prej 'that may exist between the parties in regard to the

Complainer's Authorities.—1. Ivory, 123; 1. Beveridge, 222; Sta 4. Ersk. 3. 18; 1669, c. 4.

Respondent's Authorities.— 4. Stair, 2. 9; 54. Geo. III. c. 137. § 4; Miller, Feb. 19. 1749, (15148); Tullis, June 18. 1817, (F. C.); Samso Vol. I. No. 464); Tait, July 3. 1828, (ante, Vol. VI. No. 404.)

J. Greig, W. S.—R. Wilson,—Agents.

No. 99.

T. Sivright, Pursuer.—*Rutherfurd.*
F. Wilson, W. S. Defender and Pursuer.—*D. of F. A derson.*
J. Borthwick, Defender.—*Borthwick—Du*

Servitude.—A negative servitude expressed in a minute of sale, but n titles, held to have been departed from.

Dec. 19. 1828.
1st Division.
Lord Meadowbank.
H.

John Adam, architect in Edinburgh, was proprietc ground at Laurieston, which he sold to John Dove. Bef up any title to the property, Dove, on the 13th of April 1 of it to Mr. Borthwick of Crookston, and at the same

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Dec. 19. 1828.

him a document setting forth the sale, and bearing that he had re-
ved payment of the price; 'and that as I have not yet received from the
id Mr. John Adam a proper title to the foresaid plot of ground pur-
ased by me from him, and a progress of writs, and so cannot at present
ant unto him, the said John Borthwick, a valid disposition of his pur-
ase, and deliver up a valid progress of writs;' therefore he bound him-
to grant a valid disposition, containing certain clauses. The document
proceeded in these terms: 'And further, it is hereby agreed that no
ilding whatever shall be raised or erected in the foresaid garden pertain-
g to me, further west than the line of the wester-side walls of my house;'
it concluded with a consent to registration and execution. Thereafter,
pril 1772, Adam granted a disposition to Dove; and in April 1773
above document was recorded. Dove having died without having
ted any disposition to Mr. Borthwick, his son and tutors executed
in March 1777, which, however, could not now be found. In July
e same year, Mr. Borthwick granted a disposition of the subjects
mself in liferent, and to his eldest son in fee, in which no mention was
e of the servitude; and in the course of the same month he obtained
rter of resignation from the Magistrates of Edinburgh, reciting the
sition by Adam to Dove, and by Dove's son to Mr. Borthwick, and
m to himself and his son, in which, although notice was taken of
al other stipulations in the document, yet nothing was said as to the
ude. In virtue of this charter infeftment was taken, and possession
njoyed by Mr. Borthwick till his death in 1812, when his son, the
nt Mr. Borthwick, made up titles to the property, without any allu-
to the servitude.

the other hand, Dove's son also expede a charter from the Magis-
s to the other part of the property over which the servitude had
granted, on which he was infeft in 1775; and on his death he was
eeded by his sister. No mention was made of any servitude in these
; and in 1800 advertisements were published by her, announcing
ground for sale, or to be feued for building; and terms and con-
ns on which the feuing should be allowed, were exhibited to intend-
purchasers. In May 1801 she sold the subjects to the pursuer Mr.
ight, and granted an obligation of warrandice 'from all burdens and
cumbrances, and grounds of eviction, at all hands, and against all
adly, as law will.' The defender Mr. Wilson married Miss Dove;
she having died, he became her representative, as her general dis-
ee. In 1821 Mr. Sivright made preparations for building upon the
und; but Mr. Borthwick, founding upon the above document, having
med a right of servitude, Mr. Sivright brought an action of relief
inst Mr. Wilson, as the representative of his wife.
The Lord Ordinary having reported the case to the Court, their Lord-
ps appointed Mr. Borthwick to be called as a party, and Mr. Wilson
ereupon raised an action against him to have it found that there was
effectual servitude in existence.

No. 99. Dec. 19. 1828.

In support of this proposition he maintained,

1. That as Dove was not infeft in the subjects, he had no power to constitute a servitude over them.

2. That the document relied on by Mr. Borthwick was merely an ordinary minute of sale, which was not intended to contain the ultimate agreement of parties, but was liable to be modified by the disposition; that although the disposition by Dove's son to Mr. Borthwick could not be found, yet there was conclusive evidence to show that the servitude had been abandoned, and had not been inserted in it, because neither the disposition by Mr. Borthwick to himself and son, nor the charter nor the sasine, made any allusion to such a servitude, and neither was there any mention made of it in the titles of the alleged servient tenements; and accordingly, although the ground was advertised for building, no objection had been made by Mr. Borthwick; and,

3. That even regarding the document as a proper obligation, it was extinguished by the negative prescription, and by the property having been possessed for upwards of 40 years on titles unqualified by any such burden.

On the other hand, it was maintained by Mr. Borthwick,

1. That as Dove had the undoubted right to the property, and the defender Mr. Wilson was his representative, he could not competently plead that Dove could not grant such a servitude; and that, in point of law, it was not necessary that he should be infeft.

2. That the document was not a minute of sale, which is a bilateral deed, whereas it was unilateral, and was a proper bond and obligation by Dove, which per se, and independent of any disposition, was sufficient to constitute an effectual servitude. Accordingly it had been decided in the case of Gray against Ferguson that a servitude might be created by an ordinary obligation, without either infeftment or publication in any record;* and,

3. That the plea of prescription was inapplicable to a case of this nature.

The Court, however, decerned in the action at the instance of Mr. Wilson against Borthwick, thereby finding that there was no servitude; and, in consequence thereof, assoilzied Mr. Wilson from that at the instance of Mr. Sivright.

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* The following notes were quoted as being written upon the session-papers of Sir H. Campbell in the above case:—

'PRESIDENT.—Question about a servitude of light and prospect. As to the second point, the extent of the servitude, the question does not come properly to be discussed in this shape, as there is only here a suspension of Winton's building.

'As to the general point. No record for servitudes. Enough that the dominant proprietor has all the possession that the nature of the subject admits of. Negative servitudes do not admit of ouvert possession. See Dict. vol. ii. p. 393; Ersk. p. 321.

'JUSTICE-CLERK.—(MACQUEEN.)—Interlocutor right. Cannot supply the defect of the 1671, and appoint a register of servitudes. Before that act, even property passed without registration.

'ROCKVILLE.—Demur on account of specialties.'

LORD BALGRAY.—I concur in the law laid down by Mr. Borthwick, that a ervitude may be effectually created by a mere obligation without infeftment; ut there is a strong peculiarity in this case. From the situation in which ove stood, he was not in a condition to grant a disposition, and therefore he ecame bound to execute one. Although, no doubt, the document is unilateral, t it is impossible to read it without being satisfied that it was just an ordinary nute of sale, which accordingly contains an obligation for the execution of a position. Until, therefore, the disposition was executed, matters remained in unfinished and imperfect state. If they had remained on the footing of minute, Mr. Borthwick might have compelled Mr. Wilson, as the representative of the granter, to execute a disposition agreeably to it. But this is not case. A disposition was granted, which was followed by a charter. It is nifest that the servitude could not have been inserted in the disposition, ause, if it had been inserted, it would have appeared in the charter, and efore must be presumed to have been departed from. On this charter ession has been enjoyed for more than forty years, and therefore it is im- ible to maintain that there is any subsisting obligation which can be en- ed against Mr. Wilson.

ORD PRESIDENT.—Are any of your Lordships of a different opinion?

ORD CRAIGIE.—I have great doubts arising from the nature of this docu- t. It is certain that an effectual servitude may be constituted by such an gation; and this is a question with the representatives of the granter, and with a third party.

ORD GILLIES.—The rule as to negative servitudes is an anomaly in our and ought not to be extended. But the general question does not arise . I am for giving effect to the agreement of parties, which is the principle hich Lord Craigie proceeds. It is perfectly clear that they contemplated insertion of the clause in the disposition. But if it was not entered, the inference in law is, that they departed from it. The disposition cannot ound; but the presumption is, that it was expressed in the same terms he charter, and in particular that it contained all the burdens there men- d; but no allusion whatever is made to it in the charter. Then, again, ming that it was in the disposition, still, as it is not in the charter, which he title of possession, the presumption is, that, for some reason or another, as abandoned.

ORD PRESIDENT.—I am entirely of the same opinion. I doubt, however, ther such an obligation by a person who is not infeft be good in a question a singular successor, more especially in relation to a negative servitude, which there can be no possession. It may be good against heirs; but here n satisfied that there is no subsisting obligation.

wright's and Borthwick's Authorities.—2. Ersk. 9. 3. 35. and 37; Gray, Jan. 31. 1792, 513); 2. Stair, 1. 7; Murie, June 26. 1810, (F. C.); 1. Bell on Deeds, 156; 2. Bell on ds, p. 3. 20.

Wilson's Authorities.—Balfour, 161; 4. Stair, 176; 2. Stair, 7. 1. and 4; 2. Stair, 12. 11 = Ersk. 7. 8.

STRACHAN and DARLING, W. S.—A. GOLDIE, W. S.—J. GREIG, W. S.—Agents.

No. 100. COL. SINCLAIR and Others, Petitioners.—*D. of F. A*
J. SUTHERLAND and Others, Respondents and Pe
M'Leod.

Factor loco Tutoris.—Circumstances under which a person sugge by the party entitled to serve tutor at law, but who was abroad, was of the mother of the minors and her relations.

Dec. 19. 1829.
1ST DIVISION.

JOHN SUTHERLAND, Esq. of Forse, died possess heritable estate and large moveable funds. He had pillarity, whom he legitimized by marrying their moth death, and she was pregnant of a third. His nephew entitled to the office of tutor at law, but was abroad timated his intention of returning and taking the office petitions were then presented, praying for the appo loco tutoris,—the one by Colonel Sinclair and the rel side suggesting the son of Colonel Sinclair, who was to the Signet,—and the other in name of the childr her relations, praying for the appointment of a Mr. V said to be the nearest male relation on the father's sid

To the petition of Colonel Sinclair it was objec abroad, there was no certainty that he would ever re taken no steps to get himself appointed tutor at law his instance was incompetent.

On the other hand, it was maintained that such a founded; and as he was the person pointed out by th of the estate, and might immediately supersede the Court by serving, the person suggested by him oug and at all events, under the peculiar circumstances of mendation of the relations of the mother should not l

The Court granted the prayer of Colonel Sincla fused that of the other.

Their Lordships were of opinion, that, under the peculia case, it would be more beneficial to the children that the relations of the father, rather than that of the mother, sl

J. T. GORDON, W. S.—J. GORDON, W. S.—Ag

No. 101. J. WILLIAMS, Pursuer.—*Pyper*
His CREDITORS, Defenders.—*Macal*

Cessio Bonorum—Process.—After an interlocutor finding a part cessio is pronounced, it is not competent to ask an assignation of p

Dec. 19. 1828.
2D DIVISION.

THE pursuer Williams, who was on the half pay raised a process of cessio, the Court pronounced an him entitled to the benefit thereof, without making should assign any part of his half pay, no opposition

No. 101
Dec. 19. 1828.

ing made by his creditors. When he attended, however, to take the oath, compearance was made for the creditors, who craved that he should be ordained to assign part of his half pay. The Court holding this application to be too late, refused it, and decerned in the cessio.

No. 102.

W. Bonthorn and Others, Petitioners.—*Deas.*

Process—Ranking and Sale.—The Court refused to allow several purchasers in a ranking and sale to give in a joint petition for getting up their respective bonds of caution for the price.

Dec. 19. 1828.
2d Division.
T.

This was a petition presented by Bonthorn and three other persons who had each purchased separate lots of an estate sold in a process of ranking, and had consigned the price, praying for exoneration, and to have their several bonds of caution for the price delivered up. On the observation of the clerk that it was irregular for several purchasers to make a joint application for this purpose, and that a separate petition should have been presented for each, the Court appointed it to be intimated as a petition for Bonthorn only, reserving to the others to present separate petitions.

T. Leburn, S. S. C.—Agent.

No. 103.

J. Hamilton, Advocator.—*Maidment.*
Durie's Trustees, Respondents.—*Marshall.*

Dec. 19. 1828.
2d Division.
Ld. Mackenzie.
M'K.

The case mentioned ante, Vol. VI. No. 55, having returned to the Lord Ordinary, and no proving of the tenor of the Inferior Court summons and interlocutors having been brought, his Lordship, without having closed the record, remitted the cause simpliciter, with expenses. Hamilton having reclaimed, the Court recalled the Lord Ordinary's interlocutor; and, in respect there was no proving of the tenor brought, dismissed the process, but of new found due the expenses prior to the Lord Ordinary's interlocutor.

J. J. Fraser, W. S.—A. Sandy, S. S. C.—Agents.

No. 104.

T. M'Kenzie, Pursuer.—*Skene.*
J. Clark, Defender.—*Dundas—M'Dougal.*

Arbitration.—Circumstances in the conduct of an arbiter named in a contract sufficient to disqualify him.

Dec. 19. 1828.
2d Division.
Lord Medwyn.
E.

The pursuer M'Kenzie and the defender Clark entered into a contract of copartnery for the purpose of carrying on the business of distilling whisky, which, inter alia, provided that 'in case any difference or dispute shall arise between the partners during the existence of the copartnery, or after the dissolution thereof, relative to the business or winding up thereof, the same is hereby submitted and referred to the determination of Thomas Clark, Esq. of Auchterraw, and John

No. 104.

Dec. 19. 1828.

'Hood, Esq. factor, Invergarry, as sole arbiters, whc
'final, and with power to name an oversman in case o
the copartnery had subsisted for two years, causes
between the partners, in consequence of which it wa
up the concern and dispose of the distillery, which w
to one M'Donald, son-in-law to Thomas Clark, the
tract, at the price of £400, to be paid by three eq
three, six, and nine months. It was alleged by the
agreed on by the partners that three bills should
price, the first at three months in name of the co
off the company debts, which were more immedi
second at six months in name of the pursuer, and
delivered to him as his share of the proceeds; and th
in name of the defender, in like manner to be del
bill-stamps, however, could be procured at the place
was agreed that M'Donald should afterwards draw
according to forms given him, and transmit them
his father-in-law, who was also the defender's uncle.
bills, however, M'Donald made them all in name of
on, he transmitted them in this shape to Thomas Cl
both parties, the first bill was discounted, and the
the liquidation of certain company debts. The s
Clark, without the concurrence of the pursuer, deli
fender, having previously indorsed it; and the defen
it up to the pursuer according to their alleged ag
presented a bill of suspension and interdict against
Thomas Clark, to prevent them indorsing away the
which still remained in Thomas Clark's hands. Tl
but interdict being refused, the suspension was n
The pursuer, however, raised the present action of c
in which he was met with the preliminary defence
barred by the submission contained in the contract,
cepted by the arbiters since the dissolution of the co
it was answered, that Thomas Clark, one of the arl
had disqualified himself by his own conduct regardin
ceeds of which formed the subject of dispute.

The Lord Ordinary found that there was 'no gro
'tion against one of these arbiters stated sufficient
'mission, more especially since there is an express
'oversman in case of difference;' therefore sustain
defences, and dismissed the process, but without exp

The pursuer having reclaimed, the Court altered, a
'Thomas Clark cannot act as arbiter in this case;'
Lord Ordinary to proceed accordingly, finding no ex
party.

No. 104.
Dec. 19. 1828.

Lord Justice-Clerk.—I never can concur, on the ground taken by the Lord Ordinary, that the objection is cured by the power to name an overseman. Next to that of a judge, the situation of an arbiter is the most delicate. There must be nothing to bias him in one way or other. I am decidedly of opinion that this man has so mixed himself up with the matter in dispute, as to disqualify him from acting as an arbiter. I do not say that he has done so with an evil intention; but having indorsed the one bill, and the other being still in his hands, and his son-in-law having bought the distillery and the whole matter in dispute, being as to these bills, we cannot allow him to act as arbiter; though I lay no stress on his relationship to John Clark, as the parties entered into the submission knowing that.

Lord Glenlee.—I incline to be of the same opinion.

Lord Pitmilly.—I entirely concur with the sentiments expressed from the Chair.

Lord Alloway.—The situation of an arbiter appears to me to be even more delicate than that of a Judge, as what he does cannot be corrected; and if he mixes himself up with the matter, however innocently, we must hold him disqualified. As, therefore, I think there is something here that may give a bias, I concur in holding that he cannot be allowed to act.

Wotherspoon and Mack, W. S.—R. Roy, W. S.—Agents.

J. B. Fraser, Petitioner.—*Forsyth—Skene.*

No. 105.

Bankrupt—Sequestration.—Sequestration awarded, under the Bankrupt Act, of the estates of a writer, broker, and commission-agent.

Dec. 20. 1828.
1st Division.
D.

Mr. Bristow Fraser, writer in Edinburgh, presented a petition, with concurrence of a creditor, praying for sequestration of his estates, under the Bankrupt Act, as a broker. When the petition was moved, the Court, ex proprio motu, ordained him to give in a condescendence, 'stating the nature and extent of the said James Bristow Fraser's business as a broker, how long he has carried it on, to what extent he has 'contracted debts therein, and whether he has kept books relative to said 'business of broker.' In his condescendence he stated that he was a partner of the North British Loan Company; but their Lordships, not being satisfied, ordained him 'to give in an amended condescendence, 'stating more particularly the petitioner James Bristow Fraser's precise 'character as a broker; whether he be an insurance-broker or stock-'broker, or what else; as well as what are his dealings entitling him to 'that designation mentioned in the Act of Parliament; and further stating what is the nature of the dealings of the company whereof he 'affirms that he is a partner; and whether the said company be solvent 'or not.' He accordingly lodged an amended condescendence, in which he stated that in 1824 a company was formed under the above title for advancing and lending monies on securities, and disposing of all descriptions of property by sale, on commission or otherwise;—that it was to endure for twenty-one years,—the capital to be £200,000, divided into £4000 shares;—that the partners were to have right to the profits, and

No. 105. Dec. 20. 1828.

be liable for the losses;—that he was the holder o company had dealt in goods of various descriptions lishment for carrying on the business of brokers a —that he did not know whether the company w that there was no prospect of a dividend or repa that, separately, he had acted as a commission-age city, having been in the practice of raising mone negotiating bills, on which he charged commiss gained a considerable part of his livelihood; an patentee of an invention for propelling ships by machinery, on which he had expended sums of m that his petition was not opposed, but was sanctio and that there were numerous instances of seques circumstances having been awarded.

The Court, after expressing great doubts, and the other Judges, awarded sequestration.

J. Martin, Agent.

No. 106.

A. and J. Dunn, Suspenders.—*Greenshi*

W. Livingston, Charger.—*Jameson*—

Process—Implied Obligation.—1.—An explicit averment havi reasons of suspension, of a fact falling within the knowledge of tl by him, held to be admitted;—and,—2.—Circumstances under wh were held liable for the expenses of an action for the value of rep their father, who was their factor, but who apparently was the pr

Dec. 20. 1828. 1st Division. Ld. Corehouse.

Livingston obtained a lease of a house in T from Archibald Dunn, the father of the suspende the proprietor. He thereafter raised an action ment of repairs, in which, after a long litigation against Dunn, and found him liable in expenses ing and caption was thereupon executed against h thrown into prison, and having applied for the Act in the course of opposing the claim, discovered th sons) were the true proprietors. He then brought before the Magistrates of Glasgow for payment of expenses of the action, and of the diligence against of opposing his application under the Act of Grac after allowing a proof, decerned against them; and given, they brought a suspension. The record w revised reasons and answers, in the latter of whic that the suspenders 'not only knew of the action, b 'the repairs by, and at the sight of, the Inferior (denied in the reasons, it being merely stated tha 'penders were not parties to this action, but its e 'mated to them.' They admitted that they wer

house, and stated their readiness to pay for th
liability quoad ultra.

The Lord Ordinary pronounced this interl
'that the suspenders are proprietors of the ho
'they permitted their father Archibald Dunn
'of the property;—finds circumstances prove
'date of the action against Archibald Dunn, t
'presume that Archibald Dunn was answerabl
'for in the action;—finds it averred by the cl
'suspension, and not denied by the suspend
'tion against their father was in dependenc
'ordered in the Inferior Court;—suspends t
'charge is given for the expenses incurred in
'application for the benefit of the Act of Gra
'the letters orderly proceeded, and decerns.'

The suspenders reclaimed.

Jeffrey for the Suspenders.—The only mate
is, that we did not deny our knowledge of tl
and it is true that we cannot point out specifi
the record; but there is no evidence of the fa
of it; on the contrary, it is substantially denie

Jameson, for the Chargers, was stopped by

Lord President.—The interlocutor appe

Lord Gillies.—There is an explicit ave
knew of the existence of the action, and this is
say is, that it was not intimated to them.

Lord Craigie.—I think both parties are i

Jameson.—If any of your Lordships are
heard.

Lord Gillies.—Certainly; but we intend

The Court accordingly adhered.

J. Cullen, W. S.—C. Fisher,-

W. and J. Jack, Petitioners.-
M. Dalrymple, Respondent

Inhibition.—A defender who had been assoilzied from
been executed, found entitled to apply for a recall of it, an
as to get the inhibition scored.

Dalrymple raised an action before the S
the petitioners, on which he executed letters
having been lodged, which he was not in a c
to lodge replies, and decree of absolvitor wa
The agent of the petitioners, on the 8th of
discharge the inhibition; but no answer ha
sented a petition praying for recall, with e

No. 107. Dec. 20. 1828.

Dalrymple stated that he had no objection to the rec decree of absolvitor was a sufficient warrant for h scored, the petition was unnecessary, and therefore expenses.

The Court, however, being of opinion that the bound to be at the expense of extracting the decr granted the prayer, and found them entitled to expe

J. Hamilton, W. S.—Tod and Hill, W. S.—A

No. 108.

J. and M. Young, Petitioners.—*G. N*

Pupil—Tutor and Curator ad Litem.—Court refused a petition i infant to have a curator ad litem appointed in an action about to be being no action actually in dependence.

Dec. 20. 1828. 2d Division.

This was a petition presented in name of John an with concurrence of their mother, setting forth that t that Margaret was a minor, and John within the ye out tutors or curators; and that they were about t count and reckoning against the cautioners of a pers pointed their factor loco tutoris, and as such had i effects, but was now dead; and praying for the non ad litem in the action about to be raised, on the gro sidered doubtful how far a summons could be valid having no tutors. As this was an application of an Court delayed in order to enable the petitioners t cedents in which an appointment of this kind had beer the action. When the petition was again put out, petitioners referred to the following as analogous cas of Scotland, August 6. 1554, (A. S.); Ogilvy, N (4. Brown's Sup. 327); Scott, February 17. 1703, (January 18. 1773, (6052); stating, however, that th tion as unnecessary would equally answer the purp presented.

Lord Glenlee.—I doubt greatly whether there is an may be validated by the after appointment of a curator a raise their summons first, and then apply for the appointme

Lord Alloway.—I should have conceived that the idea in a pupil raising a summons to be a mere fancy, if one of t not told me lately that, in a case which came before him, h mons null. But as doubts have been expressed, and the C applications as to a wife, in regard to whom the objection c as to a pupil, I think it can do no harm to grant the praye

Lord Justice-Clerk.—I am not prepared to sanction There is a great deal in what Lord Glenlee says, that ever the appointment of a curator ad litem after the summons co ceive a curator ad litem to mean a curator ad litem pend would be dangerous for the Court to give power to raise ac

THE COURT, therefore, in respect that there was no action actually raised, refused the petition.

G. and W. NAPIER, W. S. Agents.

No. 108.
Dec. 20. 1828.

D. CORMACK, Petitioner.—*Jeffrey—Ivory.*
J. LAWRIE, Respondent.—*D. of F. Moncreiff—A. M'Neill.*

No. 109.

Sequestration—Personal Objection.—Held that the trustee of a sequestrated bankrupt, applying for the sequestration of a third party, was barred from founding on diligence done against that party upon a bill, of which the bankrupt was bound to have relieved him.

Dec. 20. 1828.
2D DIVISION.
Lord Medwyn.

THE respondent Lawrie, a builder in Edinburgh, feued a piece of ground from Mr. William Gardner, W. S., and entered into an agreement with him as to the building of houses thereon, which gave rise to a course of bill and cash transactions between the parties. Among the rest, Lawrie accepted a bill for £235, receiving at the same time from Gardner an obligation to relieve him. This bill Gardner discounted with the Bank of Scotland, who held an heritable security sufficient to cover their advances for him. When it became due, they did diligence against Lawrie for it; but, on being satisfied that Gardner was ultimately liable, they did not enforce it, having, however, made a search on letters of caption. In the mean time Gardner had been sequestrated, and the petitioner Cormack appointed his trustee; and in July last he presented a petition for sequestration of Lawrie's estates. This petition proceeded on the diligence executed by the Bank of Scotland on the bill for £235, that, as it was accompanied by an affidavit on the part of Cormack, a creditor of Lawrie's to the extent of £984; and, in the month of September, an action of count and reckoning was raised by Cormack to have this balance constituted. From the accounts produced in this process, however, it seemed very doubtful on which side the balance lay between Gardner and Lawrie, and there was reason to believe that Lawrie's funds were not sufficient ultimately to pay his engagements in full; and no other creditor appeared to join in the application.

In these circumstances, Lawrie pleaded, inter alia, in answer to Cormack's petition,

1. That Cormack, as standing in the place of Gardner, was barred peremptorie exceptione from founding, as the ground of sequestration, on the diligence done upon the £235 bill which had been granted for his accommodation, and which he was bound to retire; and,

2. That, in the circumstances of the case, it being doubtful whether any balance was truly due to Gardner's estate, and there being no proof of insolvency on the part of Lawrie, and no other creditor having come forward to support the application, there were just reasons for the Court, in the exercise of the discretion vested in them, refusing to award sequestration.

No. 109.
Dec. 20. 1828.

The petition having been remitted to the Lord the Bills, Lord Medwyn, before whom it came to cation, pronounced this interlocutor:—'In res' founded on to prove the bankruptcy of the resp' bill which the petitioner's constituent William G' retired in terms of his express obligation to th' petitioner, who insists in right of William Gard' exceptione from founding on such diligence in t' therefore refuses the prayer of the petition, and

The Court unanimously refused a reclaiming n additional expenses.

Lord Justice-Clerk.—I must own that I cannot which the Lord Ordinary refuses to grant the sequest in whose situation Cormack is now placed, stands boun his own hand to retire the bill, on the diligence on wh asked. Besides, this is an attempt to sequestrate, wh how the debt stands between the parties. It bears a ing this person; and we cannot shut our eyes to this, Cormack would have an overwhelming majority under t a trustee. But, under the peculiar circumstances of th sequestrate on this application. Though the applicatio creditor of this man has come forward to concur, and th alter.

Lord Glenlee.—I am of the same opinion. We ca except on good cause; and when, joined to the other c we see that no other creditor has come forward, I think trate. The Bank did not do diligence for their own beh but at the instance of the trustee; and as the personal o do not see any reason to alter.

Lord Pitmilly.—I am clearly of the same opinion. Lord Ordinary's ground for refusing to sequestrate is r others also sufficient, because this man requires to brin his debt in September, while the application was made ir

Lord Alloway.—I entirely concur. I never remem applied for by a trustee on a sequestrated estate, thoug tent; yet it is not in the ordinary course of proceeding. there are two sufficient grounds for refusing sequestrat Lord Ordinary that, in the particular circumstances of cannot found on this diligence; for I conceive that a pers against diligence, as well as any thing else. Now there i Gardner to pay this bill, and we cannot allow him to fou of which he was bound to relieve Lawrie. The other g sufficient. This is the first attempt to sequestrate while ence, in which it is uncertain to whom the balance will b not see evidence of any balance in the papers. It is impos sequestration.

Cunningham and Walker, W. S.—A. Johnston, W

No. 110.

MRS. M. M'KENZIE and Others.—*Rutherfurd.*
J. GRIEVE.—*Forsyth.*

Judicial Factor—Multiplepoinding.—The disposal of certain trust-funds, over which the trustee had obtained the appointment of a judicial factor, being before the Court in a process of multiplepoinding—Held that the factor was not entitled to demand that the funds in the hands of the trustee should be paid over directly to him, but ordered to be consigned in a bank in his name, and the receipt lodged in process.

Dec. 20. 1828.
2D DIVISION.
Ld. Mackenzie.
F.

MRS. M'KENZIE and others having raised a process of multiplepoinding in name of Mr. Broughton, and other trustees appointed by the deused Mr. Wilson of Loudwater in his deed of settlement, for the distribution of the trust-funds in terms of the deed, compearance was made Grieve, accountant in Edinburgh, who had been appointed by the urt judicial factor on the trust-estate, in terms of powers contained in trust-deed, upon the application of Broughton, who wished to relieve nself of the management. Grieve craved that a balance admitted by oughton, and which he was ready to pay, should be ordained to be d over to him as judicial factor, and the Lord Ordinary pronounced order accordingly. Mrs. M'Kenzie, however, and the other claimants laimed against this interlocutor, and contended that the balance ought to be paid to Grieve; but as the whole matter as to the disposal of trust-fund was now before the Court, it ought to be consigned, and receipt lodged in process.

The Court recalled the Lord Ordinary's interlocutor, and appointed money to be consigned in Grieve's name, but the receipt to be lodged process.

R. ROY, W. S.—D. FISHER, S. S. C.—Agents

No. 11

PROFESSOR COUPER and Others, Pursuers.—*Robertson.*
MARQUIS of BUTE, Defender.—*Jeffrey.*

Dec. 20. 18
2D DIVISIO
Jury Court
F.

THE cause mentioned ante, Vol. V. No. 401, having been remitted to e Jury Court, a verdict was there obtained in favour of the pursuers, ding that at the time the bond in question was transmitted by the late mes Couper to the late Marquis of Bute, he was of unsound mind, and capable of managing his own affairs; and that at the time the bond as so transmitted, the obligation therein contained had not been exnguished. This verdict having now come to be applied, the Court ecerned for payment of the nine years' annuity fallen due before the eath of James Couper, with simple interest, and remitted to the Lord rdinary, quoad ultra, in regard to a claim for accumulated interest, and or a proportion of a year's annuity for a few months which the deceased ad survived the last term.

J. G. HOPKIRK, W. S.—T. FERGUSON, W. S.—Agents.

No. 112. W. GRAHAM and G. SINCLAIR, Suspenders
D. CUTHBERSTON, Charger.—*Mor*

Expenses—Process.—A general finding of expenses in a suspensio
cree does not carry the expenses incurred in the Inferior Court.

Dec. 20. 1828.
2D DIVISION.
K.

IN pronouncing the decision in this case, mentio
whereby the Court suspended simpliciter the decre
Lanarkshire, thier Lordships found the 'chargers
but without any special mention of those incurred in
In their account given in to the auditor, the suspen
expenses, which were, however, struck out by him, a
the finding of the Court. On the auditor's report
suspenders objected to it in so far as the Inferior Cc
not allowed.

LORD JUSTICE-CLERK.—Our attention was not called to
advising. If it had been, we would probably have given
think we have done so by the general finding, and we cannot
The other Judges concurred.

THE COURT accordingly repelled the objection, approv
decerned.

J. PATTISON jun. W. S.—W. and A. G. ELLIS, W. S.—

No. 113. MRS. M. LITTLE and HUSBAND, Raisers.—*Jame*
J. WIGHTMAN, Claimant.—*G. G. Be*

Real Burden—Homologation.—1.—Lands cannot be declared to be
burden in a process of multiplepoinding as to the price brought by
full payment or a discharge.—2.—A party holding a real lien not bar
the lands shall not be declared disencumbered, by having claimed in th
the price, and allowed a judgment, finding the sale valid, to be pronou

Jan. 13. 1829.
2D DIVISION.
Ld. Mackenzie.
F.

THE trustees of the late Nichol Shaw, in the year 18
tenement in Dumfries to the late David Williamson at t
which was declared to be a lien and real burden on the
accordingly inserted as such in the disposition to Willia
feftment which followed thereon. In 1822 William
tenement for sale by public roup in three lots, one of w
by Mrs. Little at the price of £880,—the other lots be
and £50 respectively. Mrs. Little immediately consig
the lot purchased by her, and then raised a summons c
clusion to have it found that the sale was valid and e
with the ordinary conclusions of a multiplepoinding as t
the price; and likewise concluding, that upon her accoun
to the defenders, who should be found to have right the
purchased should be 'declared to be free and disencumb

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and burdens affecting the same, and the different parties, who shall be found entitled to the whole or any part of the price, decerned and ordained to execute discharges and renunciations, so far as their rights, debts, and diligences shall have affected or extended over the said subjects, so that the record may thereby be expunged and freed of the same;' or otherwise, if it should be found that the sale and disposition were not valid, that Mrs. Little should be declared not liable in payment of the price.

Instead of first of all insisting in these declaratory conclusions, Mrs. Little proceeded to take an interlocutor, finding her liable in once and single payment only, as in an ordinary multiplepoinding. She gave in a condescendence of the price as the fund in medio, and an order pronounced for parties interested to lodge their claims. Several claims were lodged, and, among others, one was given in for Wightman, the survivor of Nicol Shaw's trustees, claiming to be ranked no loco for the £650, which had been declared a real burden on property in the disposition to Williamson, with interest; under reservation, however, of the real lien over the subjects till the whole amount of the debt and interest should be paid, and also of all competent objections against the action, and the several conclusions thereof. Before any decision was pronounced on the several claims, Mrs. Little was in a minute, praying to have decree of declarator that the sale was void; and after this minute had been allowed to be seen by all concerned, decree was pronounced in terms of it. Pending the process, Williamson, without having executed titles in favour of Mrs. Little, whereby an expensive procedure became necessary in order to make up titles, charging his heir, and leading an adjudication in implement. This procedure was conducted by a writer in Dumfries, who held the titles, and who claimed a preference for the expense over the price of the subjects, in virtue of his hypothec. When the amount of his account was deducted from the fund in medio, there was not sufficient left to discharge the burden in favour of Shaw's trustees; but Mrs. Little craved that decree should now be pronounced in terms of the conclusion of the summons, that, on her making payment to the parties who should be preferred, the lands should be declared free of all burdens affecting the same. Wightman having opposed this, on the ground that the lands could not properly be freed of the real lien attaching to them, except by payment of the debt or by a voluntary discharge, the Lord Ordinary pronounced an interlocutor preferring the writer primo loco on the fund in medio for his account, and Wightman to the balance in virtue of the real lien, 'in extinction pro tanto of the said real lien or burden;' declaring the subjects 'to be freed and disencumbered of the said real lien or burden, to the extent only of the balance payable to the said John Wightman;' and his Lordship granted warrant for payment of the consigned price accordingly.

Against this interlocutor Mrs. Little gave in a reclaiming note, con-

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tending that as she was only bound to have paid t
of getting a valid conveyance to the property, and
parties into the field by a summons which conclu
that the sale was valid, and Wightman having allo
nounced finding it to be so, whereby she became bo
and having claimed that price in liquidation of his r
part of it under an interim decree, was barred fr
having a decree finding the lands disencumbered.

To this it was answered, that it was impossible tc
burden in the manner here attempted; and that W
respect homologated the proceedings, or barred hin
to the property being so disencumbered, seeing that
reserved the lien to the full amount of the debt, tog
tions to the several conclusions of the libel; but he
full payment from Mrs. Little, to assign to her the l
tended over the two other lots.

Lord Justice-Clerk.—We are all agreed that this lien
mologation, or any thing else; but an opportunity should be
new offer to assign the lien over the other lots, on receiving

Lord Glenlee.—The lien certainly cannot be cleared, e
voluntary discharge. Still Mrs. Little might have said sh
consign or pay the price, or she may yet say she is not obli
signed money to be lifted till the incumbrances be dischar
case should go back to the Lord Ordinary to hear her upon

Lord Alloway.—I am quite clear that the Court has no
lien discharged. But I doubt if the writer's claim, which alo
in full, be preferable to this heritable creditor; and I woul
included in the remit for consideration, as well as the other
by your Lordships.

The Court pronounced this interlocutor:—'Find th
'fender has not been affected by the sale of the subje
'constituted, and in so far adhere to the interlocuto
'remit to the Lord Ordinary to hear parties as to the
'arrangements for the relief of the pursuer, and also
'extent of the preferable claim of the agent, in virtue of l

R. Welsh, S. S. C.—W. Stewart, W. S.—Agent

No. 114.

J. Johnston, Pursuer.—*Sol.-Gen. Hope*—.
A. Cochran and Trustee, Defenders.—*Fullerto*

Heir and Executor—Interest—Approbate and Reprobate—Legiti
in his son's contract of marriage, become bound for a certain provis
the marriage; and having thereafter executed a general settlement, wl
the payment of this provision out of the rents of an estate entailed b
wherein he also left certain provisions to a daughter, declared to be in fu
and, on his death, the daughter having refused to accept these, and beta
gitim—Held,—1.—That in estimating the executry of the deceased, the
in the son's contract was not to be deducted.—2.—That the daughter

on the deed, the provisions of which she had repudiated, to show that this sum was not a burden on the executry fund.—3.—That an advance of legitim being made during the father's life, interest on it, as well as the principal, falls to be deducted;—and,—4.—That arrears of feu-duties due by a vassal are a burden on his executor, not on his heir, and must be deducted from the executry in estimating the legitim.

No. 114.
Jan. 13. 1829.
2d Division.
Ld. Cringletie.
F.

THE late Mr. Cochran of Ashkirk, in the contract of marriage of his son, the defender, entered into on the 11th of March 1802, bound himself, his heirs &c., to pay to the spouses, in conjunct fee and liferent, and to the issue of the marriage in fee, the sum of £6000, restrictable to £4000 in the event of there being only a daughter of the marriage. In the contract of marriage between his second daughter Jean with Mr. Thomas Brown, Mr. Cochran became bound to pay Mr. Brown £500 at the first Whitsunday after his death, in consideration of which provision Mrs. Brown renounced her claim of legitim; and Euphan, another daughter of the occasion of her marriage to the pursuer Johnston, received from Mr. Cochran the sum of £500. In the year 1809, Mr. Cochran entailed estate of Ashkirk on his son and a certain series of heirs; and of the date he executed a general settlement of his affairs, narrating the vious provisions in favour of his children, and conveying to his his estates, real and personal, 'with and under the burden of the yment of my debts, provisions &c.,' and, inter alia, 'of the following ditional provisions, viz. To Mrs. Euphan Cochran, otherwise Johnston, my daughter, in liferent, and to the child or children of her body ually in fee, the sum of £1500,' and other sums to Mrs. Brown, to the children of a daughter deceased; which provisions were declared to be 'in lieu, and in full satisfaction to them respectively, of all rns' part of gear, legitim, executry, and other legal and conditional ms or demands, of whatever nature or however constituted, arising competent to them against me or my representatives, or out of my te, real or personal.' Prior to the execution of this deed by Mr. ran, his son's wife had died, leaving issue of the marriage an only nter, whereby the provision in the marriage-contract became reed to £4000. With reference to this provision, the deed of settle contained the following clause:—'And whereas, by the predecease e said Elizabeth Somerville, (his son's wife,) leaving only one child e said marriage, a daughter, viz. Miss Robina Cochran, she will ually be entitled to the fee of the said restricted provision, in case hould prefer the same to the more ample provision and rights of ssion which may eventually open to her, and which, if accepted by vill preclude her claims under the said contract; and whereas the and funds, real and personal, hereby settled by me on my said fee-simple, may be nearly adequate to the special burdens with the same stand charged, as well as the foresaid restricted pro- ; therefore my said son, by acceptance hereof, or of my entailed s in terms of the settlements thereof, and the heirs succeeding to herein, stand pledged and engaged, as aforesaid, to satisfy and

No. 114.
Jan. 13. 1829.

'procure discharges of every debt and obligation, prc
'of every description, created or contracted by, or inc
'that in such habile, proper, and effectual manner as
'hereafter cease to exist, or afford action or execut
'tailed estates. And whereas I deem it expedient,
'after mentioned, that, after my decease, a sum no
'per annum shall be set apart from the rents and rev
'of Ashkirk, and stocked out at interest, until a cap
'gressive accumulation, be raised therefrom to the am
'capital originally assured to him under the aforesai
'riage, subject to the regulations therein mentioned,'
therefore named trustees for carrying this accumulati
and added, 'But in trust, for the purposes in the diff
'specified, viz. 1. In the event of the said Robina
'cluded from the succession to the said entailed es
'and Musselburgh by an heir-male of his body, for
'the aforesaid restricted provision of £4000 sterling
'mother's contract of marriage, the surplus of such
'his absolute disposal: But in the event of her succe
'entailed estate in default of heirs-male of his body,
'case she shall have no claim to that provision; bu
'together with the surplus of the said £6000, belong
'absolute disposal of her father, which she shall be bo
'him and his disponees; and failing my said son and
'body, the said sum to be liferented by my survivi
'daughter at the time, and on their demise to descend a
'of their children as are not in possession of the entailed

Mr. Cochran died in 1812, when his son, the defende to the entailed estates, and took up the other succession. trated in 1820, at which period no part of the restricted vour of his daughter had been set apart from the rent estate; but in a question between her and Paterson, wh pointed trustee on her father's sequestrated estate, the C she was entitled to have £500 yearly set apart from entailed estate till the sum of £4000 was accumulated. (Se No. 76.) Until Cochran junior's bankruptcy, Mrs. Jo husband had accepted the interest of the sums provided t senior's deed of settlement; but on that event she repud visions, and claimed her legitim. This claim having bee trustee, she and her husband raised the present action, (c husband alone since her death,) concluding for payment legitim. In defence against this action it was pleaded, th the interest of the provisions in the deed of settlement, clared to be in lieu of all legal claims, and by possess Musselburgh disponed to Mrs. Johnston in liferent, and fee, by a separate revocable deed, but referred to in the

ment, she and her husband had homologated that deed, and could n repudiate the provisions therein contained, in order to betake themselv to Mrs. Johnston's legal claims.

The Court (November 29. 1825) found that there was no sufficie evidence of homologation, and remitted to the Lord Ordinary with i structions 'to take an account of the free executry of the decease 'Archibald Cochran, and to do further as he shall see cause.' (See ante Vol. IV. No. 189.)

The Lord Ordinary thereupon appointed the pursuer to give in a stat of the executry of the late Mr. Cochran. A state was accordingly give in, showing the amount of moveable funds to be upwards of £9000. Thi was admitted by Cochran junior and his trustee to be correct; but they gave in objections, in which they claimed that the following deductions inter alia, should be made from that amount in fixing the share belong ing to the pursuer as the legitim of his deceased wife, viz.

1. The restricted provision of £4000 contained in Cochran junior's contract of marriage.

2. The £500 provided to Mrs. Brown in her contract of marriage which was still unpaid; and,

3. Certain arrears of feu-duty due by Mr. Cochran at his death.

And they also claimed that there should be imputed in extinction o the legitim,

1. The £500 paid by Mr. Cochran to Mrs. Johnston on occasion o her marriage, with interest thereon from that period; and,

2. The value of a house in Musselburgh disponed by a revocable deed to Mrs. Johnston in liferent, and her children in fee.

In support of these claims, Cochran junior and his trustee contended,

1. The provision of £4000 in his son's contract of marriage undoubt edly formed a debt against the late Mr. Cochran, and so falls to be deducted from his executry, unless some change has been effected by the terms of the general settlement directing a fund to be accumulated for payment of it out of the rents of the entailed estate. But this provision, in the first place, was not meant to relieve the executry funds, its object being merely to give additional security to Miss Robina Cochran for her provision; or, at all events, it only gives rise to a claim of relief, which does not alter the character of the provision as a debt on the executry funds; — and, secondly, the pursuer is barred from founding on the general settlement to the effect of increasing the free executry, seeing he has repudiated the provisions contained in that deed, and he cannot approbate and reprobate the same deed.

2. It is impossible to doubt that the £500 provided to Mrs. Brown is a debt of the late Mr. Cochran, and must be deducted from his executry.

3. Arrears of feu-duty form a burden on executry funds; for although in the case of Wilson, July 1718 (5455), the opposite rule was adopted, this has been acknowledged to be a bad decision, since it has been finally settled that such arrears go to the superior's executor, and not to his heir,

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as the same fund cannot be moveable quoad the superior, and heritable quoad the vassal; and accordingly Erskine evidently disapproves of that decision.

4. It is not disputed that the £500 advanced to Mrs. Johnston on her marriage must be imputed in extinction pro tanto of the legitim; but the interest also must be so imputed, as, if the sum had not been paid till the death of Mr. Cochran, the interest would have been in bonis of him, and so far increased his executry. And as to the case of Skinner, December 20. 1775, founded on by the pursuer, it was a very special case, where a father handed over to his son a sum of £100, which he held, without payment of interest; and it cannot rule the present case.

The pursuer answered—

1. The effect of the provision in the general settlement regarding the £4000 is undoubtedly ultimately to relieve entirely the executry from the burden of it, which must in any event fall upon the rents of the entailed estate; and although, therefore, this sum might have formed a burden on the executry, it does not actually do so, and consequently deduction cannot be allowed. Nor does the pursuer, in referring to the general settlement which he has repudiated, in order to show that this sum does not form a burden on the executry, approbate and reprobate the same deed; for he claims nothing under that deed. He merely refers to it as a piece of evidence; and the rule of approbate and reprobate only applies to the case of a party attempting to take something under a deed which he in part rejects.

2. The deduction of Mrs. Brown's £500 is not seriously disputed.

3. Arrears of feu-duty, being debita fundi, properly form a burden on the heir succeeding to the feu, which may be evicted from him ob non solutum canonem; and he could not claim relief from the executry in order to preserve to him the feu by payment of the arrears. The only case on the point (that of Wilson) has so settled the question; and although it has since been found that arrears of feu-duty belong to the superior's executor, that cannot affect the question as to whether the burden of such arrears falls on the heir or the executor of the vassal, which depends on totally different principles. The superior's executor succeeds because the arrears formed a debt exigible before his death, and which if paid, would have formed part of his moveable funds; while the vassal heir should be liable to pay such arrears, because they form a burden on the subject to which he succeeds.

4. The case of Skinner lays down a rule as to the not imputing of interest on an advance of legitim in part payment of it, which ought to be followed; and the specialty there can make no difference on the point because, if the father had kept the £100 there in question in his own hands, his funds would have been so much the greater by the amount of interest, whether he was liable in payment of interest on that sum to another party, or no.

The parties also argued the question, whether the value of the hou

Musselburgh ought to be imputed pro tanto in extinction of the legi- No. 114.
n. But as the Court ordered Cases on that point separately, it is unne- Jan. 13. 1829.
ssary to advert to it.

The Lord Ordinary having reported the cause on Cases, stating his inion in the subjoined note,* the Court, as above mentioned, ordered

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* The Lord Ordinary has advised this cause, and perused all the settlements of the late Mr. hran of Ashkirk which bear on the question at issue between the parties, which is to ertain the amount of the free executry left by him, in order to determine what is the amount e legitim due to Mrs. Johnston.

he points agitated on Saturday last, the 7th instant, by the counsel for the parties, were e: 1. Whether a sum of £4000 provided by Mr. Cochran in his son's contract of mar- e to a child thereof, in case there should be only one, ought to be considered as a debt, thereby deducible from the whole mass of executry; or whether it ought not to be held e a burden thereon, in respect that a separate and independent fund was established for its harge? 2. Whether a sum of £500 provided to his daughter Jean in her contract of riage with her husband Mr. Brown is to be reckoned a debt due by her father at his death? Whether arrears of feu-duties due by Mr. Cochran at his death are a burden on the exe- r, or on the heir? 4. Whether Mrs. Johnston is bound (on the supposition of her taking legitim) to give credit for £500 she received from her father during his life, with interest on from the date of the advance? And, 5. Whether she is bound to give credit for the e of a house in Musselburgh, disponed to her in liferent by her father, to commence after death, by a deed 6th July 1804?

he Lord Ordinary will advert to these in their order.

he question of £4000 depends entirely on the effect of Mr. Cochran's settlement dated ugust 1809; for, independent of that deed, there cannot exist a doubt that it was a personal created by him in his son's contract of marriage. From that settlement there arises some ety. It was in favour of his son, and conveyed to him certain heritable property, and all personal estate. He left by it various provisions, which, with the said £4000 alluded to , amounted to £9400; after which follow these words, 'And whereas the estate and funds, l and personal, hereby settled by me on my said son in fee-simple, may be nearly adequate the special burdens with which the same stand charged, as well as the foresaid restricted ovision, (viz. the said £4000); therefore my said son, by accepting hereof, or my entailed ates in terms of the settlements thereof, and the heirs succeeding to him therein, stand dged and engaged, as aforesaid, to satisfy and procure discharges and extinctions of every bt and obligation, provision and bequest of every description, created or contracted by, or cumbent on me.' The Lord Ordinary considers it very clear that the whole real and per- al estate conveyed by that deed was specially burdened for payment of these debts and visions; and he thinks that the respective subjects, viz. heritable and moveable, were bur- ed suo ordine, viz. the personal estate first for personal debts, and next the heritage. But re follows another provision in the same deed, which seems to him to exempt the heritage l moveables conveyed in fee-simple, and to lay the burden of the said £4000 on the tailzied ate. It is necessary, for the sake of perspicuity, to mention that Mr. Cochran, in his son's ntract of marriage, provided £6000 to the children of the marriage, other than the heir; d, in case of there being one child only, £4000. With reference to this provision, the tlement 1809 bears, immediately following the above-recited clause, 'And whereas I deem t expedient, for the purposes after mentioned, that, after my decease, a sum not exceeding £600 (£500) per annum shall be set apart from the rents and revenues of the estate of Ash- kirk, and stocked out at interest, until a capital shall, by progressive accumulation, be raised therefrom to the amount of £6000, the capital originally assured to him under the aforesaid contract of marriage, subject to the regulations therein mentioned.' Mr. Cochran herefore named trustees for carrying this accumulation into execution, and adds, 'But in trust, for the purposes in the different events after specified, viz. 1. In the event of the said Robina Cochran (his son's only child) being excluded from the succession to the said entailed estates of Ashkirk and Musselburgh by an heir-male of his body, for payment to her of the aforesaid restricted provision of £4000 sterling in terms of her mother's con- tract of marriage, the surplus of such capital being at his (Mr. Cochran son's) absolute disposal: But, in the event of her succeeding to the said entailed estate in default of heirs-

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additional Cases on the question regarding the house in Musselburgh; and on the other points their Lordships found that 'the provision of the sum

'male of his (son's) body, then and in such case she shall have no claim to that provision; 'but the same shall, together with the surplus of the said £6000, belong to and be at 'the absolute disposal of her father, which she shall be bound to convey to him and his dis- 'ponees; and failing my said son and the heirs of his body, the said sum to be liferented by 'my surviving daughters or daughter at the time, and on their demise to descend and belong 'to such of their children as are not in possession of the entailed estate,' &c.

From this it appears clearly to the Lord Ordinary that this sum to be accumulated from the reserved fund of £500 yearly out of the rents of the entailed property was not meant nor was made a fund supplementary of the fee-simple estate to pay that sum of £4000, but was created on purpose to pay it; and on the daughter succeeding to the entailed estate, she was bound to repay or reconvey it to the heirs and disponees of her father; and failing them, to Mr. Cochran's own daughter in liferent, and their children in fee, equally among them. If, therefore, Mr. Cochran's fee-simple estate was burdened with this debt, (for a debt it was,) so as to pay it to Miss Cochran primo loco in the mean time till the fund could be accumulated from the savings of the rents of the entailed estate, she was bound to assign to her father, or the executors of her grandfather, her right to the said accumulating fund, and they must have drawn back the sum paid away by them. And the clear conclusion arising from this is, that this £4000 is not an ultimate burden on the late Mr. Cochran's executry, and cannot be charged against it as a debt for which it is ultimately liable.

2. With respect to the sum of £500 provided and still due by the late Mr. Cochran in his daughter Jean's contract of marriage, the Lord Ordinary has no doubt that it is a debt, and must be deducted from the whole executry.

3. The same is his opinion upon the arrears of feu-duties due by Mr. Cochran at his death. If they had been paid, they would have so far diminished the executry. If they had been due to instead of by him, they would have belonged to the executor, as has been uniformly decided; and for that reason the Lord Ordinary thinks that the arrears in question are a debt on the executor, although he admits that there is one decision, 29th July 1718, Wilson, Morison, p. 5455, finding that the arrears of feu-duties are a burden on the heir, for which he has no relief. This is but a single decision; and being, with all due submission, contrary to the principle uniformly decided, that arrears of feu-duties due to a deceased belong to his executor, the Lord Ordinary has presumed to dissent from it. He thinks that if arrears be due by the heir, because they arise from the feu-contract, which is the ratio of that decision, they must, for the same reason, belong to him; and yet the contrary has been established.

4. The two remaining points are, How far the pursuer is obliged to impute, towards satisfaction of her legitim, the provisions she obtained from her father during his life? And with respect to the £500 she got at her marriage, there is no doubt about it. Indeed she did not dispute it at the bar, but she said that the interest must not be reckoned on it; for which she referred to the case of Skinner, 20th December 1775. But that case is no authority, seeing the facts are quite different. There Skinner's father borrowed a sum of £100 from his son-in-law, which he gave to his son, the pursuer in that case. But the bond given by the father to his son-in-law expressly bore that he was not to be liable for interest on it during his life. The defender pleaded that the pursuer was bound to impute the £100, with interest on it from the time he received it, to account of his legitim; and the Court found that he must impute the capital, but was not liable for interest. And the principle there seems clear, that as the father's personal estate was not diminished by payment of interest during his life, the son could not be required to increase that estate by paying interest to it. If, on the other hand, the father had paid interest on the £100 during his life, all that interest would have been advances to his son, and would have been imputable to the legitim as well as the principal sum. The fact here and the principle are quite different. If the late Mr. Cochran had not advanced to the pursuer the £500, the same, with all the accruing interest, would have been in bonis at his death. The interest, therefore, of the capital is an advance to her as much as the capital itself, and, in the Lord Ordinary's opinion, ought to be so reckoned in every case where a child repudiates his or her father's settlements.

There were other trifling articles on which the parties said that they would not differ, and did not bring them forward to the Lord Ordinary.

'of £4000 contained in the marriage-contract of Archibald Cochra
'junior, and therein provided to the issue of that marriage, was thereb
'made a real burden upon the entailed estate of Archibald Cochran senio
'as affecting the rents thereof, and is not a burden upon the executry c
'the said Archibald Cochran senior, and cannot be charged against tha
'executry;—that the sum of £500 provided to Jean Cochran in he
'contract of marriage is a debt which falls to be charged as a deb
'affecting the whole executry of the said Archibald Cochran senior
'—that the arrears of feu-duties must in like manner be charged a
'a debt affecting that executry;—that Mrs. Johnston was bound t
'impute the provision of £500 received by her during her father's life
'with the interest thereof since payment, in satisfaction pro tanto of he
'legitim.'

The Judges all concurred with the Lord Ordinary on the third and fourt points. On the first point—

Lord Glenlee observed—I do not think the doctrine of approbate and repr bate applies here, as Johnston does not claim through and by this deed. He on says this deed gives rights to other parties, which are of such a nature as founds tl objection against striking off the £4000 from the executry. It is quite unco nected with the provisions as to his other children. But the objection to Joh ston's plea is, that this was a debt binding the whole executry, and that the clain ant of the legitim has nothing to do with the claim of relief competent against tl heir of entail. But I doubt this, as, if not only a claim of relief but a fund l created, is it not to have effect? Attend to the way in which bishops' quots a regulated by the act 1659. It says, where there are heritable debts, and the he is able to pay them, these shall not be struck off the whole head of the executry Now here, holding there is a sufficient fund, I think it should not be struck off th head of the executry in hoc statu.

Lord Pitmilly.—I am disposed to concur in the views taken. The doctrine of approbate and reprobate does not apply.

Lord Alloway.—I view the case much in the same light. Supposing a declaration by a party deceased as to an heritable bond being declared to affect the legitim: The law declares it is ineffectual, though it might affect the dead's part. The legitim was beyond his control; and I agree in the Lord Ordinary's view on this point, that though no party can approbate and reprobate the same deed, yet the party is not here claiming any thing under this deed. Had there been no such deed as this, the whole was a personal debt. But, supposing an heritable bond had been granted as in lieu of the whole claim, that would not have affected the executry in any way. This lady does not claim any part of this £4000, but says it is part of the heritable estate, and not executry.

Lord Justice-Clerk.—I was much moved by the plea maintained by the defenders, that as the £4000 was originally a manifest burden on the moveable estate of the deceased, it cannot be thrown on his heritable property, without the pursuer, who is claiming legitim in right of his deceased wife, having recourse to the provision in the general settlement of 1809, but which deed he is reprobating in rejecting the provisions there made for her, and betaking himself to the claim of legitim. The deceased only made this special provision as to the £4000 in con-

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templation of the whole deed having effect. It is an unum quid containing this special purpose as only one branch, and thus the question of approbate and reprobate is raised. It is said to be only as evidence for which the deed is looked at. But if you reject the general settlement, can we say this is not a part of the general purpose? and therefore I must confess that the doctrine of approbate and reprobate seems to me to apply. There is a sort of subtlety in the argument of the pursuer. He does not exactly claim under the deed; but he says that effect is to be given to it, so as in substance to increase the executry by £4000, and this comes to the same thing. An heritable bond would be quite different, and would stand on its own legs. This is my doubt and difficulty, to allow the pursuer, who rejects the deed, to found on this clause. As to the other points, I have no doubt.

T. Darling, S. S. C.—Donaldson and Ramsay, W. S.—Agents.

No. 115. H. Johnston, (for Leith Bank,) Complainer.—*Fullerton—Anderson.*
A. Scot, Respondent.—*Robertson.*
T. Small, W. S.—*Gillies.*

Law Agent—Contempt of Court—Summary Complaint—Process.—Held,—1.—That a law agent is not responsible for false statements in a bill of suspension communicated to him by his client, and pertinent to the cause.—2.—That the client is not liable to be punished for a contempt or abuse of the forms of Court in respect of these false statements;—and,—3.—That it is irregular to produce affidavits in support of the statements of a party.

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Scot who had been agent at Langholm for the Leith Bank, having been threatened to be charged by Johnston, on behalf of the Bank, on a bond for £4000, presented a bill of suspension, which was refused by the Court on the 10th of July 1827. On the 9th of June 1828, Scot presented another bill against a threatened charge on the same bond, and on one for £5000. The Court, on the 26th, refused the bill relative to the bond of £4000 as incompetent, but passed it as to the other bond. Letters of horning having then been raised on the £400 bond, Scot offered another bill of suspension, which was again refused as incompetent on the 21st of November. Mr. Small, W. S., acted as agent for Scot, and had done so for twenty years. In the meantime while the Bank had applied to the Court for a sequestration of the estates of Scot under the Bankrupt Act; and after the refusal of the last of the above bills, Scot, as was alleged by the Bank, went to England, and there induced a person of the name of Carruthers, who it was said had lately obtained a cessio, to make affidavit in presence of a Mr. Lightfoot, a Master Extraordinary in Chancery, that Johnston, on behalf of the Leith Bank, owed him £100; that the Bank had traded in England, and had committed an act of bankruptcy; and at the same time Carruthers granted a bond in terms of the English Bankrupt Statutes. No docquet, however, was struck; and Lightfoot, having doubts, communicated the circumstances to his agents in London. On the 2d of December Scot wrote to Mr. Small, 'that

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Sunday I expect to forward you some papers of very great import-
ance,' and he requested that he would look after them on the arrival
of the mail. He did not, however, state what the nature of these
papers was. On the 6th he again wrote to Mr. Small, and transmitted
to him a bill of suspension and interdict prepared by himself. In
his letter he stated that 'I now send you bill of suspension and
interdict against Kerr and Johnston, with the important production
referred to it, and trust that you will use every effort to procure a sist
for interdict on Monday as soon as the Bill-Chamber opens, and send
me a certificate by that post. You are aware it is of the very deepest
importance to me that you should move the Lord Ordinary to afford
me safety on the present occasion. If I can possibly borrow the com-
mission of bankruptcy itself, and enclose it in the parcel, I will. In
that case it can also be shown to the Lord Ordinary; but I am con-
vinced the letter from the solicitor to the commission is quite sufficient
in the first instance. You cannot, I think, borrow up the bill and pro-
ductions by the late Act of Sederunt, otherwise I should have liked to
have had them for a few days.

You will receive this to-morrow night, which will give you time to
consider the matter, and Walter will help all that he can. I return the
Act of Sederunt, in case you need it. I hope the sequestration has not
come on, and that it will be refused. If not come on, you must
get counsel to state the commission of bankruptcy, which has been
issued against the Bank, as a bar to their proceeding further in the
matter. I have written a few lines to Messrs. Skene and Marshall, re-
questing them as a favour to do all they can. Walter can deliver them,
and you can aid what I have said by your own hints.

Entreating your earnest attention to these matters, I am, &c.

You have the certificates of captions having been prematurely ex-
tracted; they were in a bundle when I was last in town. Keep all quiet
what course is pursuing by the Bank's creditors. Walter will copy
Lightfoot's letter.

Take no opinion from the clerks at the Bill-Chamber; pay them the
fees, and let the Ordinary judge. Borrow the production with the bill,
if you can.'

Mr. Small accordingly presented the bill of suspension, in which it was
stated that 'the Bank have committed several acts of bankruptcy, and
that a commission of bankruptcy has in consequence just been issued
by the Lord Chancellor, at the suit of some of the Bank's creditors,
against the charger Johnston, as one of the managers or public officers
of the company or copartnership carrying on the trade and business
of bankers in the city of Carlisle in the county of Cumberland, and
at Leith and other places in Scotland, under the style and firm of
the Leith Banking Company.' Scot therefore maintained that they
had no title to insist; and the bill concluded with this statement, 'in
order to satisfy your Lordships that no doubt exists as to the fact

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'that the Bank have committed several acts of bankruptcy, and that 'a commission of bankruptcy has been issued against them, the com- 'plainer produces herewith a letter to him from the solicitor under the 'commission on the subject, and in which that gentleman, acting for the 'creditors, and in obedience to the law, warns the complainer against 'making any settlement with, or payments to the chargers, after the date 'of it.'

On the 7th, Scot wrote to Mr. Small another letter, in which he stated,

'Dear Sir, I wrote you yesterday by a packet forwarded by the mail 'this morning.

'I then omitted to tell you, that in case the Lord Ordinary should re- 'fuse to sist or interdict, which I hardly think he will do in so strong a 'case, you must ask him to sist proceedings till the opinion of the Court 'be taken. That will no doubt at once occur to you, particularly in so 'urgent a case; but you will be no worse of this hint. In case I should 'get friends to settle the debt upon an assignation, or in any other way, 'I cannot pay the Bank, because I would have to pay it again to the 'creditors. The solicitor under the commission of bankruptcy writes me 'so, and the Act of Parliament (Bankrupt Act of England) is express 'on the point. I have made out a clear primâ facie case, which entitles 'me to an interdict in the mean time, and I cannot see on what ground 'it is possible to refuse it. Mr. Marshall would, I am sure, advise you 'on the subject, if any difficulty occur, on your calling on him to-morrow 'night. There is not a moment for delay. I am pressed by the Bank 'on the one hand, and their creditors under the act of bankruptcy are 'claiming the money on the other. There must be a legal remedy for this. 'Let nothing be left undone, and that quickly.

'I had some expectation that I would have got the use of the 'commission of bankruptcy under the hands of the Lord Chancellor '(Lyndhurst), and sealed with the Great Seal, and sent it to you this 'morning; but I could not. If it can be got, I shall send it in a 'parcel to-morrow morning by the mail. It will be put up in a tin 'book, probably with 'two office copies' of it, as they are *called; but* 'the commission itself is on two pieces of vellum sealed together. It is 'this which you will produce to the Lord Ordinary, but you must 'get it back again immediately after he has seen it. You may retain 'it for a day or two afterwards, that our counsel may produce it when 'the sequestration may be advised, and crave that, in consequence of it, the proceedings may be stayed till those who may be appointed 'to wind up the Bank's estate shall be made parties. It was occur- 'ring to me, that it may be proper to present a short petition to the 'Court to this effect. Mr. Marshall should be seen as to this. I have 'thrown my ideas on the subject into a short petition, which I enclose 'If the sequestration is either awarded or to be advised immediately, this 'petition, after being seen by Mr. Marshall, should be printed, and in 'stantly presented to the Court; or probably the form is not to print, til

after it is presented to the Court for an order and interdict. You can see Mr. Marshall to-morrow night. Send for Walter, and he will do what he can. No. 115. Jan. 14. 1829.

'Every thing now, and my hopes of doing my friends good, depends on getting the sequestration kept off. It would divest me of every thing, and I would be kept out of all business while it was going on, and the Bank would swallow up every thing, and never grant me a discharge. But if I can ward off this measure, and the Bank go first into the Gazette, then I shall be saved. The commission may come in a parcel to Mr. Lightfoot, and it will likely go on unopened, as there is no time; but you can open it, and take out the commission. For God's sake, therefore, spare no pains at the present moment. Write in course of post.'

In consequence of this letter, Mr. Small carried the petition to Scot's unsel, who converted it into a note, in order that it might be pre- nted to the Court, and get judgment superseded in the petition r sequestration. In this note the same statements were repeated as ere contained in the bill of suspension. The note was accordingly xed; but the counsel for Scot having reason to believe that they had en imposed upon, waited upon the Lord President with the view of thdrawing the note, and it was afterwards, by permission of the Court, thdrawn. In the mean while the Lord Ordinary had refused the bill, cause there was no evidence of the allegation on which it rested, and cause it was improbable. Thereafter a note repeating the assertion at a commission of bankruptcy had been issued, and which was pre- red by Scot himself, but which Mr. Small declined to subscribe until had been signed by Scot, praying for delay, was presented to the Lord dinary, who refused it. A petition and complaint was then presented Johnston on behalf of the Leith Bank, in which he stated that he s 'under the necessity of complaining to your Lordships of certain most illegal and unwarrantable proceedings which have lately been dopted by Mr. Archibald Scot, writer in Langholm, with the assistance of Mr. Thomas Small, W. S., his agent in Edinburgh, for the purpose of impeding the course of justice, by preventing the execution of certain diligence against Mr. Scot, which has been found by repeated decisions o be perfectly legal and unexceptionable, and by endeavouring to in- duce your Lordships to delay pronouncing judgment in a process of equestration against him, which is presently in dependence.'

In support of this general allegation, he founded on the preceding cir- mstances, and on an affidavit by Mr. Lightfoot, representing that he d been imposed upon by Scot, and that the proceedings were not suffi- ent to sustain a commission of bankruptcy. In conclusion he stated, at 'these circumstances mark the complexion of the whole transaction, nd, when taken in connexion with the use which was immediately made of Lightfoot's letter, it is conceived that they prove, beyond the possi- bility of contradiction, that the whole was a device wilfully and know-

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'ingly contrived by Mr. Scot for the purpose of unduly influencing the 'decision of the Court, of misleading your Lordships, and of procuring 'a stay of diligence which he could not otherwise have hoped to obtain;' and he prayed the Court 'to inflict such punishment upon them for their 'contempt of the authority of this Court, and for their gross abuse of 'its forms, as your Lordships may think proper, reserving always to the 'petitioner, and the company whom he represents, their claim of da-'mages.'

In defence Mr. Small stated, that as the allegation of the Bank having been divested by the commission of bankruptcy was a relevant reason of suspension, and as he had no means of knowing whether the fact was true or false, and as he was Scot's agent, he was bound to present the bill; that he had acted in perfect good faith in doing so; that if he had not complied with the order of his client, he would have violated his duty as an agent, and it was not relevant to inquire whether he believed the statement to be true or not, or to say that, on inquiry, he would have discovered that it was utterly false. By Scot it was stated, that as he was not a member of Court, he was not liable to be called on to answer to a summary petition and complaint; that the only allegation in support of the prayer that he should be found guilty of a contempt of Court was, that he had made a false statement, knowing it to be false; but this was not relevant. It was indeed done daily by litigants, who, on that account, were never supposed to be guilty of a contempt, and so subjected in punishment, but were only liable in expenses. He had not abused the forms of Court, but had strictly observed them; and although he denied that there had been any conspiracy or device, yet, assuming the statements made by Johnston to be true, they amounted to a charge of subornation of perjury, which could not be tried in this shape, nor without the concourse of the Lord Advocate.

On the other hand, Johnston maintained that it was clearly proved that Scot had been guilty of a gross attempt to impose upon the Court, and that Mr. Small, being in the full knowledge that such was the true object, was equally liable to punishment.

Lord Balgray.—The prayer of the petition is, that your Lordships shall 'inflict such punishment upon them for their contempt of the authority of this 'Court, and for the gross abuse of its forms, as your Lordships may think 'proper.' But it is manifest that there has been no contempt, and no abuse of the forms on the part of Mr. Small. Indeed I should tremble for the situation of lawyers and agents, if Mr. Small were liable in the present case to punishment. A counsel or an agent who has undertaken a case, is bound to state every fact material to the cause communicated to them by their clients; and indeed I myself at that Bar have been frequently compelled to state facts which, in my own mind, I was satisfied were utterly untrue. But, in doing so, will it be alleged that a counsel is guilty of a contempt of Court? The statements are made upon the authority of the client, and not upon the responsibility of the counsel. Whatever may be their own private opinions as

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LORD PRESIDENT.—We must be cautious in finding that this individual has been guilty of a contempt of Court, because every litigant who tells a falsehood may, on the same principle, be exposed to a similar accusation. But there are numerous and daily instances of this; and indeed one or other of the parties in a process must in general be guilty of telling that which is not true, and so attempting to impose upon the Court. No doubt, if he states upon the record any thing improper and censurable, we may order it to be expunged, and the injured party may have his action of damages; but we cannot find a party guilty of contempt, merely because he states that which is not true.

LORD BALGRAY.—If a party manufacture evidence, and produce it in process, as for example a forged letter, he will be liable to a summary complaint But, in the present case, the allegation is merely that Scot had made false statements; for the commission of bankruptcy was not produced. There is also another difficulty that Carruthers, who is said to have been a party to the conspiracy, is not here.

LORD GILLIES.—Besides, where is the evidence that this Bank is not, by the law of England, at this moment bankrupt? Carruthers is not here to contradict their averments, and in his affidavit he swears they have committed acts of bankruptcy.

Fullerton.—But our statements are not contradicted by Scot.

LORD GILLIES.—Carruthers, however, is the proper contradictor.

LORD PRESIDENT.—If it be true that Scot got Carruthers to swear falsely there may be grounds for a charge of subornation of perjury. But that is no the accusation before us.

Fullerton.—We charge him with the fabrication of evidence.

LORD GILLIES.—But where is the evidence that it was fabricated?

Robertson.—The proper question is, whether this is a competent petition A complaint on the ground of subornation of perjury, with concourse of the Lor Advocate, may be competent; but here we are said to have been guilty of a con tempt of Court; and this they endeavour to make out by representing that Sco had made a false statement. This, however, is not relevant.

Fullerton.—What, then, is meant by a contempt of Court?

LORD PRESIDENT.—It means a contempt of the authority of the Court; as fo example, if we had issued an interdict, and he had committed a breach of it.

LORD GILLIES.—The whole charge is set forth on the 10th page of the pet tion, and amounts merely to this, that Scot had been guilty of a device, 'for th 'purpose of unduly influencing the decision of the Court, of misleading you 'Lordships, and of procuring a stay of diligence, which he could not otherwis 'have hoped to obtain.' But this is what litigants daily attempt to do, and it wa never supposed they were guilty of a contempt.

LORD CRAIGIE.—This party has been wilfully abusing the forms of Court; an your Lordships ought, before finding that this petition is not competent, to loo into the Acts of Sederunt.

LORD PRESIDENT.—I have looked at them, and could find no cases, exce those relating to subornation of perjury, or falsification of evidence. We all kno that it is the daily custom for litigants in the Bill-Chamber to make false stat ments, just to get delay, and yet was it ever supposed that they had been guil of a contempt?

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'estate of Sansonseal, or bearing any proportion of the burdens of the 'trust-deed effeiring to the value of the said estate.' This being opposed by the younger children, who contended that the heir could not claim under the trust-deed without complying with the testator's intention by collating the English estate, the Lord Ordinary reported the cause on Cases, stating his opinion that the heir was not entitled to claim under the deed without collating.

Argued for the heir—

By the law of England, a devise of land, not tested by three witnesses, is so totally invalid, that it cannot be read; and an heir, accordingly, is never put to his election in such a case as this, where the devise of the land is not tested by three witnesses. In considering the effect, therefore, of the disposition of the English estate in this deed, which is only tested by two witnesses, the law of England must be taken as the rule, since it is a devise of English property; and if so, it undoubtedly cannot be read against the heir, so as to put him to his election; and as the heir does not take the English estate by virtue of the law of Scotland, he cannot be subjected to the operation of that law, so as to be obliged to collate, before taking the provision in the trust-deed, to which he has right, not ex lege, but by the express terms of the deed.

For the younger children—

The question is, Whether there appears on this deed of settlement an intention on the part of the testator to pass the English estate to the trustees; for if so, the heir will be barred, by our rule of approbate and reprobate, from claiming a share of the other property under the deed, while he repudiates it as to this estate. Now this is a Scotch deed, executed by a domiciled Scotchman; it must be construed, therefore, according to the law of Scotland, and the intention of the testator inferred from it, consistently with the rules of that law, and not of the law of England. The case is exactly the converse of those of Trotter and Murray; and the very same principle which led the Court in these cases to decide as to the intention of the testator, expressed in English deeds according to the opinion of English counsel, must necessarily lead them to decide the question of intention here by the rules of the law of Scotland. This then being the case, there cannot be a doubt of the intention as expressed in the deed, which is probative according to the Law of Scotland, although ineffectual to carry English freehold property; and consequently the rule of approbate and reprobate applies, and *prevents the* heir from claiming under the deed, and at the same time *taking the* English estate, contrary to the will of the testator.

The Court unanimously found that the heir cannot claim a share of the trust-funds, and at the same time take the English estate; and remitted to the Lord Ordinary to proceed accordingly.

Lord Justice-Clerk.—The cases of Trotter and Murray arose out of English deeds; and we therefore sent to English counsel to ascertain whether the

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this term arrived, M'Michael died. He had previously, however, raised an action of damages on the warrandice in his lease against the executors of the late Duke of Queensberry, the granter, which was carried on in his name notwithstanding his death, and in which decree for a certain amount of damages was pronounced. These were paid to his eldest son and heir; but thereafter the pursuers, his younger sons, and executors qua nearest of kin, raised an action concluding for reduction of the decree in the action of damages, and to have the Queensberry executors found liable to them in payment of the damage arising from the reduction of the lease, which they contended to have been a moveable claim in the person of the deceased, and so descendible to them as executors, and not to the heir. The Queensberry executors, on the other hand, objected to their title to pursue, on the ground that the right to claim damage descended to old M'Michael's heir.

The Lord Ordinary reported this point on Cases; but the Court, without deciding it, remitted to his Lordship to appoint the production to be satisfied, reserving the defence as to want of title.

J. Pattison, W. S.—Lamont and Newton, W. S.—Agents.

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J. Smith and Others, Pursuers.—*D. of F. Moncreiff—Sol.-Gen. Hope—A. Murray.*

Bank of Scotland, Defenders.—*Jeffrey—Walker.*

Cautioners—Fraud.—A Bank having required an additional bond of caution for one of their agents who had been several years in their employment, and having accepted the bond covering past as well as future transactions, without acquainting the cautioners with certain circumstances as to the situation and conduct of the agent which might have induced the cautioners to refuse to subscribe the bond, and which could be known only to the Bank—Held that the cautioners were not bound.

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2d Division. Ld. Mackenzie. B.

The late Alexander Paterson was, in the year 1794, appointed agent for the Bank of Scotland at Thurso; and, upon this appointment, he granted a bond, with certain co-obligants, to the extent of £5000. His salary was only £120, afterwards raised to £140; and it was stipulated by the Bank that he should not engage in trade or speculation, nor discount his own bills. These stipulations, however, he disregarded; and, with the knowledge of the Bank, he engaged in trade as a grain-merchant and entered into speculations as a house-builder, ship-owner, and distiller; and he also discounted, to a considerable amount, bills on which his own name appeared as a party. It is the practice of the Bank to send round an official person annually, but at irregular intervals, to inspect their several agencies; and in September 1803 the Thurso branch was visited by Mr. Marshall, then inspector for the Bank. It appeared from the evidence adduced, that Paterson had succeeded in deceiving Mr. Marshall as to the real state of affairs; and the report returned by the latter to the directors bore, 'The books are posted up, and kept with great accu-'racy; the bills were all regularly drawn, accepted, and indorsed, a

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'The directors having had under review the cautionary bonds given by 'their agents; finding some of your cautioners are dead, and at the same 'time considering that the present amount of your caution is too small 'for the business done at Thurso, they desire that the amount of your 'caution may be £10,000 by a new bond for that sum, or by a bond for 'new securities corroborating the present one for £5000.'

In consequence of this, some correspondence took place between Paterson and the Bank, who agreed to allow the existing bond to remain without corroboration, and to accept merely an additional bond for £5000. Paterson having accordingly prevailed upon the pursuers Smith &c., who were gentlemen resident in the part of the country where the branch was situated, to become bound with him to that amount, a bond was prepared by the Bank's agent in Edinburgh, binding the obligants for past as well as future transactions on the part of Paterson, and it was transmitted to Paterson on the 7th of April 1804 to be executed. It was signed by the cautioners on the 22d and 24th of June following, and was then returned to Edinburgh, where it was received on the 2d of July. Having, however, been signed on the last page only, it was next day retransmitted to Paterson, with instructions to have it 'immediately' subscribed by himself and the cautioners 'on every page, in presence of their respective witnesses.' The secretary at the same time wrote to Paterson's clerk in these terms:— 'In case Mr. Paterson has set out from Thurso, I have to request that 'you will not lose a moment in getting his additional bond, herewith en- 'closed, fully executed, by getting the gentlemen who subscribed the 'last page of it to subscribe the first three. I must press this the more, 'that the bond has been too long delayed, and the blame of delay often 'laid to my charge.' The additional subscriptions having been made, the bond was returned to Paterson, and by him to the secretary, enclosed in a letter dated the 11th of July; but it did not appear to have been actually transmitted to the Bank till the 14th.

In obtaining this additional bond, the Bank had no communication with the cautioners, either to the effect of requesting them to become cautioners, or of giving them any information regarding the state of Paterson's transactions with the Bank, or his conduct as agent. By this time the amount of Bank of Scotland notes returned in the states as lying in the office had increased to £17,976, and that of mixed notes and specie to £2164, amounting in all to £20,140, which was the sum apparently in the agent's hands by the state dated 9th July. About this time Mr. Sim, one of the officers of the Bank, set out on the annual tour of inspection of the northern agencies, and he arrived at Thurso on the 13th, it being the custom for the inspector to take the most distant branch first in order. Mr. Sim deponed, that 'when he went from Inver- 'ness to Thurso, he left at the former place his gig and all his clothes, 'taking with him only one change of linen;' and 'that at this time he 'had not the slightest suspicion that he was to be detained at Thurso 'more than one day.' On inspection, however, of the affairs of the branch,

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'the validity of the deed, as the same may be affected by the said sta-
'tutes, or either of them, having regard to the nature of the deed;' and if the Court should adjudge the deed to be valid, then to allow the pursuers 'a proof of the circumstances by them alleged as affording ground 'for reducing it, as unduly obtained as aforesaid.'* In pronouncing this judgment, it was observed by Lord Chancellor Eldon, 'My opinion is, 'that, on a fair construction given to the terms of the bond, the fact 'cannot admit of a doubt, that the bond is equally applicable to past as 'to future transactions. For that very reason, however, I esteem myself 'bound to look with greater caution to the way in which this bond was 'obtained. If it should appear that a person became surety for another, 'who was at the time in arrears to his employer, that employer being 'ignorant of the fact, then I am clearly of opinion that the surety must 'be understood to have taken for better or for worse the conduct, cha-'racter, and credit of him for whom he became surety. But if, on the 'other hand, a man or a body of men employing a number of agents 'find one whom they have reason to suppose not trust-worthy, one who 'most likely owes them large sums of money, or who, they may have 'reason to suppose, owes them large sums of money, and call on that 'man to give sureties, or cautioners as it is called in Scotland, both for 'his past and future dealings, thereby holding him out as a person trust-'worthy, when they know, or have strong ground for suspecting, that he 'is not so, that would not bind the cautioners or sureties.'

After the cause returned to this Court, judgment was pronounced, repelling the reasons of reduction founded on the alleged defects of execution on the ground that the pursuers having delivered the bond as properly executed, and binding on them, could not liberate themselves by showing that they had not executed it according to law, (see the case Jan. 25. 1821, F. C.†); and this judgment was affirmed on appeal, June 4. 1824.‡ Thereafter a proof was allowed of the allegation as to the bond having been obtained by dole and improper concealment on the part of the Bank. In addition to the evidence arising from the circumstances above narrated, that the Bank were in the knowledge of, or had strong reason to suspect the situation of Paterson, and his misconduct as their agent, the pursuers adduced the following direct testimony.

The widow of Paterson (who was now dead) deponed, that her husband had frequently communicated with her on the state of his affairs, and his appropriation to his own purposes of the money belonging to the Bank, and that he had stated to her that he suspected the demand for additional security was made in consequence of the Bank having come to the knowledge of the embarrassed state of his affairs, through the information of an individual now deceased.

* 3. Dow, 272.

† The report does not accurately state the ground of decision by the Court. See observations of the Judges in Earl of Fife, Dec. 22. 1825, (ante, Vol. IV. No. 241.)

‡ 2. Shaw's Appeal Cases, 265.

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'ors did any thing they thought in the least wrong, but believes their view 'of the law was different from that expressed in the House of Lords, and 'which the Lord Ordinary adopts; and that they considered it finally and 'absolutely the duty of the intending cautioners to make all inquiries 'ex proprio motu, the Bank Directors having no duty in the matter, ex-'cept to ask for caution in any way they pleased.'

The Court adhered.

LORD JUSTICE-CLERK.—I consider this a very important question in regard to the law applicable to cases of this kind. We are called to decide on broad principles of equity applicable to the situation of the parties at the time when the bond in question was granted, and to determine whether a bond, obtained as this was, is one of which the Bank are entitled to avail themselves. The pursuers are permitted by the judgment of the House of Lords to go into this investigation, and we are to decide whether they have proved sufficient to support the interlocutor. I am clearly of opinion that there is no ground to doubt that this bond covers past transactions; and that, in my opinion, is a very material ingredient. It is not a common bond, whereby cautioners become liable for future intromissions only, but also for all past transactions. Keeping this in view, and entertaining no doubt on the relevancy, that if the parties obtained the bond, being in the knowledge of past transactions on the part of the agent which created great dissatisfaction as to his proceedings, if they conceal these, they are not entitled to avail themselves of it, we have to consider the circumstances proved in this case. The first and most important is, what were the reasons assigned for demanding new and additional security? These are to be found in the letter of 20th December 1803, which must have been the medium of communication with the cautioners; and it is material that it is written within a month of Marshall's report. The words are, 'The directors having had under review 'the cautionary bonds given by their agents, and finding that some of your cautioners 'are dead, and at the same time considering the present amount of your caution is 'too small for the business done at Thurso, they desire that the amount of your cau-'tion may be £10,000,' &c. Now I cannot help observing that the death of some of the cautioners might require others in their *room*, but not additional security. Moreover, as to the business done at Thurso, it is material that there is no hint that Mr. Paterson's allowance was to be increased in consequence of the supposed increase of business. Then the question is, Did this letter disclose the whole of the objects the Bank had in view in making the demand; or were there any circumstances in Paterson's past transactions known to them, which they should have communicated to the cautioners? For any person who saw that letter could discover nothing to lead him to suppose that the Bank was dissatisfied with Paterson's conduct. As to the proof of the knowledge of the Bank of such circumstances, part is direct, and great part circumstantial. I am not disposed to lay much stress on the inspection by Marshall in 1803; for although there were circumstances sufficient to have created considerable doubt as to the way in which Paterson was conducting the Bank business and entering into other concerns, and which did attract the attention of the Bank, still I do not think Marshall's report decisive, though it does establish that £4500 of this person's own bills were lying discounted at the Bank. No doubt, it does hold out the probability of an increase of business; but it is material that, notwithstanding, it is demonstrated, in consequence of the war, the Bank saw the necessity of directing this agent, with others, to diminish the di-

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this was the case, I could not concur in the observation in the note, that the directors meant nothing wrong, for I think they would have been very wrong. In the secretary's letter requiring additional security, there is no insinuation of any increase of business at the Thurso branch. It is only from the existing extent of business that £5000 was not considered an adequate security. Now, there is every reason to believe that this was no false pretence; for we see bills discounted to the amount of about £6000 per month, making the whole for which Paterson was responsible of such an amount, that there was nothing unreasonable in the Bank saying it was too much to be trusted on caution for £5000; and it was another fair consideration, whether the circumstances of the agent were such as made him a responsible person himself, and this was affected by his being engaged in other businesses; yet it would have been unnecessary to tell Paterson himself, in a private letter, that his speculations rendered it necessary to have larger security. Then, what inference could the Bank draw from Marshall's report? I rather think favourable to the Bank continuing Paterson. There is nothing in it at least, to make the Bank think him not trustworthy. The next point is, what subsequent information had they before the bond was signed? Nothing whatever inferring that Paterson was not trustworthy. I see there was a large amount of Bank of Scotland notes in hand, but there is nothing to show that the directors had any notion that they were not in the cash chest. Then Sir John Sinclair's evidence just amounts to this, that there was a great extent of business, and Paterson's being engaged in other concerns was the principal reason for being dissatisfied. No doubt, he says the directors were dissatisfied, because he applied money to his own purposes; but he explains that as only done by discounting bills on which his own name appeared, and this was done openly, and afforded no ground to suspect any thing untrustworthy; and in the correspondence he is not specially admonished not to discount his own bills, and there was no necessity to communicate that which must have been notorious in that part of the country. So that all the Bank did not communicate was what was open to the whole world as well as the Bank, who were not called on to say any thing about such matters; and I think there is a deficiency of evidence on the part of the pursuers. The only other thing is the surprise said to have been expressed by the directors at Paterson's getting cautioners. There is nothing, however, in the hearsay evidence to show that the expressions of surprise were uttered till after the discovery, and there is no reason to suppose they had heard any thing about it till after that. Now after knowing this, and the extent of Paterson's bankruptcy, it is not extraordinary that they should express surprise that people in the same county should have come forward as cautioners, although I certainly am not surprised, as their interest was very great to keep a branch in that part of the country; and, besides, their having expressed surprise is very inconsistent with the idea of a trick, as they would rather have held their tongue, which might have given room for an argument, such as that brought forward as to Fraser writing a mere official letter in answer to that of Mr. Sim, and expressing no surprise in it. Further, we see the extent to which the Bank trusted Paterson in other matters independent of the Thurso branch which shows no suspicion of impending bankruptcy. As to the urgency to get the bond executed, it might have afforded room for an argument, if it had been a new bond; but as it was to remedy a defect ex intervallo, it was material and proper to lose no time at all, as the death of a witness might have prevented the possibility of ever getting it done. On the whole, I think there is not sufficient evidence to warrant the interlocutor of the Lord Ordinary.

No. 119. J. SPENCE, (MEGGET'S TRUSTEE,) Pursuer.—*Murray—Brownlee.*
W. THOMSON and Others, Defenders.—*Ro. Bell—J. W. Dickson.*

Bankrupt—Fraud.—A party having executed a trust-disposition of his property to his wife and children, which was challenged by a creditor as in fraudem of his rights, a remit made to ascertain whether the deed was onerous or not.

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1ST DIVISION.
Lord Eldin.
D.

MEGGET, as creditor of Walter Thomson, brought an action of reduction of a disposition of certain heritable subjects which Thomson had executed in favour of a Mr. Stirling, as trustee for Thomson's wife and children, and on which infeftment was taken. To this action the only parties called were Thomson and Stirling, the latter of whom stated that he had never accepted of the trust, and did not intend to do so.

The Lord Ordinary having reduced in terms of the libel, and Thomson having reclaimed, the Court sisted process till a supplementary summons should be brought against the wife and children, (see ante, Vol. VI No. 67.) Megget having become bankrupt, Spence, as his trustee, accordingly called them by a new summons; and having alleged that the trust-deed was gratuitous, and insisted that, agreeably to the decision in the case of the Earl of Rosebery against M'Queen, (ante Vol. II. No 422,) it should be set aside as fraudulent, and they having asserted that it was onerous, the Court recalled the interlocutor, and remitted to the Lord Ordinary to ascertain whether it was onerous or gratuitous.

T. MEGGET, W. S.—R. CARGILL, W. S.—Agents.

No. 120. JOHN GIBSON, Petitioner.—*Ro. Bell—Jameson.*
J. DODS and Others, Respondents.—*Robertson—W. Bell.*

Agent and Client—Inhibition.—1.—A party who had ceased to be a writer to the Signet but held a license as a notary public and agent, entitled to pursue for an account contracted to him as an agent.—2.—An inhibition competent on the dependence of a petition by an agent for a remit to the auditor, and decree against his client, in terms of the Act of Sederunt 1807.

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1ST DIVISION.
D.

THE estates of Dods having been sequestrated, the petitioner Gibson, formerly a writer to the Signet, but now a notary public and auctioneer, was employed to act as agent in the sequestration. By Dods it was alleged that Gibson had been appointed to this office through the interest of his friends, and upon the representation that he would make smaller charges than other agents. A composition-agreement having been entered into, under which Dods and two other persons as cautioners bound themselves to pay the expenses, Gibson rendered an account of £87: 0: 9, and they having insisted that it should be taxed by the auditor, he rendered a second account, increasing the amount to £118: 2: 5. Dods and his cautioners having refused to settle or pay this sum, Gibson presented a petition to the Court, under the Act of Sederunt 1806, for remit to the auditor and decree, on the dependence of which he ex

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trates and Council, setting forth their wish to be able to erect hospitals and reasonable schools, where the youth may be brought up in letters; and praying, therefore, that her Majesty would give them a grant of the Black Friars' yards to build an hospital upon, 'and als caus some 'dress be made, yat we may haif the place, kirk, chalmeris, and houses 'of the Kirk of Field to beig ane scule, we satisfiand reasonablie yair-'for; and also yat your Grace will gif and dispone to us, for sus-'teining of the hospitall and scule foresaid, ye annuellis of chaplanries 'and freris being presentlie in your Grace's handis, and ye remanent 'of ye same quhen yai sall pertene to your Grace.' In answer to this supplication, 'Hir Grace promissis, quhen evir sufficient provision is 'maid for biging of the hospitall and scule within written, hir Grace 'shall provide ane roome convenient yairfore, and shall support yt ye 'samin be dotyt to be enterteinit in tyme cuming.' Previous to this supplication being presented, the Town Council had appointed certain of their members to commune with 'ye persoun of Pennycuke' with regard to the purchase of the Kirk of Field, and in the course of the year 1564 they effected this purchase for £1000; and they subsequently purchased up certain burdens affecting the property. In 1566, Queen Mary, by advice and consent of her Privy Council, granted a charter, whereby she annulled all transferences made by churchmen to the prejudice of the Crown's rights, and conveyed to the Magistrates all the church lands within the city, with power to levy the rents &c.; and also, 'cum potes-'tate præfatas terras et tenementa locandi et removendi, loca diruta ex-'truendi et reparandi, eademque in hospitalia aut alios similes usus legi-'timos, prout ipsis, cum avisamento ministrorum et seniorum dicti nostri 'burgi, videbitur, reducendi et applicandi,' &c.

No steps seem to have been taken, for some time after this, in erecting the proposed College; but in 1579 a committee was appointed to take steps to found a College, and in the same year certain rights of a prebendary in the Kirk of Field were bought up by an annuity granted to the holder. It also appeared that, in 1580, Mr. Clement Little, advocate, presented to the Town his library, which formed the commencement of the present College Library; and in 1581 the Magistrates appear to have obtained from one Gibb a renunciation of the provostry of the Kirk of Field, which that person seems to have obtained from his Majesty; and a sum of 8000 merks had been left by the Bishop of Orkney to the Town for founding a College, for the recovery of which sum the Magistrates, on the 8th of June 1582, gave directions. In that year, however a charter was obtained from King James, whereby his Majesty ratified the previous grant to the Magistrates by Queen Mary of all church lands within the city; and declared the purpose of the grant to be, that these lands 'per ipsos in perpetuum applicanda in sustentationem ministerii 'pauperum auxilium, reparationem scholarum, propagationem literarum 'et scientiarum, pro eorum et successorum suorum arbitrio, uti eis magis 'utile videbitur.' The charter also confirmed the different purchases and

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'realme hes or may do within the samyne, to be frille and peaceablie 'bruiked, joissed, and usit be the said Mr. Robert, but ony impediment, 'reservatioune, or again calling; providing always yat the said Mr. 'Robert sall be subject to us and our successoures as undoubted pa- 'trones of the said College, to be comptrollit for randring of compt upoun 'the administration of the said office, and to obey and fulfill the comand, 'reules, and injunctions to be given unto him be us and our successoures 'for the wiel of the said College—syklyk yat it sall not be leisum to him 'to depart fra the said Colledge, leif or renunce his office, without the 'speciall guidwill, awyse, and consent of us and our successoures, had and 'obteinit yairto.' Regents were also appointed in the College; and public disputations, with annual laureations of students, were regularly held. One of these disputations was held, in 1617, in presence of King James, who thus expressed himself thereupon:—'I am so well satisfied 'with this day's exercise, that I will be godfather to the College of 'Edinburgh, and have it called the College of King James; for, after 'the founding of it had been stopped for sundry years in my minority, 'so soon as I came to any knowledge, I zealously held hand to it, and 'caused it be established; and although I see many look upon it with 'an evil eye, yet I will have them to know that, having given it this 'name, I have espoused its quarrel.' And in a letter dated from Paisley, 25th July 1617, his Majesty requires the Town 'to order the said Col- 'lege to be called in all time hereafter by the name of King James's 'College, which we intend for ane special mark and ane badge of our 'favour towards the same.'

In the year 1621, the Town of Edinburgh obtained from Parliament acts ratifying all their rights, and in particular an act intituled 'Rati- 'fication of divers Infeftments granted to the Town of Edinburgh 'for sustentation of College Ministers and Hospitals,'—whereby, after narrating the charter 1582, by which his Majesty is stated to have granted to the Council 'license and liberty to erect ane Colledge,' and for that purpose had disponed to them the provostry of the Kirk of Field, with the possessions and duties of the same; that, conform thereto, the Council had erected a College, and that various grants had subse- quently been made to the Magistrates and Council for sustentation of the College,—the King, with advice of the Estates, ratifies and confirms all their rights, 'togidder with the erectione of the said gryit ludging, 'manss, and hous of the Kirk of Field in ane Colledge, for the profes- 'sioun of theologie, philosophie, and humanitie &c., in all and sindrie 'poyntes, passes, heiddis, articles, conditionis, priviledgis, immunities, 'liberties, and utheris circumstances quhetsumever therein conteinit, 'after the form and tenor thereof.' By this act his Majesty, 'for their 'further encouragement,' with the advice of the Estates, 'hes of new 'again given, grantit, and disponit to them and their successoures, in fa- 'vours of the said burgh of Edinburgh, patrons of the said Colledge 'and of the said Colledge, and of the rectors, regentis, bursaries, and

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adopted without applying for such approval, and without any interference on the part of the Council; but, so lately as 1809, the Town Council having interfered on a petition of the students as to a regulation in regard to raising the fees of medical graduation, the Senatus, on a report of the Professor of Scotch Law, yielded to the Council, and did not enforce the regulation.

With regard to the course of medical study, the Council had not interfered further than by the appointment of new Professorships, and separating the subjects taught from the chairs previously existing into different branches; and they had left the requisites for obtaining a degree entirely to the regulation of the Senatus Academicus. In 1824, however, a petition was presented to the Council by the Professor of Midwifery and the Diseases of Women and Children, setting forth that he had been refused to be received by the other Professors as a member of the Medical Faculty in the College, on the ground that he was not in his commission called a 'Professor of Medicine,'—and praying to have these words introduced into his commission, with power to examine candidates &c., in order to make attendance on the midwifery class essential to obtaining a medical degree.

In the course of the discussion between the Professors and the Council which followed on this petition, the former maintained that there were certain powers 'which belong to the University itself exclusively, and 'which arise from the essential and indispensable nature of an Univer-'sity;' and among these they claimed 'the sole right to originate and 'carry into execution every regulation respecting the course of study to 'be followed by candidates for medical degrees.' Thereafter the Council recalled the Professor of Midwifery's former commission, and granted him a new one in the terms and with the powers craved. The Senatus Academicus, however, on the 25th of October 1824, just beforethe meeting of the College, entered into a resolution that the previously existing statuta solennia, which did not require attendance on the midwifery class, should remain unchanged as to all students who should have matriculated prior to the 1st of January 1825. On this the Council called on the Senatus to rescind their resolution, and give immediate effect to the new commission to the Professor of Midwifery, by adding that class to the course of medical study necessary for candidates for graduation; and by an act of Council, dated 26th October 1825, they required the Senatus forthwith to add this class to the curriculum as to all students who should thereafter take degrees as Doctors of Medicine, and to promulgate an order to that effect. The Senatus having refused to comply with this requisition, the Magistrates and Council, on the 10th of November, held a visitation at the College, and passed an act of visitation enacting that thereafter attendance on the class of midwifery must be given by all candidates for graduation, and that no medical degree should be conferred, except in terms of this act,—and further prohibiting the Principal and Professors from conferring degrees on students who should not have at-

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In defence against this action it was pleaded—The right of conferring degrees, and regulating the course of study necessary to qualify candidates, belongs essentially, and from its very nature, to the University itself, and not to the patrons or founders. Besides, in the present case, the Magistrates and Council are not the founders, but the King; and the charter of King James, and Act of Parliament 1621, merely delegated the power of erecting the College, and giving it a constitution, and did not confer on the Town Council the rights now claimed by them; so that, when erected and established, it necessarily possessed the powers and privileges belonging to such bodies at common law. The privileges specially conferred by the act 1621 were not given to the Magistrates and Council, but were merely given through them, and were truly conferred on the 'rectors, regentis, busareis, and studentis of 'the College;' and these privileges being described as the same possessed by other Colleges leaves the matter to be settled by the common law as to such bodies, which fixes the power of regulating every thing regarding the course of study, and of obtaining degrees, in the Professors. Under this act, therefore, the Magistrates and Council have merely the patronage, and the consequent power of appointing new chairs, which necessarily infers the power of fixing what the new Professors are to teach; but their power can extend no further than the original erection of the College, or institution of new Professorships,—all other powers of regulation belonging essentially to the College so erected; and as to the usage the Senatus Academicus has been in use constantly to regulate the course of study &c. by their statuta solennia.

To this it was answered—

The Magistrates and Council are undoubtedly the founders of the College, and the charter of 1582 is expressly in their favour,—they, not the College to be erected by them, being the donees in the charter. The object of the act 1621, again, was to ratify the charter granted to the Magistrates and Council; and it does not bear the construction put upon it by the defenders, the new grant therein contained being still in favour of the Magistrates and Council. There is no common law regulating the constitution or privileges of an University; but the rights of each depend on its own special constitution. In the present case, these privileges which it is the undoubted right of the King to confer, were granted to the Magistrates and Council, who have exercised the same down to the present day.

The Lord Ordinary pronounced this interlocutor:—'Finds that the pursuers have the right of making regulations or statutes for the College 'of King James; and that in respect of the studies to be pursued in the 'College, and course of study for obtaining degrees, as well as in other 'respects, finds that the Principal and Professors of the said College 'have not right to make regulations, statutes, or laws for the College 'contradiction to the pursuers, or which may not be rescinded or altered 'by the pursuers, and decerns and declares accordingly; therefore finds 'that the resolution of the defenders, of date 25th October 1824, libelled

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cognised over all the world. The erection of a College is, for instance, in this respect, something similar to the creation of a Peer. The King may create any man a Peer; but, having done so, the privileges of the peerage do not depend upon the royal grant, but are inherent in, and necessarily emerge from, the status which has been created. But, unfortunately, when you come to look at the practice of this University, it is as plain as that two and two make four, from the documents produced, that, from the date of its foundation to the present time, the Town Council has interfered in these matters, and made regulations for the curriculum of study, and every thing else connected with conferring degrees; and the College has all along recognised this right by submitting to those regulations imposed by their patrons, and occasionally remonstrating against them and getting them changed; but it is quite evident that the right itself, as existing in the Town Council, was never disputed. The Senatus Academicus have no doubt made, and have a right to make, rules for themselves, which are binding so long as they are approved of or unrepealed by the patrons.

As to the expediency of this state of matters, if we had any business to enter into that question, I really do not think it likely to be so inexpedient as the defenders represent. It is notorious that formerly the Universities of Europe assumed great and sometimes dangerous powers, and have occasionally given rise to much turbulence, under pretence of their privileges. It is not likely, perhaps, that this should again happen; but I do not see any good reason for indulging the defenders in the fancy they have now taken to vindicate their independence.

Lord Pitmilly.—I must begin by observing that this case, which is one of very great importance, has been argued with the greatest ability on both sides. But when I acknowledge the merit of the argument contained in the Case for the defenders, I must, at the same time, admit that the argument of Mr. Dundas, in the pursuers' Case, supported as it is by this great weight of documentary evidence, has most completely convinced me of the soundness of the views which have been taken by the Lord Ordinary, who has substantially decided this case in favour of the pursuers, without going the full length of the summons. The summons concludes, first, that the pursuers, 'as patrons and 'founders of the College of Edinburgh, have the sole and exclusive right and 'privilege of prescribing rules and regulations, and making laws and statutes, &c.; and then, in the next page, it goes on to say, 'that no rules, regulations 'laws, or statutes, made by the Principal and Professors of the College, shall 'be of any force or strength, if they shall not be approved of and sanctioned 'by the pursuers, or their successors in office, after the form and tenor of the 'foresaid charters,' &c. The Lord Ordinary does not go that length; and, I think, with great propriety. He finds that the College are not entitled to make rules and regulations which the Magistrates may either distinctly disapprove of or which they are not entitled to recall, but that they may make rules and regulations which will be effectual, if not objected to or recalled by the Magistrate. I think this is the fair result of the combined effect of the charters, Act of Parliament, and usage. We must consider the charters.

There is no such thing known in Scotland as a general constitution for all the Colleges. On the contrary, we find that every one of them stands on a different footing from the others. Our books of reports are full of cases from

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of the conduct of the Magistrates, if they had proposed to restrict the medical classes. But when I see that they wish to add a very important class to the curriculum, I can have no jealousy of their excercising their right of interference. I think, in this case, the Magistrates have acted most judiciously, and have done so with the greatest propriety towards the Professors. I cannot wonder that the pursuers, on the one hand, who are Patrons of the University, and so designed in the oldest charters, and have always watched over the interests of the University with care, and from a wish to promote learning, should not willingly yield this right of administration and control, if it belong to them; nor, on the other hand, that the defenders should think themselves fitter to decide such points, and should even think the interests and honour of the University at stake, and strenuously endeavour to emancipate themselves. We cannot, however, be guided by views of expediency, but must decide according to rights; and I am glad of it, for I do not consider the matter of expediency so clear as the defenders do. I believe the greatest encouragers of learning have not always been themselves learned men. The pursuers can have no object but to promote the interests of the College; and they have always done so, and have access to the best advice.

Again, we must keep in mind, that in all the commissions to the Professors, they are taken bound to be subject to the authority of, and to obey the regulations laid down by the Magistrates. This attracted the attention of a very eminent Professor; but he did not think it prudent to attempt to get the better of it. Therefore, upon the whole, I have come to the decided opinion, that the interlocutor of the Lord Ordinary is quite right in all its points.

Lord Alloway.—I have read over this case with every attention in my power, and had made many notes, with which I do not consider it necessary to trouble your Lordships at present. It was impossible to read this case without a great deal of interest. The general conclusion to which I have arrived is this, that no lawyer can entertain any doubt on this case in point of law.

I must agree with the opinion expressed by Lord Glenlee, that men of learning have not been always the best judges for directing the course of University study. In the history of the Universities of Europe, you find that, at different periods, they have been the greatest literary tyrants in the world. I cannot help thinking that the defenders would have done well, before agitating this question, to have taken the advice of some of the learned gentlemen now before me.

The case has been remarkably well argued on both sides; but I confess I never read a paper which more completely satisfied my mind, and which removed my doubts, (for I did entertain doubts at one time,) than the Case for the pursuers. The only question is, To whom were the powers and privileges granted? They were granted exclusively to the Magistrates of Edinburgh; and from the very first commission granted to Principal Rollock, to the last commission granted to a Professor, every one of them is taken bound to obey the laws and regulations imposed on them by the Town Council.

The argument for the defenders on the act 1621 appears to me most singular. The act was passed for the purpose of confirming the rights of the Town; yet the defenders maintain that it actually deprived the Town of the rights which had formerly been granted to them. This will not do. No doubt, as a

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proper, or considered it necessary, for the well-being of the College, to interfere in the regulations, made new regulations for the government of the Senatus; and their right to do so has never been disputed. They have remonstrated against some of the orders of the Town Council, and obtained sometimes an alteration; but the matter of right was never brought to issue—it was never disputed by the College. The power is granted solely to the Magistrates; and, in this respect, this stands on a very different footing from all the rest of the Universities. In all cases where the Magistrates choose to interfere, their right to do so has never been disputed; so there has been no change of circumstances, from the original foundation, affecting the right of the Magistrates.

I think the Lord Ordinary has drawn a very proper line. The Professors may make rules, and such rules may be effectual, if they are not objected to, or opposed by the Patrons; but all such rules are subject to the review of the Magistrates. I think this is in perfect consistency with the usage.

I must add, that I do not admire the time and manner in which they have brought this question to issue. In consequence of the appointment of the Royal Commission, the whole affairs of the College are under consideration; and I think it might have been as well to have allowed the present question to sleep, without calling on us to decide it here.

Cuningham and Bell, W. S.—Cranstoun and Anderson, W. S.—Agents.

No. 122.

A. Swan, Advocator.—*Jeffrey—Jameson.*

W. Jeffrey and H. Wright, Respondents.—*Forsyth—Cuninghame—Sandford.*

Writer's Hypothec — Sequestration — Trustee. — A party having obtained decree, with expenses, in an Inferior Court process, which was thereupon advocated, and the agent who had conducted the process having taken a bill for his business account, and the party having thereafter been sequestrated, and his trustee having compromised the action, receiving from the defender a certain sum, together with the expenses which had been awarded; but having upon the party's obtaining a discharge on a composition-contract, paid over to him the balance of the estate, without having paid these expenses to the agent, although the agent had made a demand for the same; and decree of exoneration having thereafter been pronounced in the sequestration—Held that the trustee and the bankrupt were nevertheless liable to the agent for the amount of the expenses.

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2d Division.
Ld. Cringletie.
B.

The advocator Swan, writer in Greenock, was employed by Wright Hume, and Company, merchants in Glasgow, to conduct a process in the Sheriff Court at Greenock against one Duncan. In this process decree was obtained against Duncan for the sum sued for, and expenses the decree for expenses as for the principal sum being pronounced in name of the party. Of the Sheriff's judgment, which was never extracted, Duncan brought an advocation; but, after some procedure in it, he died. In the mean time Swan had taken from Wright, Hume, and Company a bill for the amount of his account of expenses, but this bill was dishonoured and Wright, Hume, and Company were shortly afterwards sequestrated and, in the state of funds given up by them, the sum due by Duncan was set down, under deduction of the expenses. The respondent Jeffrey having been appointed trustee on the sequestrated estate, entered in

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THE COURT adhered, reserving all claims of relief between the respondents.

CAMPBELL and MACDOWALL, S. S. C.—D. FISHER, S. S. C.—Agents.

No. 123.

HUNTERS and COMPANY, Petitioners.—*Jamieson—Cowan.*
DR. W. BOWIE and Others, Respondents.

Judicial Sale.—An estate having been ordered to be sold under articles of roup, whereby the purchaser was bound to grant bond, with a cautioner, for payment of the price at the first term thereafter, with interest till that period, found incompetent for the Lord Ordinary, at the sale, to authorize an alteration, to the effect of giving the purchaser an option immediately to consign the money in bank, or be relieved of subsequent interest.

Jan. 16. 1829. 1ST DIVISION. Lord Newton. D.

A ranking and sale of the estate of Blackhouse, belonging to the late John Taylor, Esq., having been brought by his eldest son and heir-apparent, it was exposed to sale, under articles of roup, on the 16th of May 1827. By these it was declared that the purchaser should have right to the rents from and after Martinmas of that year, and that 'the 'person or persons who shall be preferred to the purchase of all or any of 'the said several lots, shall instantly enact himself or themselves for

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advocator from applying to the Sheriff for extract in his own name, if the action had returned to that Judge by being remitted simpliciter from this Court.

"After the cause was advocated, however, Wright, Hume, and Company became bankrupt; and the respondent, having been elected the trustee on their sequestrated estate, thought it advisable to compromise the case, and made an offer, which was accepted, viz. to accept the principal sum found due in the Inferior Court without interest, but with the full expenses awarded there. These sums were accordingly paid to him as trustee; and, by using this decree, the Lord Ordinary thinks that the trustee, by recovering the expenses under that decree, was bound to pay them to the advocator, to whom they were due. But this is not all. When the advocator learned that a compromise of the nature just mentioned was proposed he wrote to the trustee (respondent,) notifying to him that the compromise had come to the advocator's knowledge, and that he considered himself to have a preference to the other creditors for his expenses, which were thus to be paid in terms of that compromise; and if any doubt had arisen in the respondent's mind on this, it was his duty to intimate it to the advocator, who could have applied to this Court, either to allow extract for these expenses to go out in his own name, or to remit to the Sheriff. It was further the respondent's duty, when such a claim was made, to set aside a sum of money to answer it, in case of being awarded to the advocator. But, in place of doing either of these duties, he made no answer to the advocator, who wrote him other three letters on the subject, viz. 12th and 20th March, and 19th April 1824, without being honoured with any answer; and he wrote him a fifth letter stating that he held him personally liable for the money. This produced an answer, importing that Wright had obtained his discharge on a composition, and 'that their affairs are now out of my hands.' But the truth is, that at the date of the advocator's first letter to the respondent, the latter had that day received the money, not as part of the sequestrated estate (for no such fund is mentioned in the account of the funds,) but as the expenses of the process;—that the composition had not been at that time approved of by the Court, nor for nearly a month after, and that it was not till a considerable time after the date of the advocator's last letter that the respondent paid the money to Wright. In these circumstances, the Lord Ordinary holds that the payment by the respondent was made malâ fide, and that his conduct could not deprive the advocator of his right to claim the extract for the expenses to have gone out in his name; and holding the money to be still in the respondent's hands, as he had not paid it away, to claim it as the advocator's property, as paid to him expressly for the expenses of process at Greenock, and not as any part of the sequestrated estate."

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'a receipt or receipts under the hand of the said cashier of the Royal 'Bank accordingly, subject to the orders of Court, it shall not be neces- 'sary for him, her, or them, so consigning within the said thirty days, 'to grant bond with caution as aforesaid, and the purchasers shall be 'relieved of the cess or land-tax up to and including the 25th day of 'September last, and of all ground-rents, feu and teind duties, minister's 'stipend and schoolmaster's salary, and all other public and parochial 'burdens, up to the said term of Martinmas 1828.'

The lands were accordingly exposed to sale on the 14th of November; and Hunters and Company having become the purchasers, they consigned the price on the 6th of December, and lodged the receipt with the clerk to the process.

When the Lord Ordinary reported the sale, two objections were stated—

1. That it was indispensable for the purchasers to have granted bond, with caution, for the price and interest, according to the usual practice, and the original terms of the articles of roup.

2. That no consignation could be made, except in the manner pointed out by the 6th section of the Bankrupt Statute.

The Court appointed Hunters and Company 'to give in a minute re- 'garding the regularity of the sale, and consignation of the price;' and they having stated that they were willing, in case the proceedings should be considered irregular, to grant bond in terms of the original articles, their Lordships, 'in the particular circumstances of this case, allowed the 'decree of sale to be prepared, upon the purchasers granting bond in 'terms of the original articles of roup; also allowed the purchasers to 'withdraw the bank receipt from process, and granted warrant on the 'Royal Bank of Scotland for repayment to Messrs. Hunters and Com- 'pany of the sum consigned, with the interest accruing thereon, and de- 'cerned accordingly.'

Russell and Cowan, W. S. Agents.

No. 124.

A. Robertson, Complainer.—*Skene.*

Rev. J. M'Donald and Others, Respondents.—*Sol.-Gen. Hope—M'Dougal.*

Interdict—Process.—Parties found to have committed a breach of interdict, although on a copy of the interlocutor granting interdict, and not of the bill, was served upon them, appearing that they knew the matter to which it applied.

Jan. 16. 1829. 1st Division. D.

The late Mrs. Mary Robertson, the mother of the complainer, ex cuted a deed of settlement in favour of the respondents, for the purpo of converting her effects into money, paying her debts, and dividing t residue among her children. The respondents having accepted the tru and the complainer having (as he alleged) entered into an agreem with the other children, by which the effects were to be conveyed to hi and the trustees having announced their intention to dispose of th

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When the case came to be advised,

Skene, for the Complainer, stated that the petition had been prepared and presented before the complainer was aware that the interlocutor refusing the bill had been pronounced.

LORD PRESIDENT.—It is of no importance in this question that the interdict was recalled. It was an interim interdict; and if there was a breach of it, it is still cognisable by us.

LORD GILLIES.—It may diminish the claim of damages.

Skene.—Perhaps so; but that is not the question before the Court. As to the objection to the form of intimation, a distinction is made in regard to bills of suspension and liberation, and others of an equally urgent nature, and those which do not require so much dispatch. In the former class, a very short time is allowed to answer; and the suspender is, therefore, ordered to serve a copy of his bill upon his opponent. But, in regard to other bills, it is sufficient that an attested copy of the interlocutor be delivered, bearing the parties' names, in which case it is the duty of the charger to enter appearance at the Bill-Chamber.

LORD PRESIDENT.—But must not you let the party know what he is interdicted from doing?

Skene.—All that is necessary is the intimation of the order of Court, and to show that the party truly knew to what it applied. But it is proved in this case, by the letters of 4th and 6th December, that the respondents were fully aware that the interdict was directed against the sale. Notwithstanding this, they proceeded to dispose of the effects.

LORD GILLIES.—It is clear there has been a breach of interdict.

The other Judges concurred.

THE COURT accordingly found that the respondents had been guilty of a breach of interdict, sustained the complaint, and found them liable in expenses.

Respondents' Authorities.—Scott on the Bill-Chamber, p. 22; Beveridge, § 209; Pattison, Nov. 28. 1823, (ante, Vol. II. No. 522.)

J. BURNESS, S. S. C.—D. HOUSTON,—Agents.

No. 125. MRS. FRANCIS GUNN or GREIG and Others, Pursuers and Advocators. T. BROWN and D. NICOLSON, Defenders and Respondents.

Servitude.—Two parties having personal rights to adjoining tenements, flowing, by singular titles, from the same author, and the prior right conveying a servitude over the property carried by the posterior right—The servitude held to be effectual, without possession, against the party having the posterior right.

Jan. 16. 1829. 2D DIVISION. Ld. Mackenzie.

IN 1796, Ferrie, a writer in Edinburgh, obtained from certain persons called Clarke a disposition to eight falls of ground, being part of forty falls belonging to the Clarkes, situated in the Abbeyhill, Edinburgh, 'with an entry four feet broad along the east wall of the east ground,

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'southward to the door leading into Baron Norton's property, and from 'thence turning westward to the King's highway,'—the ground through which this entry was to pass being the rest of the property retained by the Clarkes. The right to these eight falls came by progress into the persons of the pursuers Mrs. Greig &c.; and an infeftment was obtained in them, dated the 29th of November 1823. In 1810 the Clarkes conveyed the rest of the 40 falls to the defenders Brown and Nicolson, without any mention of the right of entry reserved in the disposition of the eight falls; and they obtained an infeftment, dated the 4th of October 1823. Neither of these infeftments was taken till after this litigation commenced, and objections were stated to both; but it is unnecessary to advert to them. Brown and Nicolson having commenced to sink a well in the space allotted for the reserved entry, Mrs. Greig &c. presented an application to the Sheriff to have him interdicted; and they thereafter raised this process of declarator of their right to the entry, which they maintained was a right of property; and, ob contingentiam of the declarator, they advocated the application to the Sheriff. No proof of possession of the entry was led by the pursuers; but the Lord Ordinary, without requiring proof of possession, found 'that the pursuers appear to have right, by titles de-'rived from the common authors of the parties, and not liable to be ques-'tioned by the defenders, to the eight falls of ground libelled in the sum-'mons of declarator, and also to an entry to the said eight falls, of the 'breadth of four feet, and in the direction, as above libelled; but that 'this right to an entry is a right of servitude, not of property; and his Lordship further found 'nothing alleged sufficient to take away the right 'of servitude by prescription or otherwise, but that it is existing and in 'force as against the defenders.' The pursuers acquiesced in this interlocutor, finding their right to the entry to be one of servitude merely; but the defenders reclaimed.

More for Defenders.—Assuming that the titles to the pursuers give a right of servitude, such right cannot be good against singular successors without possession. Now here there has been no possession whatever.

Dean of Faculty for Pursuers.—Our title is only in 1796, when alone the right of entry for the first time came into existence, so that there can be no prescription; and being a right contained in our titles, it is of no consequence whether there was possession or not.

Lord Alloway.—Mr. More, do you really maintain that a servitude by disposition and infeftment is not good without possession?

More.—At the date of the action, both rights were personal.

Lord Glenlee.—Then yours, being the last in date, and from a common author, cannot compete with the other; because, as to personal rights, the common author is divested by the conveyance. I am for adhering.

The other Judges concurred, and the Court accordingly adhered.

Act. W. Dickson, W. S.—*Alt.* A. Gifford, S. S. C.—*Agents.*

No. 126. W. C. LEARMONTH, Advocator.—*Jameson—Anderson.*
J. MORTON, Respondent.—*Cuninghame.*

Process—Advocation—6th Geo. IV. c. 126, § 40.—1.—An advocation under the 40th section of the Judicature Act, with the view of having a proof taken before the Jury Court relative to a question of possessory right, held competent, although the action did not set forth that it was of the value of £40;—and,—2.—The case remitted to the Jury Court.

Jan. 17. 1829.
1ST DIVISION.
Lord Meadowbank.
H.

LEARMONTH, proprietor of Craigend in the county of Stirling, presented a petition to the Sheriff, setting forth that Morton and his family, who resided in the neighbourhood, had been in the practice of trespassing upon his grounds, and he therefore prayed the Sheriff to 'interdict, prohibit, and discharge the said James Morton, his wife, family, and servants, and all others employed by him, or acting under his instructions, from travelling over or through the petitioner's said estate of Craigend, or from entering his policies, pleasure-grounds, or grass parks, until parties are heard, and judgment given; thereafter, upon advising this petition, with or without answers, to find the interdict perpetual; to find the said James Morton liable in the sum of £100 sterling, or such other sum, less or more, as the petitioner can instruct he has sustained, in name of damages and expenses, including the expense of this application, and procedure to follow hereon, or of such other sum or sums as your Lordship may be pleased to modify, in name of damages and expenses.'

In defence, Morton stated various pleas, but in particular that he had a right of road through Learmonth's grounds, of which he had been in possession for more than seven years, and therefore that he was entitled to a possessory judgment.

The Sheriff, after a record had been closed, allowed Morton a proof, to the effect of showing that he had 'acquired a right of servitude thereon, and has travelled along the same or any other road, through the pursuer's property, without interruption, for seven years previous to the act of interruption referred to in the 7th article of the revised condescendence and answers;' and to this interlocutor, with a slight modification, the Sheriff afterwards adhered.

Learmonth then presented a bill of advocation under the 40th section of the 6th Geo. IV. c. 120, which was passed. This occurred prior to the late Act of Sederunt regulating the mode of ascertaining the value of the subject in dispute, where there is not a specific conclusion for £40.

In support of this advocation he lodged reasons, the first of which was, that the cause ought to be tried, and the proof led, before a Jury; and this was followed by two others, in which he maintained that the interlocutors were erroneous upon the merits, and that judgment ought to have been pronounced in his favour.

On the other hand, Morton contended in his answers, that as he had not an interest to the extent of £40, the advocation was incompetent; and

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separatim, that as this was not an advocation presented solely on the ground referred to in the statute, but upon other pleas which could not be discussed in an advocation of this nature, it ought to be dismissed.

The Lord Ordinary, on hearing parties 'as to the competency of the 'advocation, repelled said objection.'

Morton having reclaimed,

The LORD PRESIDENT observed, that as the prayer of the petition did not set forth that that which was claimed was worth £40, the advocation must be incompetent.

Jameson for the Advocator.—No; for if so, very important cases may be excluded. Prior to the late Act of Sederunt, it was competent to ascertain the extent of the value by probation; but that act was passed to prevent such investigations. If the circumstance of the value not being specifically set forth rendered an advocation under the statute incompetent, it is manifest that the Court, by their Act of Sederunt, could not make them competent.

LORD GILLIES recollected a case of nuisance before the Aberdeen Circuit Court, where it was objected that as the libel did not set forth the value required by the statute, the appeal was incompetent; and the objection was repelled.

Cuninghame.—But there is another objection. This is an advocation for the purpose of sending the case to the Jury Court; and an attempt is now made to turn us out of Court, not on the proof, but on the merits of the case.

LORD PRESIDENT.—When the bill is passed, it must, as a matter of course, go to the Jury Court.

Cuninghame.—We were always ready to go before a Jury, if the advocation were competent; but the other party has pleas upon the merits.

LORD PRESIDENT.—The first plea is, that the case should be sent to a Jury; and the others are merely supplementary, in case it should not be sent there.

Jameson.—These pleas were entered as matter of protest against the validity of the judgment, lest it should be supposed that we acquiesced in it.

The Court adhered to the interlocutor repelling the objection to the competency, but remitted to the Lord Ordinary to send the case to the Jury Court.

A. PEARSON, W. S.—W. WADDELL, W. S.—Agents.

No. 127. D. BUDGE, Petitioner.—*M'Neill.*

TRUSTEES for the COURTS of JUSTICE in SCOTLAND, Respondents.—*Sol.-Gen. Hope—Henderson.*

Stat. 6th Geo. IV. c. 68.—*Property.*—Question raised, and a remit made to a Jury under the above statute, to ascertain whether a party who held a lease of premises which had been destroyed by fire, had such an interest as to entitle him to the value of the lease from commissioners authorized to appropriate the ground for public purposes.

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1ST DIVISION.
H.

THIS was a question as to whether Budge, the tenant of St. John's Coffee-house, on the east side of the Parliament square, Edinburgh, was entitled to the value of his lease from the Parliamentary Commissioners under the 6th Geo. IV. c. 86, authorizing them to take possession of the ground on which the houses were situated, (and which had been destroyed by the great fires,) for the purpose of erecting buildings for the Courts of Justice. On the part of the trustees it was alleged, That the coffee-house had been so entirely destroyed as to be rendered utterly useless; and therefore, as the lease had thereby terminated, Budge's interest had ceased, agreeably to the decision in the case of Bayne v. Walker, 3. Dow, 333; and consequently he could make no claim under the statute.

To this it was answered, That the coffee-house had not been entirely destroyed; that it could have been repaired; that he had therefore an interest, and was entitled to the value of it as ascertained by a Jury in terms of the statute.

The trustees having refused to submit the matter to a Jury, Budge complained to the Court of Session; and their Lordships, considering that the parties were at issue as to whether the premises had been so completely destroyed as to take from Budge any interest in the premises, granted warrant for a remit to a Jury in terms of the statute.*

HORNE and ROSE, W.S.—F. WILSON, W.S.—Agents.

No. 128. T. WATMORE and MISS J. TAYLOR, Complainers.—*Sol.-Gen. Hope—Houston.*

T. BURNS, W. S. Respondent.—*Jeffrey—More.*

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2D DIVISION.
Bill-Chamber.
Lord Pitmilly.
F.

BILL of suspension, which was refused by the Lord Ordinary in respect of its being presented without caution or consignation, passed by the Court on juratory caution.

R. BURNS, W. S.—W. ALLESTER,—Agents.

* The Lord President, being a trustee, declined judging.

W. BEVERIDGE, Complainer.—*D. of F. Moncreiff—Cuninghame.* No. 129.
A. WILSON, Respondent.—*Jameson—Sandford.*

Heritable Creditor—Sequestration.—Trustee on a sequestrated estate not entitled to prevent an heritable creditor holding a bond and disposition in security, with powers of sale, from selling in virtue of these powers, without qualifying some substantial injury to be suffered by the creditors.

Jan. 17. 1829.
2D DIVISION.
Bill-Chamber.
Lord Newton.
F.

THE respondent Wilson held bonds and dispositions in security over the estate of Saline, belonging to Henry Bardner, writer and brewer in Dunfermline, to the extent of £11,000. Of these, two, amounting to £9000, were first and preferable securities. After them came a bond for £2000 in favour of another creditor, then another bond of Wilson's for £2000; and a postponed creditor held a further security to the extent of £4000. The bonds and dispositions in security held by Wilson contained the most ample powers of sale. The parties differed as to the value of the lands; but it was not denied that the rental of the estate fell short of the interest of the heritable debt by £267, so that it did not yield sufficient to pay the interest of the postponed bond held by Wilson.

In the month of December 1827, the estates of Bardner were sequestrated under the Bankrupt Statute. The complainer Beveridge was appointed trustee, and the usual decree of adjudication was pronounced in his favour. He thereafter advertised the lands of Saline to be sold by public roup in June 1828, and exposed them at the upset price of £18,826. No person having offered, they were subsequently exposed at the reduced upset price of £17,500; but still no bidders appearing, they were again advertised for sale, in the month of October, at the upset price of £16,000. In the mean time Wilson also advertised the lands to be exposed to sale by him under the powers in his bond; and on this Beveridge presented, in the course of last summer session, a bill of suspension and interdict, praying to have Wilson prohibited from proceeding with the proposed sale, on the ground that his right to do so was suspended by the sequestration.

The Lord Ordinary having refused the bill, Beveridge reclaimed; and the Court, in consideration of the case being of a novel description, and of the circumstance that the creditor stated he would be satisfied if the estates were actually sold by the trustee during the vacation, delayed advising the cause, and ordered Cases. No sale was effected by the trustee during the vacation, and the Cases were accordingly given in.

Argued for the Complainer.—In terms of the sequestration statute, the whole property of the bankrupt is adjudged to the trustee, and power is given to him to expose the heritable estate to sale according to the directions of the creditors, and, after applying the price in satisfaction of the heritable debts, to throw the surplus into the common fund of division. The object of the statute is to provide one general system of management

No. 126.

W. C. LEARMONTH, Advocator.—*Jameson—Anderson.*
J. MORTON, Respondent.—*Cuninghame.*

Process—Advocation—6th Geo. IV. c. 126, § 40.—1.—An advocation under the 40th section of the Judicature Act, with the view of having a proof taken before the Jury Court relative to a question of possessory right, held competent, although the action did not set forth that it was of the value of £40;—and,—2.—The case remitted to the Jury Court.

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1ST DIVISION.
Lord Meadowbank.
H.

LEARMONTH, proprietor of Craigend in the county of Stirling, presented a petition to the Sheriff, setting forth that Morton and his family, who resided in the neighbourhood, had been in the practice of trespassing upon his grounds, and he therefore prayed the Sheriff to 'interdict, prohibit, and discharge the said James Morton, his wife, family, and servants, and all others employed by him, or acting under his instructions, from travelling over or through the petitioner's said estate of Craigend, or from entering his policies, pleasure-grounds, or grass parks, until parties are heard, and judgment given; thereafter, upon advising this petition, with or without answers, to find the interdict perpetual; to find the said James Morton liable in the sum of £100 sterling, or such other sum, less or more, as the petitioner can instruct he has sustained, in name of damages and expenses, including the expense of this application, and procedure to follow hereon, or of such other sum or sums as your Lordship may be pleased to modify, in name of damages and expenses.'

In defence, Morton stated various pleas, but in particular that he had a right of road through Learmonth's grounds, of which he had been in possession for more than seven years, and therefore that he was entitled to a possessory judgment.

The Sheriff, after a record had been closed, allowed Morton a proof to the effect of showing that he had 'acquired a right of servitude thereon and has travelled along the same or any other road, through the pursuer's property, without interruption, for seven years previous to the act of interruption referred to in the 7th article of the revised condescendence and answers;' and to this interlocutor, with a slight modification the Sheriff afterwards adhered.

Learmonth then presented a bill of advocation under the 40th section of the 6th Geo. IV. c. 120, which was passed. This occurred prior to the late Act of Sederunt regulating the mode of ascertaining the value of the subject in dispute, where there is not a specific conclusion for £40.

In support of this advocation he lodged reasons, the first of which was that the cause ought to be tried, and the proof led, before a Jury; and this was followed by two others, in which he maintained that the interlocutors were erroneous upon the merits, and that judgment ought to have been pronounced in his favour.

On the other hand, Morton contended in his answers, that as he had not an interest to the extent of £40, the advocation was incompetent; and

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separatim, that as this was not an advocation presented solely on the ground referred to in the statute, but upon other pleas which could not be discussed in an advocation of this nature, it ought to be dismissed.

The Lord Ordinary, on hearing parties 'as to the competency of the 'advocation, repelled said objection.'

Morton having reclaimed,

The Lord President observed, that as the prayer of the petition did not set forth that that which was claimed was worth £40, the advocation must be incompetent.

Jameson for the Advocator.—No; for if so, very important cases may be excluded. Prior to the late Act of Sederunt, it was competent to ascertain the extent of the value by probation; but that act was passed to prevent such investigations. If the circumstance of the value not being specifically set forth rendered an advocation under the statute incompetent, it is manifest that the Court, by their Act of Sederunt, could not make them competent.

Lord Gillies recollected a case of nuisance before the Aberdeen Circuit Court, where it was objected that as the libel did not set forth the value required by the statute, the appeal was incompetent; and the objection was repelled.

Cuninghame.—But there is another objection. This is an advocation for the purpose of sending the case to the Jury Court; and an attempt is now made to turn us out of Court, not on the proof, but on the merits of the case.

Lord President.—When the bill is passed, it must, as a matter of course, go to the Jury Court.

Cuninghame.—We were always ready to go before a Jury, if the advocation were competent; but the other party has pleas upon the merits.

Lord President.—The first plea is, that the case should be sent to a Jury; and the others are merely supplementary, in case it should not be sent there.

Jameson.—These pleas were entered as matter of protest against the validity of the judgment, lest it should be supposed that we acquiesced in it.

The Court adhered to the interlocutor repelling the objection to the competency, but remitted to the Lord Ordinary to send the case to the Jury Court.

A. Pearson, W. S.—W. Waddell, W. S.—Agents.

No. 129. Jan. 17. 1829.

borne proportionally by those who receive the benefit. But, in the present case, the trustee has shown no just ground for his interference with the right of the heritable creditor.

The Judges of the Second Division had, at the first advising, delivered the following opinions:—

Lord Justice-Clerk.—We thought this question deserved deliberate consideration, and therefore ordered Cases; and I shall now merely state my doubts. This is not a case in which the validity of the bond and power of sale are brought into question. It is clear that the bond is legal, and the holder entitled to exercise his power of sale in the ordinary case, if he follow the stipulations of the bond as to intimation &c. This question, however, arises as to the case in a sequestration, where the estate, heritable and moveable, is vested in the trustee, and he, with consent of the creditors, takes measures to sell. Then Mr. Wilson having the bond with powers of sale, says, I consider it more for my benefit to bring the property to sale under the powers in my bond; and the question arises, Is he entitled in this manner to interfere with the trustee? We must look at the Sequestration Statute, and the provisions of the 42d section, which are clearly brought before the Court in the Case for Beveridge; and it is evident that, in regard to judicial sales by individual creditors, the creditor is not entitled to proceed, if the trustee is taking steps for that purpose. This is a very important point; and the individual creditors are even barred from a judicial sale, if the trustee first take steps to a voluntary sale. Now this section certainly does not specially include a sale under powers contained in an heritable bond. I had, however, a faint recollection that there had occurred in this Division a case analogous to the present, and I have discovered it in my note book. It is that of Fleming v. Brown, 10th December 1819. In that case the Court were unanimous; and the ground was, that whatever power the individual might have had to bring the lands to sale tempestivè, yet if he allowed the trustee to take steps for selling, he was not entitled afterwards to interpel the trustee, there being nothing in his conduct to warrant interference. There is another case alluded to in the papers, of which I have notes, and which is a decisive answer as to one objection, if a creditor be obliged to submit to pay commission to the trustee. That was the case of Brock v. Brown, where it was found that the trustee was not entitled to any commission. This demonstrates that the heritable creditor will not suffer; and as to the upset price &c this party will be heard against it, if any thing proposed by the trustee is contrary to his interests. But if every thing is correctly done, I doubt if he can interfere; and we being bound to interpret the Bankrupt Act most beneficial for all concerned, the question comes to this, Are not those proceedings the most beneficial mode in which the lands can be disposed of for the interest of all parties? I do not think this person can interrupt the proceedings of the trustee; but that, in the circumstances of this case, the trustee is entitled to go on, provided every thing be correctly done by him.

Lord Alloway.—As there is here an abstract question of great importance I think it necessary to make some observations. It is clear that no proprietor or any person in his right, can clear posterior incumbrances. This is provided by judicial sale, to secure the safety of purchasers; but it required two statutes

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to accomplish it. Where there is no judicial sale, and no sequestration, if there be securities beyond the value, there is no proceeding by which the inefftments in the later securities can be extinguished. At all periods that was the understanding of the law; and it is illustrated in the case, not quite accurately stated in the report, though it is so by Mr. Bell, Glen and Currie v. Fleming, 19th February 1811. The Sequestration Statute, however, has introduced a new mode of effecting this, and making the purchaser perfectly safe. The 42d clause of the statute gives effect to the sale, and makes the title effectual; but, independently of the act, Wilson cannot give an effectual title. In the case of M'Lean v. Robertson, there was a defect in the sale, in not following out the statute in regard to paying the price to the heritable creditors. The decision there is quite right; but it does not touch the efficacy of the statute, when followed out duly. Sale, under the 42d section, is just a short and summary judicial process, and it is equally safe and effectual. But Mr. Wilson cannot grant a sufficient title; and will your Lordships allow a sale where a good title cannot be given, in preference to one where a perfect title can be granted. I am entirely of opinion that the creditor cannot interfere or interrupt the proceedings of the trustee. Here the trustee was allowed to go on exposing the estate for some time to sale; and Mr. Wilson cannot surely expect to get more than the trustee, when he cannot give a good title. The case of Fleming, mentioned by your Lordship, is a decision in terminis.

Lord Glenlee.—I cannot say that I am satisfied with the argument for the trustee. One thing is plain, that if the Court were satisfied that the sale would be to the injury of the creditors generally, and only for the heritable creditor's own interest, they would interfere. But the trustee asks more, and says he is entitled to the whole management; and entitled, for the mere chance of a residue, to throw on the heritable creditor a loss much greater than the prospect of gain on the other side. I am sensible of the difficulty arising from the circumstance of the heritable creditor not being able to give a proper title, and therefore I think it would be desirable to have the opinion of the whole Court; but my own opinion is, that on the mere matter of law Wilson is right. This is not an attempt to prevent the trustee selling; on the contrary, Wilson would be glad if the trustee sold. In the case of Fleming, the proceedings were under the old act, and under that act the heritable creditor could appear at all meetings of the creditors, and vote; and he had acquiesced in all the former proceedings, and I think that he had barred himself. Now the heritable creditor is not entitled to vote at all; and yet he is told that, by force of the 42d section, he is barred by the resolution of meetings of creditors in which he has no voice. I think that this is a very extraordinary stretch of the words of the clause, and not required in the case of a creditor with powers of sale. For so cautious was the statute of interfering even with creditors having no power, that it only prevents process of sale, if the trustee have previously raised it; and the object was to prevent unnecessary processes and expense; and, in the same way, voluntarily sale under the sequestration, being equivalent to judicial, is a good reason for stopping the process. The case is different, however, where there is no need of any process, as when the party has an independent right to sell; and I do not think that there is any such analogy as authorizes us to stretch the clause beyond the words and the true meaning and motive of the statute, which are to prevent useless and needless processes. Then I agree with the Lord Ordinary that there is nothing in the statute that puts an

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end to the creditor's right; and I cannot concur with the argument that the power expires by the debtor's bankruptcy. The act 1693, as to precepts of sasine, proceeds on the ground that a precept was a mandate, which, though in rem suam, from its nature required somebody to appear and act for the mandant as procurator, and he could not appear for a man who was dead; and that, therefore, was the necessity for the statute. If the heritable security was in the form of a commission to sell in the debtor's name, it might expire by death; but that is not the case in a disposition with powers of sale. The party there is not a mandatory, procurator, or bailie, but possesses a real right to sell in his own name; and therefore I am not moved by the argument on the supposed effect of the bankruptcy; for death does not put an end to the powers of sale; much less can bankruptcy. Therefore, on the point of law, I am not prepared to alter the interlocutor. But, on the other hand, considering the difficulties of the creditor's giving a title, if it can be shown that he will not benefit himself, and will injure others, the Court might interfere; and therefore I wish to have the opinion of the other Judges.

Lord Pitmilly.—I am much in the same situation with Lord Glenlee. I shall only say that I have not seen any grounds for disputing the right of the creditor, unless it can be done under the equitable powers of the Court, in the particular circumstances of the case.

D. Douglas, W. S.—W. Alexander, W. S.—Agents.

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Sir James Carnegie, Complainer.—*Sol.-Gen. Hope—Gillies—H. J. Robertson.*

Ross's Trustees, Respondents.—*D. of F. Moncreiff—Jameson.*

Salmon-Fishing — River. — Circumstances in which stake-nets were interdicted, as being situated in the mouth of a river.

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2d Division.
Ld. Mackenzie.
B.

At the mouth of the river South Esk, which enters the sea in the Bay of Montrose, the land on the southern bank is prolonged considerably further than that on the northern bank, which trends to the north about a mile to the eastward of the extreme point of the land on the southern side; so that at full tide the river appears to end, and to enter the sea in the Bay of Montrose, where the land on the northern side begins to trend towards the north. From the whole line of the coast to the north of the river there extends into the sea an extensive bank of sand, which is left dry at ebb tide, the difference between the level of ebb and flood tide being generally about 14 feet. At the mouth of the river this bank is prolonged eastward to a point called the Annat, extending as far as the land on the south side of the river, and at low tide forming, on the northern side, the bank of the river, which then flows solely in a channel between it and the land on the south, thus apparently prolonging the river, at that state of the tide, as far out as the point where the land on the south turns to the southward. The bank of sand at the Annat point is of a considerably higher level than the rest of the bank; and accordingly, when the flood tide commences, the water, besides flowing up the main channel between the sand-bank and the land

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on the south, at about two hours after the commencement of flood, flows from the northward over a hollow part of the sand-bank between the Annat and the east shore of the land on the north side of the river, the Annat consequently being, at this state of the tide, an island, which is of considerable extent. The Annat is gradually covered by the flux of the tide, and after about three hours of flood it entirely disappears, the tide then flowing over the whole space between the southern bank and the coast of the land to the north, the stream of the tide converging from all points towards the entrance of the river, which has now the appearance of being in the angle formed by the land on the south, the line of which is east and west, and that on the north trending towards the north in a line nearly north and south. About two hours, however, after ebb begins, the Annat again becomes visible; and the water, in issuing from the river, flows partly in the main channel between the sand-bank and the land on the south, and partly in the other but shallower channel formed in the low part of the bank between the Annat and the shore, giving to the river the appearance of two mouths, one on the east between the Annat and the land on the south, and the other in a northerly direction between the Annat and the east coast of the land on the northern side of the river, after it begins to trend to the north. In this latter channel the water continues to flow till after about three hours of the ebb, when it becomes dry, and during the rest of the ebb, the water from the river (which consists of the proper water of the river, and also of an immense quantity of sea water, which, during the flood tide, fills a large basin a short way up the river, and issues out at the rate of 46,000 cubic yards per minute,) flows solely through the eastward or main channel between the sand-bank and the land on the south. The other channel continues dry until the flood begins, when, after being gradually filled by the influx of the sea from the north, it reaches the main channel of the river in about two hours of the flood tide, and then the water from the sea again begins to flow over it, as already mentioned.

On the low part of the sands which form this channel, the respondents, the trustees of the late Mr. Ross of Rossie, erected several stake-nets at right angles to the course of the stream flowing into and out of the river. These nets having been challenged by Sir David Carnegie, a proprietor of fishings in the river, by a bill of suspension and interdict, (which also prayed for an interdict in general terms,) the Lord Ordinary remitted to Mr. Buchanan, civil engineer, to report on the situation of the nets with reference to the question whether the place where the nets were placed fell to be considered as in the river, or in the ocean. Mr. Buchanan accordingly gave in a report, detailing the circumstances above mentioned, accompanied with several plans of the river and lands at the different states of the tide.

The Lord Ordinary, having then advised the cause on Cases, pronounced an interlocutor suspending the operations complained of, and granting interdict accordingly, but refusing to grant a general interdict,

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as craved, against fishing 'at and within the mouth of the South Esk, 'and upon the Annat bank.' His Lordship added the subjoined note.'*

Both parties reclaimed; and the respondents made certain general averments as to the nets in question not being in the mouth of the river, but in the sea, in regard to which question Mr. Buchanan had not stated his opinion.

Lord Justice-Clerk.—In Lord Cassilis's case, his Lordship admitted that his stake-net was within fourteen yards of what might be considered the mouth of the river, and the Court granted interdict, on the broad ground that it was a necessary obstruction to fish going up the river; and here, when we see that the tide flows over this place from the river during ebb, and into it during the flood tide, we cannot allow the nets complained of to stand. In the case of Dalgliesh, we held that there was a breach of the interdict which had been granted by the Court; and although our judgment was reversed in the House of Lords, that proceeded on the ground that the limits had not been specially mentioned in the interlocutor granting interdict; and the House of Lords reserved to the complainer to be heard in a proper process. These are the two cases which bear most on the present; and if there were a positive offer of proof that the nets here cannot be held to be within the mouth of the river, I would not have refused to allow it, notwithstanding the report of Mr. Buchanan. No doubt, we cannot hold the sand-bank to be the proper bank of the river; but the Lord Ordinary does not decide that, or where the proper line is. But I can find no averment here which could be the subject of an issue; and therefore, holding that no person is entitled by nets to obstruct the entrance to a river, I think that the Lord Ordinary's interlocutor should be adhered to.

Lord Alloway.—This case is in rather a singular situation; but no point of law does or can occur in it. It is fixed that no stake-nets can be placed in the mouths of rivers where the tide ebbs and flows, while stake-nets may be placed on the sea-shore. The point of law, therefore, is decided. The whole question is of fact. Are these nets in the mouth of the river? Can fish get into the river without passing them, or do they intercept their passage into it? Instead of going to a Jury, the parties have had a report from a scientific man, and I think they were fortunate in the person selected. The only question therefore is, what is

* "The Lord Ordinary does not mean to disturb the decision in the case of the Earl of Kintore, which he conceives related to stake-nets on the open sea-coast, not connected with any river. But he thinks it impossible to reconcile to the statutes a stake-net situated, as this is, on sands within the immediate flux and reflux of the river South Esk, and in truth closing up, in no small part, the mouth of that river during great part of the tide. He considers this stake-net not more admissible than one running along the low tide margin of the river, all the way from the extreme point of the Annat, at low tide, up to the lower light-house where the river is narrow at high water, or from that extreme point across to the letter X. And then he cannot think that it was the intention of the statutes to allow the mouths of rivers to be beset in that way by yairs or stake-nets. He does not rest any thing at all on speculation of expediency. If he were to hazard an opinion of that sort, he might be just as likely to imagine that all killing of salmon in rivers ought to be prohibited, and these fish caught only in the sea, or ostium fluminis, not at all in the fresh breeding streams, as to form an opposite opinion. But he does not go into that—he takes the statutes as they stand. The Lord Ordinary cannot grant interdict generally as craved, because he does not think the terms sufficiently definite."

the effect of the report? And, on a fair consideration of it, there can be no doubt *that* the nets are within the mouth of the river. In the case of Kintore, the stake-nets were *two* miles from the mouth of the river. The case of Dalgliesh, in the House of Lords, was a case of breach of interdict. The Court had never specifically *fixed* the limits, so that the breach was not clearly made out; and Lord Gifford reserved the question in another form.

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LORD GLENLEE.—I am for adhering.

LORD PITMILLY.—If this case is to be decided on the evidence now before us, *I can see* no reason for differing. But averments so material have been made by the respondents at the Bar, that I should like to see them in writing; and if relevant, *I* would remit again to Mr. Buchanan. For this is a question not of law, but of fact; and it must be a question of fact in every particular case. Here it is attended with some difficulty. I do not think that the river can be limited to the channel where the tide flows at low water. I think that it extends to the sands, over which, at high water, it flows and mixes with the sea water. Mr. Buchanan does not say what is, or what is not, the river; or where, in his opinion, the line ends.

LORD GLENLEE.—If there were any physical facts necessary to enable us to decide whether the nets are in the river or not, which are not stated in the report, I would allow further investigation; but when the physical facts are ascertained, we cannot ask the opinion of Mr. Buchanan, as it is a pure question of law what, on the facts, is the river.

Jameson.—If your Lordships will allow us to give in a minute stating specifically what facts we can prove, I believe we shall be able to aver that no water from the river flows over the bank where our nets are situated.

THE COURT accordingly allowed a minute to be given in; but in it the respondents stated that they found they could not establish such an averment, and the Court thereupon refused both notes, and adhered to the Lord Ordinary's interlocutor.

J. MACKENZIE, W. S.—J. THORBURN, S. S. C.—Agents.

G. RODGERS and Others, Pursuers.—*Jeffrey—Neaves.*

T. HARVIE, Defender.—*D. of F. Moncreiff—Skene.*

No. 131.

Road—Process.—1.—Under a verdict finding a public foot-path in virtue of immemorial usage, held competent to decern in terms of a summons libelling a right acquired by the inhabitants of certain towns and places in the neighbourhood;—and,—2.—A foot-path having been unduly shut up, the Court refused to delay ordering the obstructions to be removed, until the precise line of the path should be marked out.

THE defender Harvie having shut up a foot-path passing through his lands of Westthorn, along the banks of the Clyde, above the city of Glasgow, Rodgers and others raised an action against him, setting forth in their summons that this path had been, for time immemorial, 'resorted 'to, and used and enjoyed by the pursuers, and the other inhabitants and 'heritors of Glasgow, and of the adjacent towns and villages of Bridge-'town, &c., and other places in the neighbourhood, without any chal-'lenge, hinderance, molestation, and interruption: That the pursuers 'are respectively inhabitants or heritors of Glasgow, and feuars and

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'proprietors of the foresaid towns and villages of Bridgetown, &c., 'and have therefore good and undoubted right and privilege of passage 'along the same, and of walking thereon between Glasgow and the other 'places above mentioned and Carmylie;—that the pursuers and others 'foresaid, as inhabitants of or feuars and proprietors in the foresaid 'places respectively, have, by themselves, their predecessors and authors, 'exercised and enjoyed the free and uninterrupted privilege before men- 'tioned, for time immemorial, and past all memory of man, without mo- 'lestation or interruption;—that, independent of the privilege and servi- 'tude thus belonging to, and exercised and enjoyed by, the whole of the 'pursuers and others as aforesaid,' they had certain interests in the navigation of the Clyde, to which it is unnecessary to advert, and that the defender had lately obstructed this path by erecting stone-walls across it, and down to the river; and they therefore concluded to have it declared 'that the pursuers, inhabitants of, and feuars and proprietors of the 'foresaid several places in the neighbourhood &c., have good and un- 'doubted right and title at all times and on all occasions to resort to the 'said piece of ground, and road or path within the bounds aforesaid, and 'there to exercise the privilege and enjoy the comfort of a free passage 'along the same, and of walking thereon for any lawful purpose, accord- 'ing to immemorial usage and custom; and that the said right and pri- 'vilege should be reserved entire, as it has been in time past, for the con- 'venience, comfort, and recreation and health of the pursuers and their 'families, and the other inhabitants and others aforesaid, who shall resort 'to the foresaid piece of ground, and road or path;' and that the defender should be ordained to remove his obstructions, and be prohibited from impeding the pursuers &c. in the use of the path in time to come.

After a condescendence by the pursuers had been given in and revised, averring more specifically the circumstances set forth in the summons, the Lord Ordinary pronounced an interlocutor appointing them 'again 'to revise their condescendence, to the effect of stating explicitly whether 'the road in question is a road for the use of the public in general, or 'only a road for the use of the inhabitants of Glasgow and the neighbour- 'hood.' The pursuers thereupon, in their revised condescendence, averred that the path in question had been constantly used by the public at large; and the Lord Ordinary, after stating that he considered 'the 'allegation to be quite distinct that the public have enjoyed a road along 'the bank of the river Clyde from the Green of Glasgow to Carmyle 'for above 40 years,' remitted the cause to the Jury Court, where the following Issue was sent to a Jury, viz. 'Whether, for 40 years and up- 'wards prior to the months of March, April, or May 1822, there existed 'a public foot-path or foot-road along the right bank of the river Clyde 'from the city of Glasgow to the village of Carmyle, situated on the said 'bank of the said river?' On this Issue a verdict was returned, finding generally for the defenders; and a bill of exceptions presented to this Court was subsequently disallowed, (see ante, Vol. V. No. 454.)

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The verdict having now come to be applied in this Court, the Lord Ordinary pronounced the following interlocutor:—'Finds that by the 'verdict of the Jury it is established, that for forty years and upwards, 'prior to the months of March, April, or May 1822, there existed a pub- 'lic foot-path or foot-road along the right bank of the river Clyde from 'the city of Glasgow, from the place called the Green to the village of 'Carmyle, situated on the said bank of the said river: Therefore finds 'and declares, that the pursuers and their families are entitled to the 'use and privilege of the said foot-path or foot-road, free from any en- 'croachment or any interruption inconsistent with or injurious to such 'use and privilege: Finds that the defender had no right to close up or 'obstruct the passage of the said foot-path or road in the manner com- 'plained of, or otherwise; ordains him forthwith to remove the obstruc- 'tions and impediments mentioned in the summons, in so far as they close 'up or obstruct the said passage; prohibits and discharges him, in time 'coming, from shutting up or obstructing passages on the said foot-road, 'or doing any other act inconsistent with, or injurious to the use thereof, 'or from hindering, molesting, or interrupting the pursuers, or their 'families, in the free exercise of the said right and privilege, and decerns; 'without prejudice, however, to the defender enclosing his ground close 'down to the said river, provided he leave in the fences, wickets, or proper 'openings for allowing free passage.'

Against this interlocutor Harvie reclaimed, and contended, 1. That the verdict of the Jury, finding it a public road, did not apply to the summons, which only libelled a servitude road in favour of the inhabitants and proprietors of certain places in the neighbourhood; and, therefore, that it could not warrant decree in terms of the libel; and, 2. That, at all events, before the road was thrown open to the public, its limits and position ought to be specifically marked out.

The Court adhered, and ordained the obstructions complained of to be removed within eight days, and allowed the decree to that effect to be extracted as an interim decree; but, 'with a view to the arrangement 'of the future exercise of the said right of road in the manner least pre- 'judicial to the defender, and consistent with the just rights of the par- 'ties,' their Lordships remitted to Mr. Kyle, surveyor, 'to lay off the 'said foot-path or foot-road along the said bank of the river Clyde, so 'far as it extends along the defender's grounds, at the sight of the par- 'ties, and report thereon to this Court quam primum.'

Cairns and Macdowall, S. S. C.—Macmillan and Grant, W. S.—Agents.

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closed, record closed, and a proof allowed. The question is, whether the present advocation be competent? Two objections are stated; the last of which shall be taken first.

It is said that this is a cause which is not of the value required by the statute.

Lord Gillies.—I do not think there is any thing in that. There have been many cases appealed to the Circuit Courts, where, although the value was not set forth, they were yet held to be competent.

Solicitor-General.—Besides, the new Act of Sederunt was not intended to be correctory of the statute, by declaring that advocation should not be competent, unless the value were previously ascertained. Indeed, if the Act of Parliament had been intended to limit the power of advocation to cases setting forth a pecuniary sum, the Court could not have enacted that it should be competent to advocate, where this was not set forth on the face of the summons.

But it is said, in the second place, that this is not a *cause* in terms of the statute. It is no doubt true, that a matter of the nature involved in this proceeding may be proper for the consideration of the Judge alone, and it may be his duty to make inquiries. If he does injustice, the party may have redress by petition and complaint; but here the procurators sisted themselves as proper parties, and as the antagonists of Sands, and from that moment it became a proper process. There cannot be a doubt, that if the Sheriff had considered the objections unfounded, he would have been entitled to have awarded expenses against the procurators, which shows that this became a proper cause. Besides, a cause in the Inferior Court may originate, not merely by a summons, but by petition; and the statute expressly declares that advocation shall be competent 'in all cases originating in the Inferior Courts.' If it were not a proper cause at the outset, the procurators have made it one; and they admitted in the Outer House, that an advocation would be competent after final judgment. The objection, therefore, is narrowed to the plea, that an advocation is not competent at this stage; but this is an objection as to the value, and not as to its being a proper cause. Sands has a manifest interest to have the matter tried before a Jury, so as to have his character cleared from the accusations made against it.

Cockburn in reply.—It is true the Sheriff thought fit to apply the machinery of the statute by ordering condescendence, and closing a record; but if this was not originally a proper cause, it could not be made so by the Sheriff ordering the investigations to be made in this form.

Lord President.—If the accusations against Sands were rested upon a single isolated fact, such as that of forgery, it might easily be settled by a Jury; but it is said there are a number of accusations and it is impossible to see how a Judge can exercise his jurisdiction in relation to this matter, without having the circumstances laid before him in detail. Possibly a very strong suspicion might warrant him to reject the applicant,

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Lord Gillies.—This is a case of great importance. There is nothing in the objection as to the value not being set forth. But an advocation in a case of this nature is a matter of considerable delicacy. The Act of Parliament authorizes an advocation in all cases originating in the Inferior Court of the value of £40, where a proof has been allowed; and it has been declared, that if the party shall not avail himself of this privilege, he shall be held to waive his right of appeal in regard to matter of fact. But this man's character is at stake, and if the proof had been taken by commission, he would have lost his right of appeal. The great difficulty however is, that this is not a process in the sense of the Act of Parliament. Sands presented a petition to the Sheriff for admission, and the Sheriff was the proper Judge as to whether he should be admitted or not. He might make all the inquiries, and take all the information which he could get. This is not like the case of an application to us for admission to the Bar. We make a remit to the Faculty of Advocates to inquire into the fitness of the candidate, and on their report we act. But here the Sheriff issues a deliverance, stating that he understands objections are to be made; and then these procurators voluntarily come forward and make themselves parties, after which a record is made up. It is plain that the procurators have no proper interest to insist in this matter. It belongs to the Sheriff entirely to make the inquiries, and to say whether the party should be admitted or not. The whole proceedings have been irregular from the date of the first deliverance, and ought to be quashed.

Lord Balgray.—I agree in every respect with Lord Gillies.

Lord Craigie suggested the propriety of taking time to consider.

Lord President.—The Sheriff has fallen into an entire mistake in making this a process. We should remit to him to quash the whole proceedings.

Lord Corehouse expressed a doubt whether it was competent for the Court, in the shape of the case, to do any thing else than to decide the question of competency which he had reported.

Solicitor-General.—When a cause is removed here by advocation, it is competent for the Court to pronounce such judgment as they shall think fit.

Lord President.—Suppose the Sheriff had allowed parole proof where writ or oath was only competent, and advocation is brought under the 40th section, would it be imperative upon us to send the case to a Jury? Certainly not.

The Court then instructed the Lord Ordinary to pronounce the following interlocutor, which he accordingly did:—'Having advised with the First Division of the Court upon the objections to the competency of this advocation, and their Lordships having heard counsel thereon in their own presence, the Lord Ordinary, by direction of their Lordships, repels the objections to the competency of this advocation; but finds that the proceedings in the Inferior Court, which followed upon the

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'petition of the advocator, are irregular and inept; therefore remits to 'the Sheriff of Forfarshire with instructions to recall his interlocutors, to 'resume consideration of the petition as it originally stood, and to make 'such inquiry as he shall deem necessary for ascertaining whether the 'petitioner is a fit person, duly qualified, to be admitted a procurator in 'his Court, and to do thereafter as he shall see cause, and decerns; finds 'the advocator entitled to expenses in this and the Inferior Court; allows 'an account thereof to be given in, and when lodged, remits to the auditor 'to tax the same, and report.'

Against this judgment the procurators reclaimed, and the Court were at first disposed to refuse the note in respect of the interlocutor having been truly pronounced by them; but as it had been pronounced by the Lord Ordinary, and the provision of the 76th section of the Act of Sederunt was confined to interlocutors in the Bill-Chamber on report, they found the reclaiming note competent.

In addition to the argument formerly maintained, it was contended by the procurators, that in so far as the interlocutor decided any question except that which had been reported by the Lord Ordinary, it was incompetent, and therefore ought to be recalled. In regard to the form of proceeding before the Sheriff, it was stated that reports had been obtained from all the counties; that there were only twelve in which any question similar to the present had occurred; that in all of them the procurators were the opposing parties; that in the Sheriff Court of Perth there was an express rule that the investigation should be conducted in the form of a regular process; and that in the Sheriff Court of Forfar there was a similar consuetudinary rule.

Lord Balgray.—It is true that the Lord Ordinary reported only the question of competency; but it struck one of your Lordships that there was a radical defect in the proceedings from the beginning, and that the ought to be quashed, in which opinion I coincided; and, after again hearing the parties fully, I remain of that opinion. There can be no doubt as to the title of the procurators to appear and state objections and I have as little doubt as to the competency of the advocation. Indeed this person was driven to present a bill of advocation, because, if he had not done so, his right of appeal would have been cut off. But it is said that we must of necessity remit the case to a Jury, even although we should see that the proceedings have been irregular. But the Act of Parliament has not made a remit to the Jury Court imperative. It has done so in regard to one class of cases, but not as to those falling under the 40th section; and therefore it is discretionary for us either to remit the case to the Jury Court, or not. But as the proceedings have been quite irregular, and the parties have now been fully heard, I am for not hering.

Lord Craigie.—The case does not appear to me in the same light. This is not a cause or case in which an advocation under the statute is competent. If there is any complaint of the proceedings being irre

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this may perhaps form a separate ground of advocation, and we may then be called upon to exercise our judgment as to whether the proceedings were inept or not. Besides, it is not proper that these procurators should be found liable in expenses. I therefore think that the advocation should be dismissed as incompetent.

Lord Gillies.—It appears to me that the advocation is competent. The leading object of the Judicature Act was to lessen the number of appeals to this Court and the House of Lords in trifling cases, and in regard to matter of fact. It was accordingly declared that, as to causes under £40, the interlocutor of this Court on the proof should be equivalent to a special verdict, and that it should be competent in cases above £40, where a proof was allowed, to have the facts settled by the verdict of a Jury; and if the party did not advocate for that purpose, his right of appeal was excluded as to the matters of fact. When, however, a party advocates, it is not imperative on this Court to send it to the Jury Court. Accordingly, the statute does not say that it *must* be sent to the Jury Court. If it had meant that it should be sent there, the statute would have said so. The case is now in this Court—it has been advocated; and when once here, the Court may dispose of it on legal grounds. In short, we must deal with it just as if the process had been raised here originally. The party conceived that it should be tried by a Jury, and therefore made this application; but his conception may have been wrong; and if we are of that opinion, we are not bound to send it there. But then there is a difficulty from the shape of the process, which leads me to differ from Lord Balgray. The only point presented upon the record, and the only question which was brought before us, related to the competency of the advocation; and if we go beyond that, we shall be told elsewhere that our judgment is incompetent. It is true that the parties have discussed the merits before us, and it might be said that they have consented to judgment being pronounced upon them; but the merits are not before us on the record, and therefore we must confine ourselves to the objection to the competency of the advocation. On that point I am clearly in favour of the advocator; but the interlocutor quoad ultra must be recalled, and a remit made to the Lord Ordinary, who may or may not send it to the Jury Court.

Lord President.—I agree both as to the competency of the advocation, and that it is not imperative to remit to the Jury Court. But there is certainly a difficulty in point of form in regard to the rest of the interlocutor. We may adhere in so far as the objections to the competency are repelled; but, quoad ultra, the interlocutor must be recalled.

Solicitor-General.—This reclaiming note was held competent on the ground that it asked review of a judgment of the Lord Ordinary, and therefore it is competent for the Court to adhere to it in toto.

Lord President.—But the objection is, that it was not competent for the Lord Ordinary to enter upon any question except the competency, and that, quoad ultra, the parties have not been heard.

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Solicitor-General.—If the Court remit back the case to the Lord Ordinary, the argument may be renewed as to a remit to the Jury Court, although the Court are of opinion that it ought not to be remitted.

The Court pronounced this interlocutor:—'Having advised the reclaiming note for the respondents, and again heard parties' procurators at great length, adhere to the interlocutor complained of, in as far as it repels the objection to the competency of the advocation, and to this extent refuse the desire of the said note; find the respondents liable to the advocator in the expenses in this Court hitherto incurred by him in discussing the preliminary objection of incompetency; allow an account of such expenses to be given in, and when lodged, remit to the auditor to tax the same, and report; but, in respect that the question reported to the Court by the Lord Ordinary related only to the competency of the advocation, remit to the Lord Ordinary to hear parties, and to proceed further in the cause as to his Lordship shall seem just.'

J. Jameson, S. S. C.—Ramsay and Imrie, W. S.—Agents.

No. 133.

R. Campbell, Petitioner.—*Shaw.*

Curator Bonis.—A curator bonis authorized to serve his insane ward, and make up titles as heir of entail.

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1st Division.
D.

Campbell, as curator bonis of a gentleman, who, while a minor, succeeded as heir of entail to an estate, and afterwards became insane, presented a petition to the Court for authority to serve him heir of entail, and make up titles to the estate, as the vassals were threatening to bring actions of declarator of tinsel of the superiority, if titles were not granted in their favour.

The Court, after the usual intimation, granted the prayer.

Petitioner's Authorities.—Blaikie, Feb. 1. 1827, (ante, Vol. V. No. 158, and cases there); Warren, Nov. 26. 1825.

Bowie and Campbell, W. S. Agents.

No. 134.

Mrs. Buchan, Pursuer.—*More.*
D. Scott, W. S. Defender.—*Wilson.*

Process—Poinding of the Ground.—It is not competent for the proprietor of the ground against which a poinding is led, to oppose decree passing in absence against the tenants.

Jan. 20. 1829.
1st Division.
Lord Meadowbank.
D.

Mrs. Buchan brought an action of poinding of the ground against Scott the proprietor, and certain other persons the tenants, in which appearance having been made by Scott only, the Lord Ordinary decerned against the tenants in absence, and allowed Scott to lodge a condescendence in support of his defence. Scott then reclaimed, and prayed for recall of the interlocutor 'in as far as it decerns against the before-mentioned defenders, tenants of the said David Scott, who have no interest in the cause.' But the Court, holding the note to be incompetent, seeing that there was no appearance by the tenants, refused it.

A. Burns, W. S.—R. Booe, S. S. C.—Agents.

No. 135.

M. MACKENZIE, Pursuer.—*Sol.-Gen. Hope—Buchanan.*
D. GILCHRIST, Defender.—*Jeffrey—A. Wood.*

Title to Pursue—Jus Tertii—Salmon-Fishing.—Held,—1.—That a proprietor and tacksman of salmon-fishings in a frith or river is not entitled to object to an heritor fishing, in a lawful way, opposite to his lands, although he has no right of salmon-fishing, the former not alleging that he had any such right;—and,—2.—(By the Lord Ordinary, and acquiesced in,) That the proprietor and tacksman has a title to object to such a party fishing in an unlawful manner.

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Ld. Corehouse.
D.

AT a certain point on the Frith of Dornoch there is bridge called Bonar Bridge, above which the estuary loses its name, and is called the Kyle of Oykell. At a still higher point, it terminates in what is properly called the River Oykell. Of the salmon-fishings, both in that river and the adjacent parts of the Kyle of Oykell, Mackenzie is either proprietor or tenant. He is also proprietor of the fishings of Easter Fern and Mid Fern, and tenant of those in the river Carron, and one half of those in the Cassley, all of which are situated below Bonar Bridge; so that he is proprietor or tenant of almost the whole fishings in the Frith and the Kyle of Oykell. The defender Mr. Gilchrist is proprietor of certain lands called Spinningdale, lying below Bonar Bridge, and almost adjacent to the lands of Easter Fern, but situated upon the opposite side of the frith. Mr. Gilchrist did not pretend that he had any right of salmon-fishing. Having, however, exercised that right opposite to his property, and disputes having taken place, Mackenzie brought an action, in which, after setting 'forth that he was proprietor of certain salmon-fishings in 'the Frith of Dornoch and Kyle of Oykell, and rivers flowing therein, 'and is also tacksman of certain other salmon-fishings in the said frith, 'and kyle, and rivers;' that 'Mr. Gilchrist has no right or title what-'ever to fish for or kill salmon in any manner of way in the said frith;' that nevertheless he had presumed to do so, and had made use of unlawful engines for that purpose; he concluded that 'it ought and 'should be found, decerned, and declared, by decree of the Lords of 'our Council and Session, that the said Dugald Gilchrist has no right 'or title whatever to fish or kill salmon in any part of the said Frith of 'Dornoch, and more particularly opposite to the said lands of Spinning-'dale, in any manner of way whatever: And it being so found and de-'clared, the said Dugald Gilchrist ought and should be prohibited and 'discharged from using or employing the stake-nets, or nets, or other 'engines of any description in the Frith of Dornoch, and more parti-'cularly opposite to the said lands of Spinningdale, in any manner of 'way, and from making any further erection on the said lands of stake-'nets, or other engines or contrivances of that description.'

In defence Mr. Gilchrist pleaded, That as Mackenzie did not pretend that he had any right to the fishings opposite Spinningdale, he had no title to interfere, except to the effect of preventing him from employing unlawful machines, which he denied that he had done.

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The Lord Ordinary pronounced this interlocutor:—'In respect the 'pursuer claims no right of fishing in that part of the Frith of Dornoch, 'adjoining the lands of Spinningdale, which is mentioned in the libel, 'finds it jus tertii for him to plead that the defender has no right to 'fish there in any way not prohibited by law; and therefore sustains 'the objection to the pursuer's title to insist in this action, in so far as it 'concludes that the defender has no right to fish or kill salmon in the 'Frith of Dornoch; but in respect it is alleged in the summons that the 'defender uses stake-nets, or other illegal engines for killing salmon, 'finds that the pursuer, in virtue of his rights of fishing in the Frith of 'Dornoch, or the streams that run into it, is entitled to challenge such 'illegal modes of fishing, and to that extent repels the objection to the 'pursuer's title.'

Mackenzie reclaimed; and when the case came to be advised—

The Solicitor-General, for Mackenzie, founded upon the case of Mackenzie against Houston, 16th January 1828, (ante, Vol. VI. No. 120, p. 359,) decided by the Second Division, as a conclusive authority in his favour.

Jeffrey, for Gilchrist, stated, on the other hand, that the report of that case was erroneous, and appealed to certain notes which he said had been taken by the junior counsel for the defender in that case.

To ascertain how this matter stood, the Court delayed the cause; and Mackenzie having produced a certified copy of the subjoined notes taken by the Lord Justice-Clerk,* and their Lordships being satisfied of the accuracy of the report, 'appointed mutual Cases to be prepared and 'given in upon the subject of the title of the pursuer, alluded to in the 'Lord Ordinary's interlocutor.'

On the part of Mackenzie it was contended, That as he was proprietor or possessor of almost the whole fishings on the frith, he had a manifest interest to increase the beneficial enjoyment of them, and consequently to prevent any one from fishing who had no right to do so; that this interest of itself gave him a title to object, although he could not allege that he had a right to the salmon-fishings in the place where Gilchrist took the fish; that although it was true that the proprietor of an estate could not interfere with any stranger exercising rights of property over adjacent lands which might be prejudicial to his estate, as, for example,

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* "Nov. 13.—ROLL.—*Op.*—We do not see exactly what the real objection is, on which the defender rests his defence of a want of title to pursue, and must hear what it is.

"Now satisfied the interlocutor is right.

"Jan. 16. 1828.—GLENLEE.—Interlocutor goes no further than to sustain the title to be heard.

"PITMILLY.—Of same opinion.

"ALLOWAY.—Also agree in opinion. Even in regard to sea-fishings, the title of superior heritors has been sustained. Cannot doubt of the title being sufficient to try the question.

"J. CLERK.—Concurred.

"Refuse."

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from raising wheat crops, and thereby coming in competition with him into the market, or killing game, and so preventing the game coming on to his lands, yet this was entirely different from the case of salmon-fishing which was a property of a very peculiar nature, in consequence of the natural instincts of the fish, which induced them regularly to return from the sea to the rivers, and proceed to the higher parts of them, so that, whenever they entered a river, they were in progress towards the upper parts; and as this was a quality in this species of property on which he was entitled to rely, he had right to prevent any unauthorized party from interfering with the fish in their progress upwards; and in support of his title he mainly relied upon the case of Sir James Colquhoun against the Town of Dumbarton, and the above case in the Second Division.

On the other hand Gilchrist contended, That as Mackenzie did not pretend that he had any right to the fishings opposite to Spinningdale, he had no title to prevent him from fishing in a lawful way; that if the right was not in Gilchrist, it was in the Crown; and therefore it was jus tertii to Mackenzie whether the fish were killed by the donatory of the Crown or by him; that interest was not sufficient to give a title, for if it were so, then every proprietor of an estate would have a title to object to the acts of his neighbour, although he could not pretend to have any right to the property. In support of his plea, he referred to the case of the Duke of Hamilton against M'Callum and others.

On resuming consideration of the cause, the Court suggested that further inquiry should be made regarding the proceedings in the case of Sir James Colquhoun, and another mentioned on the Bench, Lord Gray against the Town of Perth. Mutual minutes were thereupon lodged, entering into a long detail of these cases,—Mackenzie alleging that, in that of Colquhoun, the present question had been decided in terminis; whereas Gilchrist maintained that the only points raised were, whether an heritor, having no right of salmon-fishing, could complain of an *illegal* mode of fishing by a neighbouring heritor; or whether, having such a right, he could complain of that illegal mode, if it could be shown that he had no interest to do so.

The Court, being of opinion that Gilchrist's construction of the case was correct, and that on principle Mackenzie had no title to interfere, adhered to the judgment of the Lord Ordinary.

Pursuer's Authorities.—Macdonell, Jan. 20. 1826, (ante, Vol. IV. No. 256); Kintore, May 31. 1826, (ante, Vol. IV. No. 397. p. 643); Balfour, p. 545; Hailes' Dec. p. 601; Colquhoun, July 4. 1804, (12827 and 14285); Mackenzie, Jan. 16. 1828, (ante, Vol. VI. No. 120. p. 359.)

Defender's Authorities.—Duke of Hamilton, Feb. 12. 1724, (7824); Fraser, July 18. 1662, (7064); Perth, June 15. 1748; Elch. No. 2. Salmon-fishing, and 12792.

H. Macqueen, W. S.—Inglis and Donald, W. S.—Agents.

No. 136.

F. Seymour, Advocator.—*Pyper.*
A. Thomson, Respondent.—*Jeffrey—A. M'Neill.*

Process—Advocation.—An action of damages in an Inferior Court having been conjoined with an action of relief at the instance of the defender against a third party, and a judgment of absolvitor having been pronounced in the former; and the pursuer, without delaying till a similar judgment had been pronounced in the question of relief, having brought an advocation—Held that the judgment was not final, and that the advocation therefore was incompetent.*

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2d Division.
Lord Medwyn.

The respondent Harvie let, by missive, to the advocator Seymour, manager of a company of players, a minor theatre in Glasgow; and he thereafter let to Alexander, the manager of another company, the under part or cellar of the same building. In this cellar Alexander commenced exhibiting performances similar to those of Seymour, who thereupon raised an action of damages against Thomson, before the Magistrates of Glasgow, for having let the cellar to Alexander for the purpose of such performances, contrary, as he alleged, to the faith of the contract between them. Thomson, in consequence, raised an action of relief against Alexander, which was conjoined with that at the instance of Seymour against Thomson. After some procedure, the Magistrates allowed Seymour a proof as to the import of his contract with Thomson, limiting it to the writ or oath of the latter. Against the interlocutor so limiting the proof, Seymour reclaimed; but the Magistrates adhered, granting, at the same time, leave to Seymour to advocate, on the ground of objection to the legal mode of proof, under the 50th Geo. III. c. 112, § 36. Seymour, however, did not avail himself of this permission; and accordingly the term for proving was circumduced against him, and an interlocutor pronounced, (dated 12th January 1827,) assoilzieing Thomson in the action of damages at Seymour's instance, and at the same time delaying to pronounce judgment in the action of relief at Thomson's instance against Alexander, till it was certified that the former had obtained circumduction against the latter. Without waiting till judgment should be pronounced in the action of relief, Seymour brought an advocation, not as to the mode of proof under the leave granted by the Magistrates, but praying generally for advocation in common form, on the ground of iniquity.

To the competency of this advocation it was objected, That as the actions of damages and relief were conjoined, the absolvitor in the action of damages was merely an interlocutory judgment; and that, until a decision had been also pronounced in the action of relief, it was incompetent to bring an advocation like this, which was not as to the mode of proof under the permission of the Magistrates, but on the merits. The Lord Ordinary pronounced this interlocutor: '‘ Finds that the present advocation was not ‘ presented in terms of the interlocutor allowing advocation on the ground ‘ of legal objection to the mode of proof, but upon the ground of ini‘ quity, which can only be after final judgment shall have been pronounced: ‘ Finds that the Inferior Court, by the interlocutor of 12th January last, ‘ had not pronounced final judgment in the conjoined action of damages

* See, however, infra, Gammell's Trustees v. Miller, Feb. 25.

'and relief, and therefore that it was not competent to apply for advoca- No. 136.
'tion of the cause at that stage of the process; therefore dismisses the Jan. 20. 1829.
'advocation as incompetent, and decerns; and finds expenses due.' His Lordship added the following note:—'It was pleaded that the complainer 'had no sufficient title to insist upon the parties in the action of relief 'proceeding to a final judgment on that branch of the conjoined actions, 'and therefore that the complainer would be cut out of his right of review, 'if they declined to proceed, and if advocation was not competent till the 'whole case was disposed of; but the complainer's remedy was obvious— 'he was entitled to apply by petition to the Sheriff, stating his intention 'to advocate, and praying that he would call upon the other parties to 'proceed with the action of relief; and failing their doing so, to disjoin 'the processes, which would entitle him competently to advocate his action 'of damages against the respondent.'

The Court adhered.

Macmillan and Grant, W. S.—Campbell and Macdowall, S. S. C.—Agents.

M. Mackenzie, Advocator.—*Skene—Buchanan—Cullen.* No. 137.
A. Taylor, Respondent.—*Sol.-Gen. Hope—A. Wood.*

The Court adhered to an interlocutor of the Lord Ordinary's, remitted simpliciter to the Sheriff of Inverness in an advocation against his judgment, which found it established that the advocator had acquiesced in a certain amount being taken as his rental, on which to assess him under a county road act. Jan. 20. 1829. 2d Division. Lord Medwyn. F.

H. Macqueen, W. S.—J. Macdonell, W. S.—Agents.

T. Thomson, Petitioner.—*A. Lothian.* No. 138.

Poor's Roll.—On the refusal of a kirk-session to grant the certificates required by the Act of Sederunt 16th June 1819, in order to obtain admission to the poor's roll, the Court remitted to the Sheriff of the county to inquire and report.

This was a petition setting forth that the petitioner Thomas Thomson, being about to raise an action against his brother John Thomson of Seggie, and being desirous of admission to the poor's roll in this Court, applied to the kirk-session of Orwell for the usual certificate of poverty, in terms of the Act of Sederunt 16th June 1819; that the kirk-session, of which his brother is a member, met, and, instead of proceeding in the application, entered into an examination of the merits of the dispute between the brothers, and thereafter refused to grant the petitioner a certificate. That thereupon the petitioner's agent addressed a letter to the session-clerk, and also to the minister, requesting an extract of the minutes of the kirk-session as to this matter, but it appeared that no minute of it had been taken, and that thereafter the minister had given the petitioner a certificate bearing that he was free from church scandal, and in Jan. 21. 1829. 2d Division.

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full communion with the church, but refused to grant a certificate of any other description. The petitioner therefore prayed for a remit to the Sheriff of the county of Kinross to inquire and report on the matters required by the Act of Sederunt to be certified by the kirk-session; and the Court remitted accordingly.

Petitioner's Authority. — Rattray, Feb. 8. 1824, (ante, Vol. III. No. 175.)

J. Paterson, S. S. C. Agent.

No. 139.

Currie, Applicant.—*Wilson.*

——— Respondent.—*Hamilton.*

Poor's Roll.—The Court refused to review the judgment of the lawyers and agents for the poor on the matter of probabilis causa; but the applicant not having been fully heard, they remitted to hear him further.

Jan. 21. 1829. 2d Division.

The lawyers and agents for the poor having reported that an applicant for the benefit of the roll had not a probabilis causa litigandi, the counsel for the applicant objected to the report, and was proceeding to state his case, in order to obtain the judgment of the Court upon it. The Court, however, stopped him, and refused to review the decision of the lawyers and agents for the poor on this matter; but, on his stating that the applicant had not been fully heard, they remitted again to the lawyers and agents to hear him further.

No. 140.

J. Russell and Company, Pursuers.—*Skene.*

J. Stewart, Defenders.—*Sol.-Gen. Hope—Currie.*

Process.—Held,—1.—That it is not a sufficient objection to the regularity of a summons founding on a letter of guarantee for the price of yarns, and on an account, that it was not specifically set forth that the sum sued for was the price of yarns;—and,—2. That it is not a good preliminary defence that the estate of the pursuer was, subsequent to the existence of the cause of action, sequestrated, and that it was not alleged that he had been retrocessed,—the subject-matter being of a moveable nature.

Jan. 22. 1829. 1st Division. Lord Meadowbank. 8.

Russell and Company raised an action against Stewart, setting forth that they had been in the custom of furnishing goods to the late James Miller;—that, on the 12th of December 1825, the defender Stewart had addressed to them this letter of guarantee:—'My friend Mr. James 'Miller informs me that you wish me to guarantee to you the regular 'settlement of his accounts to you for yarns when called for, which I will 'cheerfully do;'—that at, and prior to January 1826, he had contracted to them an account of £188: 14: 8; and then the summons proceeded in these terms:—'That, on the faith of this letter of guarantee, the pur-'suers continued their transactions with the said James Miller down to 'the last date embraced in the foresaid account, when the said James 'Miller having then, or shortly thereafter, become insolvent, he, upon 'the 27th February 1826, executed a trust-disposition of his whole means

'and estate in favour of Gilbert Lennox, merchant in Glasgow, and the 'pursuer, the said James Russell, for behoof of themselves and the other 'creditors: That the trust-estate of the said James Miller being wholly 'insufficient for the payment of his debts, the pursuers have been under 'the necessity of claiming relief from the said James Stewart, in virtue 'of the foresaid letter of guarantee.' They therefore concluded against Stewart for the above sum of £188: 14: 8.

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Jan. 22. 1829.

In April 1826, the estates of Russell and Company were sequestrated; but of this no notice was taken, nor was it stated in the summons that they had obtained any retrocession from the trustee.

As preliminary defences to this action, Stewart pleaded,

1. That as the summons did not allege, in terms of the letter, that the subsequent transactions libelled had reference to yarns, and it did not appear from the account that they related to yarns, the summons was not relevantly laid; and,

2. That as the estates of the pursuers had been sequestrated, and they did not allege that they had been retrocessed, they had not set forth a proper title to pursue.

On the other hand, it was stated by Russell and Company,

1. That the summons referred to a specific account; and besides, as it set forth a sufficient cause of action, it was competent for them to state the particulars in a condescendence; and,

2. That although it was true there had been a sequestration of their estates, yet it had terminated, whereby they were reinvested; and it was not usual to grant a reconveyance where the estate consisted of moveables.

The Lord Ordinary repelled the preliminary defences, and the Court adhered.

J. Cullen, W. S.—J. Forrester, W. S.—Agents.

J. Henderson, Suspender.—*Skene—Ivory.*
W. Steel, Charger.—*Smythe.*

No. 141.

Stamp—Process.—A party having raised an action against another for repayment of a loan of money, and the defender having alleged that the money was given to him in relation to a partnership with the pursuer; and the latter having produced an unstamped letter by the defender, to show that the money had not been given, as alleged by the defender; and the Lord Ordinary, after a record was closed, having ordered the letter to be withdrawn as not being stamped, the Court opened the record, and recalled the interlocutor, and remitted to prepare the case in reference to the allegation of partnership, and as to the admissibility of the document to refute that allegation.

Steel raised an action before the Sheriff of Caithness against Henderson for payment of £31, being lent money. In defence, Henderson alleged that he and Steel had been engaged in partnership as drovers, and that the £31 had been given to him, not in loan, but for the use of the partnership, and had been so applied. To obviate this allegation of the money having been given to Henderson in his social capacity, Steel produced a letter written by Henderson in these terms:—'Thurso, '14th August 1822.—Sir, I have received from you, of this date, the sum

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D.

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'of £31 sterling in loan, which I promise to pay you on demand.' This document was not stamped.

The Sheriff found the allegation of partnership not proved; and having decerned in terms of the libel, Henderson brought a suspension, in which, among other pleas, he maintained,

1. That as the letter was not stamped, it could bear no faith, and ought therefore to be withdrawn from process; and,

2. That as there was no other evidence of the loan, (which he denied,) he was entitled to absolvitor.

The Lord Ordinary, after the record was closed, found 'that there is 'no other evidence of the money advanced by the charger to the sus-'pender having been in the way of loan, than that arising from the do-'cument bearing date 14th August 1822; that that document, not being 'stamped, can bear no faith in judgment, and therefore ordained the 'same to be withdrawn from process; and found that the admission of 'the suspender amounts to no more than that the money was advanced 'by the charger for the behoof of a joint adventure;' and, quoad ultra, appointed parties to debate.

Steel reclaimed.

Skene for the Charger (*Steel.*)—The suspender admits the receipt of the money, but alleges that he got it in relation to a partnership. To refute that allegation, we produced the document; and, although not stamped, it may, to that effect, be received as evidence.

Smythe for the Suspender.—The document, although expressed in the form of a letter, is truly a promissory note; and the Stamp Act expressly declares that if such a note be not stamped, it shall not be received in judgment.

Lord President.—I understand the distinction in England to be this: You may produce an unstamped document for a collateral purpose, as, for example, that the party was in such a place on such a day, but not to prove either the obligation, or the nature of it.

Lord Gillies.—In this case it has been produced, not to prove the debt, but to establish something else.

Skene.—Precisely; we brought our action on the footing that the suspender owed us so much money. In defence he stated that he had received it in relation to a partnership concern, and we produced this document to show that that allegation was not true.

Lord President.—We should send the case back to the Lord Ordinary to have this inquired into; for if the document was produced merely to refute the allegation of partnership, I think it may be received.

Smythe.—But the action is rested on a loan, and we deny that there was any loan.

Lord President.—You admit, however, that you received the money, and you have put your defence on an alleged partnership.

Lord Gillies.—I think, in hoc statu, the interlocutor ought to be recalled.

THE COURT accordingly 'recalled the interlocutor of the Lord Ordinary 'in hoc statu, and remitted to his Lordship to proceed in the cause as to 'him should seem proper, with power to open the closed record, if the 'same appeared necessary,—reserving the question of expenses till the 'issue of the cause.'

No. 141.
Jan. 22. 1829.

HORNE and ROSE, W. S.—INGLIS and DONALD, W. S.—Agents.

A. CHRISTIE and Others, Suspenders.—*More.*
A. GOODSIR, Charger.—*Maitland—A. M'Neill.*

No. 142.

THIS was a suspension of a decree pronounced in a long special and involved litigation. The Lord Ordinary refused the bill, and the Court adhered.

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1st DIVISION.
Bill-Chamber.
Lords Medwyn and Newton.
H.

W. WALKER, W. S.—T. WALKER,—Agents.

MRS. BOWIE or HARVIE, Pursuer.—*Sol.-Gen. Hope—More.*
J. HARVIE and CURATOR, Defender.—*Jameson—Shaw.*

No. 143.

Aliment—Husband and Wife.—An aliment of £25 per annum awarded to a widow during her viduity out of heritable subjects which had belonged to her husband, yielding a free rental of £54: 10: 2.

THIS was the sequel of the case noticed ante, Vol. VI. No. 450. By the report of an accountant and a person of skill, it was ascertained that the free rents of certain heritable subjects in Glasgow, which had belonged to the pursuer's husband, and to which the defender had succeeded as heir, amounted to £54: 10: 2.

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1st DIVISION.
D.

The Court, by their previous judgment, had allowed her an interim aliment of £20; and they now awarded to her £25, so long as she remained in a state of viduity.

W. and A. G. and R. ELLIS,—C. FISHER,—Agents.

J. and J. THOMSON, Suspenders.—*Forsyth.*
A. A. ANNANDALE, Charger.—*D. of F. Moncreiff—Christison.*

No. 144.

Force and Fear.—An allegation that a bill had been obtained by concussion, held refuted by a partial unconstrained payment before the bill fell due.

THOMSONS presented a bill of suspension of a charge on a bill accepted by them in favour of Annandale for £244. 11s., payable on the 5th of December, in support of which they entered into a detail of circumstances to show that they had been concussed to grant the bill. They, however, admitted that in the month of November, and before the bill fell due, they had paid £80 to account, without objection or constraint.

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1st DIVISION.
Bill-Chamber.
Lord Balgray.
D.

The Lord Ordinary, 'having adverted to the payment of £80 sterling 'to account of the debt,' refused the bill, and the Court adhered.

AINSLIE and MACALLAN, W. S.—RENTON and GRANT, W. S.—Agents.

No. 145. J. and A. M'Donald, Advocators.—*Jameson.*
R. Graham Burden, Respondent.—*Brown.*

Proof—Oath.—A reference to oath having been made in an Inferior Court process, after a defence of prescription had been sustained in circumstances to which this defence did not apply, and the oath not proving the debt sued for—Held that the party referring was bound by the reference; and as the oath did not prove resting owing, the defender assoilzied.

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2d Division.
Ld. Cringletie.
F.

The advocators having raised an action against the respondent before the Sheriff of Perth for bygone aliment of a child of which they alleged he was the father, he pleaded, inter alia, the triennial prescription. The Sheriff having sustained the defence, the advocators acquiesced, and referred their claim generally to the respondent's oath. This not establishing the claim, the Sheriff assoilzied, whereupon an advocation was brought, in which the advocators contended, That as the triennial prescription did not apply to the case of aliment of children, (the party advancing the aliment being considered as negotiorum gestor for the father,) there was no necessity for a reference to oath; and that the oath, therefore, in so far as it did not negative the claim, ought not to preclude them from establishing it aliunde.

To this it was answered, That the advocators having acquiesced in the interlocutor sustaining the defence of prescription, and having thereupon referred the whole case to the respondent's oath, that must now be the only ground of decision; and that, as it did not establish the constitution of the debt, the Sheriff's judgment was right.

The Lord Ordinary remitted simpliciter with expenses, and the Court adhered.

C. M'Donald, W. S.—W. Robertson, W. S.—Agents.

No. 146. Captain J. M'Donald, Advocator.—*Sol.-Gen. Hope—Maitland.*
C. Murray, Respondent.—*Cuninghame—Hopkirk.*

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2d Division.
Lord Medwyn.
R.

This was a special case originating before the Sheriff of Elgin, who decerned against M'Donald; but in an advocation the Lord Ordinary and the Court altered the interlocutor, and assoilzied with expenses.

A. Duff, W. S.—Rod. Mackenzie, W. S.—Agents.

NISBET'S TRUSTEES, Pursuers.—*Keay—Small Keir.*
MORRISON'S TRUSTEES, Defenders.—*Skene—Spiers.*

No. 147.

Triennial Prescription—Proof.—Circumstances held not sufficient to elide the plea of triennial prescription.

Jan. 23. 1829.

2D DIVISION.
Ld. Cringletie.
M'K.

THE late Mr. Winton and the late Mr. Morrison were engaged together, under the firm of Winton and Morrison, in certain building speculations in Edinburgh, Winton having an interest to the extent of two thirds, and Morrison to the extent of one third. They did not keep any joint company books; but each partner kept a book, holograph of himself, in which they entered their several advances for the concern. The company was dissolved in 1814. Mr. Morrison died in 1820, and Mr. Winton in about a year afterwards,—both having disponed their properties, by their respective deeds of settlement, to trustees. The company had been in use to employ the late Mr. Nisbet, a plasterer, to execute the plaster-work of their houses. This person died in 1811, leaving a trust-deed in favour of certain individuals, including Mr. Winton; and, after Mr. Winton's death, the trustees brought an action against Morrison's trustees and Winton's trustees for payment of an account said to have been incurred to Nisbet by the company of Winton and Morrison, in the years 1809-10, for executing the plaster-work of the houses built by the company in Abercromby place, at the rate of 100 guineas for each house, under deduction of £130 admitted to have been received to account. To this action defences were given in for Morrison's trustees, stating that they knew nothing of the debt claimed, and pleading the triennial prescription. On this the pursuers referred to the oaths of both sets of trustees. Under this reference the son of Mr. Winton (who was also one of his father's trustees) was examined, and he deponed that, about the time to which the account sued for related, Nisbet had been employed to execute the plaster-work of two houses belonging to Winton and Morrison in Abercromby place; that he remembered his father accidentally finding Nisbet's account among some papers about two or three months before his death, and observing that it had been too long unpaid; that he heard his father say that he was satisfied of the accuracy of the account; that he did not think any part of the account had been paid by his father's trustees; and that, under all the circumstances, he was inclined to think that the account was still unpaid. Accordingly Winton's trustees thereafter made a compromise with the pursuers, paying them two thirds of the account sued for as Mr. Winton's share. In further proof, production was obtained of the books kept by Mr. Winton relative to the company affairs. The second book was headed thus:—'Second account-book of cash paid out and received by George Winton in 'sundry buildings done and doing by Thomas Morrison and me since 'April 1799. Two thirds of the whole to be paid by me. Thomas Mor-

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'rison to pay one third, and each of us to receive profit or loss in pro-'portion.' This title was signed by both parties, and under the year 1809 there were seven entries, in Mr. Winton's hand, of payments to Mr. Nisbet,—the first being titled 'Mr. Nisbet, plasterer, to account plaster-'ing two of our lodgings;' and the others simply 'Mr. Nisbet, plasterer, 'to account;' and the whole amount so taken credit for being exactly £130, for which sum credit was given in the account now pursued for, which account had been rendered by David Nisbet, Mr. Nisbet's son and representative, in 1816. It was stated by the pursuers (but of this there was no conclusive evidence) that the account had been at first rendered to Mr. Morrison, who objected to one item as being Mr. Winton's private debt; and that this having been corrected, it was, by Mr. Morrison's desire, handed to Mr. Winton (with whom at this time he was not on good terms) along with Mr. Winton's private account, and the following letter from David Nisbet to Mr. Winton:—'Please to receive enclosed 'states up to this time of the accounts due by the late copartnery and 'yourself, which I hope will prove correct. The reason for my doing 'so at this particular time is, that Mr. Morrison lately called on me, and 'signified that it was wished to make a final settlement now, before clos-'ing the partnership accounts.' There were further produced the books kept by Morrison, in which a payment of four shillings (being for lime) was the only sum entered as paid to Mr. Nisbet; and there was also adduced a letter from Mr. Wardlaw, one of Morrison's trustees, who acted as factor and agent, which letter was agreed to be held as his oath on reference, stating that no payment of any part of the account claimed had been made by the trustees, but that they knew nothing of the constitution or subsistence of the debt.

The Lord Ordinary reported the cause on Cases, stating his opinion in the subjoined note.*

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* "The Lord Ordinary has advised this case. He thinks it necessary to observe, that it is quite different from those in which the Court have found, or where our authorities have laid down, that a debt may be proved by books to be resting-owing merely by the absence of an entry in them bearing the debt to have been paid. In all these cases the constitution of the debt appeared in the books. It was entered in them as due. But in the present case there is no constitution of debt by the books either of the late Mr. Winton or Mr. Morrison. In the book of the former are entries of payments amounting to £130; but there is nothing from which any one can discover that these payments were to account of £210, as the agreed price for plastering two houses. There is in this book no charge for any sum whatever against Winton and Morrison. The payments may be made to account of a debt of £135, £1000, or any other sum whatever, above or equal to £130; and consequently nothing can arise or be presumed from the absence of entries of payment.

"It is no doubt true that the heir of Mr. Winton has sworn that he understood from his father, who is dead, that an agreement had been made by Winton and Morrison with the late Mr. Nisbet to plaster two houses for £105 each; but it appears to the Lord Ordinary that in this case the oath of the heir of the late Mr. Winton, who was not a partner of Morrison, is not to be considered to be equal to that of the oath of Mr. Winton himself, who was the partner, in a question with the defenders, but is rather to be viewed as the oath of a witness

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Pleaded for the Pursuers.—The constitution of the debt, which was a company debt, is proved by the oath of the son of Winton the surviving partner, and also by the company books kept by Winton, and likewise by the fact of the account sued for having been rendered to Winton by Nisbet's heir at the desire of Morrison. The non-payment of it, either by Winton or his trustees, except to the extent of £130 admitted and entered in Winton's books, is proved by the books and the oath of the son respectively; and the non-payment by Morrison or his trustees is, in like manner, proved by Morrison's books and the oath of the trustees.

Pleaded for the Defenders.—The books kept by Winton were not proper company books, but were kept by Winton alone with reference to his interest in the company property; and at any rate they do not prove the constitution of the debt, as the 'two lodgings' to account of plastering, which the entries of payments to Nisbet referred to, are not identified with those in Abercromby place, for which the account sued for is claimed; nor is the amount of the alleged debt set forth in these books. Again, as to young Winton's oath,—the oath of a partner of a company himself, after the dissolution of the company, could not establish a prescribed debt against the other partner, any more than the oath of one co-obligant on a bill of exchange could establish the debt against the other co-obligants; and still less can the oath of the heirs or representatives of one of the partners have this effect. Besides, when young Winton's deposition was emitted, he had a material interest to establish the debt against the company, and thereby throw one third of it on Morrison's trustees. There being, therefore, no evidence of the constitution of the

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against them, obligatory, no doubt, on Mr. Winton himself, who has honourably agreed to pay two-thirds of the debt as remaining due, but not conclusive evidence against the defenders that the other third is still owing. It is impossible to say what the late Mr. Winton, had he been alive, might have said on cross-examination by the defenders. Mr. Winton, as a trustee for Nisbet, might have sworn that Morrison had paid his share to him.

"2. A company debt is not a stronger obligation on the copartners than an obligation constituted by a bill granted by a number of acceptors. Each obligant is as much bound to the creditor as is each partner of a company to its creditors. In short, a bill accepted by two or more is a company debt to the extent of the amount of the bill. It is an indivisible obligation quoad the creditor. But it is a final point, that after the years of prescription have elapsed, the acknowledgment by one of the correi debendi that he has not paid the debt is not sufficient to elide the prescription as to the others. The case of Alexander Blair, Esq. and that of Crawford's Trustees, both within these three years, afford proof of this; and therefore the Lord Ordinary entertains great doubts, that even if Mr. Winton himself had been alive, and emitted the oath that was given by his son, it would have been proof against the representatives of Mr. Morrison. The Lord Ordinary thinks that the case of Stewart is not applicable in any way to this. That gentleman in his oath referred to the conduct of a person who had been employed to pay the debts of Stewart, Campbell, and Company, by whom no such payment appeared to have been made. In this case no reference has been made by Mr. Wardlaw to the conduct of Mr. Winton, or any other person. The Lord Ordinary wishes to prevent expense as much as he can, and therefore will not pronounce any judgment which, in all probability, would cost a reclaiming note. He therefore enables the parties to have the direct judgment of the Court on these Cases."

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debt in a question with Morrison's trustees, the absence of any entries of payment in his books is of no consequence, as the pursuers are bound to prove by writ or oath the constitution of the debt, as well as that it is resting-owing.

Lord Glenlee.—It appears from the letter from Nisbet's son that he sent states to Winton, and it is pretty strong evidence of an account having been rendered. Then the account produced gives credit for so much paid to account, which corresponds exactly to the entries in the books; so that there is something more than the books and oath proving this account to have been rendered to Winton at Morrison's request.

Skene.—I cannot find any such letter in the process as the one to which your Lordship alludes, and we cannot admit it.

Keay.—It exists in the letter-book of David Nisbet.

Lord Glenlee.—The account libelled seems to be that sent to Winton at Morrison's request, and I have a great suspicion that the claim is good. No doubt, in these books we do not find the precise amount contracted for; but that defect is supplied by the actual rendering of the account with Morrison's knowledge and desire, and certain alterations made on it at his request. The matter comes into the same situation as if in both sets of books the precise sum was stated, and then it comes to the case where constitution appears, and there are no entries of payments. There is all the difference in the world between the case of co-debtors in a bill and partners. One partner can bind the company by acknowledging that he contracted for the company. If a bill be signed by the company, and reference is made to oath, you may make all the partners swear, and take their depositions as one oath in judging of the result No doubt, when the company is dissolved, and the persons to pay are only representatives of partners, it may make a difference; but if we are once satisfied that it was a constituted debt against the company, which I think is made out here, and if we have the oath of one set of representatives that they do not pay, and if the other set say they know nothing about it, and do not pretend that they paid it, I really think it may be sufficient.

Lord Pitmilly.—There are different points to be considered separately I agree with what the Lord Ordinary says as to the books of Winton and Morrison, that they do not prove the constitution of the debt; but that the only prove the payment of £130 to Nisbet, without connecting it with any particular charge, and therefore cannot elide the plea of prescription. That as to the deposition of George Winton, if his father had been alive, and had emitted such an oath, it would have gone far against him, and also against his partner's representatives. And here I differ from the Lord Ordinary; for the question is, not whether the debt was due by the individuals, but by the fictitious person, the company; and there is a wide difference between the case of partners and correi debendi in a bill where there is no third person, by which each is liable as the fictitious person of the company; and therefore, to prove a debt against a company, reference may be competently made to the acting partner. But it is totally different as to George Winton, the son; he is only liable as one of the trustees of his father, and he never was a partner

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the company. Now it appears that although this gave a right to refer to the oath of George Winton, so far as the trust-estate of his father was concerned, still the question afterwards is as to its effect. And though I hold it a good oath against the trust-estate of his father, it is equally clear that it is of no value at all against the partner Morrison, and can give no legal proof quoad him; and it is indeed objectionable on the ground of interest, as subjecting Morrison would relieve his father's trust-estate. On the whole, I am of opinion that the plea of prescription must be sustained.

LORD ALLOWAY.—I concur with Lord Pitmilly. Is the constitution of the debt established by the books of the copartnery? If so, I should hold the plea of prescription elided by them; but there is no entry in these books to prove constitution of this debt. There are entries of certain payments made by the company to Nisbet, but no proof that they applied to the debt in question. The whole question, therefore, turns on the effect of Winton's oath. Had old Winton or Morrison admitted on oath, as the son has done, the effect of that oath would have been very different from the actual one now in process. Young Winton's oath may affect the estate on which he is trustee, but no further. The reference to oath made to any one can only be on account of the interest he himself has in what is referred. This oath cannot have the slightest effect on the deceased Morrison's trustees. The pursuers could only refer to the trustees or representatives of Morrison after his death. Wardlaw's letter declares that he knew nothing of the existence of the debt. The presumption of law by prescription is not removed as to Morrison's trustees by Winton's oath, the effect of which is limited to Winton's estate.

LORD JUSTICE-CLERK.—This is a nice question. There is a material distinction between the oath of a trustee, and that of a partner of a dissolved company. Reference to oath, in regard to a prescribed bill, is not made to rear up the bill which is utterly gone, but to prove the debt resting-owing. So I think with the Lord Ordinary there is a strong analogy between reference to oath to any co-obligant under a prescribed bill, and the reference to one partner of a dissolved company. Do the oaths of Winton and Wardlaw (whose letter is held equivalent to an oath) prove the debt still owing? Not so. The debt might have been paid, notwithstanding young Winton's oath; but then he has gone the length of saying, and Winton's trustees have acted thereon, that he believed the debt might be still owing. This will not prove resting-owing against the estate of Morrison's trustees. I must also remark, that though I concur with the Lord Ordinary in holding Winton's oath an honourable one, yet there is a certain degree of interest affecting his statement, in a legal point of view, as to Morrison's trustees, against whom he might get a certain relief, if their liability were proved, and if Winton's estate had been made liable for the whole company debts. His oath does not prove against Morrison's estate; then, do the books eke out the deficiency of proof? I do not think so. Per se, the books do not prove resting-owing of this particular account. Seeing, therefore, that young Winton's is the oath merely of a trustee of a dead partner, his oath as to the estate of the other dead partner, though taken with these books, does not, in my opinion, prove the debt resting-owing.

THE COURT accordingly sustained the defences, and assoilzied Morrison's trustees.

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Pursuers' Authorities.—Murray, March 2. 1827, (ante, Vol. V. No. 259); 3. Ersk. 7. 18; Purveyance, June 7. 1767, (12623); Leslie v. Town of Brechin, Nov. 15. 1808, (F. C.); Broughton, Feb. 24. 1826, (ante, Vol. IV. No. 322); 2. Bank. 12. 64; Stewart, Dec. 5. 1823, (ante, Vol. II. No. 544.)

Defenders' Authorities.—1. Bell, 333-4, (5th edit.); Douglas, Nov. 18. 1794, (11116); 4. Bank. 32. 5; 4. Ersk. 2. 10; Tait, 269; Houston, May 31. 1822, (ante, Vol. I. No. 504); M'Neil, Jan. 31. 1823, (ante, Vol. II. No. 158); M'Indoe, Nov. 18. 1824, (ante, Vol. III. No. 214.)

J. Young, W. S.—Gibson-Craigs and Wardlaw, W. S.—Agents.

No. 148.

J. Dougal, Pursuer.—*Cockburn—Gillies.*
R. and A. Neilson, Defenders.—*Thomson.*

Jan. 24. 1829.

1st Division.

H.

Cessio.—Cessio refused in respect of concealment of funds, although the pursuer had been in prison for upwards of two years and a half.

J. Nairn, S. S. C.—J. Usher,—Agents.

No. 149.

J. Leslie, Pursuer.—*Thomson.*
J. Sproat, Defender.—*Cowan.*

Society—Title to Pursue.—A mason lodge having sold a lease held by them, and taken a bill from the purchaser in favour of their treasurer for part of the price, the rest having been paid in cash; and having executed an assignation of the lease, and obtained a confirmation from the landlord, the purchaser not entitled to resist payment of the bill on the ground of the inability of the lodge to hold property or to grant an assignation, or of want of title in the treasurer to pursue.

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2d Division.

Lord Newton.

T.

Mr. Hannay of Blairinnie granted to certain individuals, as office-bearers of St. David's Mason Lodge, Kilpatrick Durham, for themselves and their successors in office, and to their assignees whatsomever, a lease of certain premises in Kilpatrick Durham. The Lodge entered into possession of the subjects let; and after some time, when a different set of individuals were in office, they sold the right to the lease to the pursuer Leslie for £210. Leslie paid £105 in cash, and granted a bill for the remaining £105 to the defender Sproat, then treasurer of the lodge,—the bill being drawn by and made payable to 'John Sproat, treasurer.' Thereupon the office-bearers executed in Leslie's favour an assignation of the lease, in virtue of which he entered into possession. Having refused to pay the bill on the ground that the lodge had not given him a sufficient title, in respect that, being a self-incorporated society, they could neither hold nor transfer property, the office-bearers transferred the bill, and all right they had to the price of the lease, to Sproat, who thereupon raised an action for payment of the bill against Leslie before the Steward of Kircudbright, in which he obtained decree. Of this decree Leslie brought a reduction, on the grounds, inter alia,

1. That the bill was vitiated in the date of the year.

2. That no sufficient title had been given him, the office-bearers of a mason lodge being incapable of holding or transferring property; and,

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3. That Sproat had no title to sue on the bill, it being payable to him in his character of treasurer of the mason lodge, and the conveyance by the office-bearers being in trust for the lodge, and also being ineffectual to transfer right to it.

To this it was answered—

1. That it appeared from the admissions of the defenders in the Inferior Court process that the apparent vitiation in the date was made at the time it was granted, and that no year could have been intended but that which the bill bore; and,

2. and 3. That the office-bearers of a mason lodge might competently hold and transfer property; but, at all events, that a party contracting with such office-bearers for property held by them, and granting a bill expressly to them, was barred personali exceptione from refusing to take a title from them on the ground of their alleged incapacity to hold or transfer the property, and from refusing to pay a bill granted by himself expressly to an office-bearer of the lodge.

After the record was closed, the defender obtained from the landlord a confirmation of the lease and assignation of it to the pursuer. The Lord Ordinary thereupon pronounced this interlocutor:—'Repels the reasons 'of reduction founded on the alleged vitiation of the date of the bill, in 'respect the pursuer's pleadings in the Inferior Court process, and par-'ticularly his petition of 12th July 1826, signed by himself, afford suffi-'cient evidence that any change in regard to the date must have been 'made at the time the bill was granted, and in respect it is clear from 'the account of the transactions given in that petition that no other year 'could ever have been meant but that which the bill now bears: Re-'pels also the reason of reduction founded on the insufficiency of the title, 'in respect that any doubt which may exist as to the effect of the assign-'ation by itself is removed by the landlord's confirm tion: Therefore 'sustains the defences, assoilzies the defenders, and decerns: But in re-'spect the confirmation was not obtained till after the record was closed, 'and the pursuer may therefore be entitled to such expenses as have been 'occasioned by the previous discussion of the validity of the title, while 'the Lord Ordinary thinks him justly liable in the expenses attending 'the discussion of all his other reasons of reduction, finds no expenses 'due to either party.'

Leslie reclaimed; but the Court, without calling on the defender's counsel to answer, refused the reclaiming note, with the expenses of opposing it.

Lord Justice-Clerk.—I have a very unfavourable opinion of this litigant, who appears to have been completely in mala fide; and as to the title, although the cases quoted are certainly well decided, I am not prepared to say that the bill is ineffectual, because of the title of treasurer attached to the defender's name. At any rate, every defect is cured by the confirmation of the landlord.

The other Judges agreed.

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Pursuer's Authorities.—Lodge of Lanark, June 11. 1730, (14554); Crawford, June 13. 1701, (14555); Wilson, Dec. 13. 1771, (ibid.); Wilson &c. June 7. 1823, (ante, Vol. II. No. 378.)

Defenders' Authorities.—Allan &c. May 25. 1791, (14583); Davidson &c. June 27. 1805, (14584.)

W. Dalrymple, S. S. C.—Donaldson and Ramsay, W. S.—Agents.

No. 150.

Mrs. A. Sheriffs or Burnett, Petitioner.—*D. of F. Moncreiff—Skene—Hunter.*

Mrs. C. W. Boyd and J. G. Barr, Respondents.—*T. H. Miller—A. Dunlop.*

Trust—Judicial Factor.—A trust having fallen by the death of a trustee, who had made considerable advances in the course of the management, and who, under the trust, would have been entitled to have retained the trust-estate till relieved of these, the Court, on the application of his widow and executrix, appointed a judicial factor to carry on the trust, notwithstanding the opposition of a creditor infeft.

Jan. 24. 1829.
2d Division.
F.

In the year 1818, the property of Sir William Johnstone of Hillton having been brought to judicial sale, his life-interest in the entailed estate of Hillton, together with the property of certain adjoining lands held by Sir William in fee-simple, were purchased by Major D'Arcy Bacon, brother of Lady Johnstone, Sir William's wife, with the view of making a provision for her ladyship. For the purpose of paying the purchase-money, Major D'Arcy Bacon borrowed the amount (£5999) from the respondent Mrs. Boyd; and he thereafter executed a disposition of the unentailed lands, and of the life-interest of Hillton, in favour of the other respondent Mr. Barr, and of his own brother, as trustees, with power to the survivor, on the death of either of them, to assume a new trustee, to be nominated by Lady Johnstone, or any two of her daughters. The trustees were empowered to borrow money on the trust-estate—to sell it, if necessary, to repay the loan of the purchase-money, or relieve the trustees of obligations come under by them in borrowing—to grant heritable securities to Mrs. Boyd for the purchase-money advanced by her; and they were then directed to apply the residue or surplus rents, or the prices of the lands, if sold, as an alimentary fund for Lady Johnstone, and provisions to certain of her children, should she predecease Sir William; and it was finally provided 'that this trust shall subsist and continue during 'the whole years of the life of the said Sir William Johnstone; and at 'his death the said trustees or survivor of them shall denude themselves 'of the said trust, upon their being freed and relieved of the obligations 'come under by them in the execution hereof.'

The trustees accordingly were infeft in the unentailed property, and entered into possession of it, and also of the entailed estate; and they thereupon granted to Mrs. Boyd an heritable bond over the unentailed property for £2000 of the loan by her to Major D'Arcy Bacon; and, in consideration of the remaining £3999, they granted her a redeemable bond of annuity for £537 out of the entailed lands during Sir William Johnstone's life. Mrs. Boyd was immediately infeft in the bond over

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the unentailed lands; and being advised that she was entitled to complete her bond of annuity over the entailed estate likewise, she passed an infeftment on it accordingly. Major D'Arcy Bacon's brother, one of the trustees, having died, Mr. Barr, the survivor, under the powers in the trust-deed, assumed as trustee, on the nomination of Lady Johnstone, the late Mr. Burnett, W. S. husband of the petitioner. Thereafter Mr. Barr executed a declaration of non-acceptance and renunciation of the office of trustee, taking, in consideration of the balance due him for advances made during his management, a bond of annuity over the entailed lands during Sir William's life. Mr. Burnett then assumed the sole management, in the course of which he made advances and came under obligations to a considerable extent; and in particular he came under a personal obligation to Mrs. Boyd for the regular payment of her annuity, and the interest of her heritable bond. In August last Mr. Burnett died, without having assumed any other trustee; and his widow (who was likewise his executrix) thereupon presented a petition praying to have a judicial factor appointed to carry on the trust-management which had thus failed, and recommending for that office a gentleman who had been in the employment of her late husband, and was acquainted with the affairs of the trust. This petition was served on Mrs. Boyd and Mr. Barr, and intimated to Lady Johnstone. The latter took no notice of the intimation, and Mr. Barr did not oppose the petition; but he stated that, if considered by the Court to be necessary, he would not refuse to reassume, as trustee, the management which had failed by Mr. Burnett's death. Mrs. Boyd, however, opposed the application, and contended that she being infeft, and there being no competition, there was no room for the appointment of a judicial factor, particularly on the application of a party having no right in the trust-estate; but that she was nevertheless willing to consent, if, instead of the party proposed as factor, the Court would nominate her agent in the country.

The Court, however, granted the prayer of the petition, and appointed the gentleman recommended by Mrs. Burnett, reserving the rights of all creditors.

Lord Justice-Clerk.—Although, when a trust has fallen, we will not nominate trustees, it is competent for us to appoint a judicial factor to manage the trust-estate; and the doing so here cannot possibly injure the creditors, and it is of importance to secure the interests of Mrs. Burnett. Mr. Barr having denuded of the trust, he cannot now reassume it.

The other Judges concurred.

Petitioner's Authorities.—4. Stair, 3. 1; 1. Ersk. 3. 22-3; Anderson, June 18. 1748, (7439); Wotherspoon, Dec. 15. 1775, (7450); Grant, March 2. 1790, (7454); Bushby, Feb. 1. 1823, (ante, Vol. II. No. 160); Alexander, Feb. 27. 1824, (ante, Vol. II. No. 682); Moir, July 6. 1826, (ante, Vol. IV. No. 482); Christie, Feb. 3. 1827, (ante, Vol. V. No. 170.)

Respondents' Authorities.—2. Ersk. 12. 56; 2. Bell, 306.

G. Farquharson, W. S.—W. Stewart, W. S.—J. G. Barr, S. S. C.—Agents.

No. 151.

R. Wilson, Advocator.—*Jeffrey—Skene.*
R. Pattie, Respondent.—*Sol.-Gen. Hope—A. M'Neill.*

Property—Possessory Right.—A party having been long in use to deposit dung in a space at the side of a common close, over which an outside stair to a building formerly existing on his property has projected; and having at a subsequent period surrendered this space, with a parapet wall to keep in the dung—Held, in an application to have this wall removed within seven years of the erection of the wall, that he was entitled to erect it.

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2d Division.
Ld. Cringletie.
R.

In a close in St. Andrews, the common property of the advocator and the respondent, there had been at one period a barn having an outside stair for entry to the loft; but the barn and stair had been removed several years ago, and the area of the barn, which had been acquired by the advocator, was now occupied by him as a garden, having a wall between it and the close. Under this stair, the advocator's authors had been long in use to deposit dung; and, after the stair was taken away, dung was continued to be laid on the same spot as formerly. In 1818, within seven years of the commencement of this process, the advocator erected a parapet-wall in front of the place where the dung was in use to be laid, and over which the stair had formerly projected, for the purpose of keeping the dung together, and preventing it from being scattered about the close. He also began at a later period to lay old crates (which he had occasion to use in his trade as a stoneware-merchant) on another part of the close which had not been in use to be so occupied formerly. The respondent Pattie having applied to the Dean of Guild for removal of the dung-court and crates, an interlocutor was pronounced, ordaining the advocator to remove the wall and crates, and prohibiting him from laying down dung, or making any encroachment on the close. In an advocation, however, the Lord Ordinary altered this interlocutor in regard to the dung-court, assoilzied him from the conclusions of the original petition with reference to it, and adhered quoad ultra. Both parties reclaimed; but the Court adhered.

P. Pearson,—Tod and Wright, W. S.—Agents.

No. 152.

A. Murray, Pursuer.—*Maitland.*
G. Little, Defender.—*Whigham.*

Jan. 24. 1829.
2d Division.
Ld. Cringletie.
T.

Mandatory.—Reclaiming note by the defender against the Lord Ordinary's interlocutor refused, in respect of his having left the country, and failed to sist a mandatory.

Æ. Macbean, W. S.—W. Martin, S. S. C.—Agents.

G. IRVINE and MRS. M. SHEPHERD, Suspenders.—*Cockburn—More—Hamilton.*
D. M'LAREN, Charger.—*Miller.*

No. 153.

Schoolmasters' Widows' Fund—Aliment—Arrestment.—Annuity provided by compulsory contribution of burgh and parochial schoolmasters under Act of Parliament 'for raising and 'securing a fund or funds for the relief of the widows and children of burgh and parochial 'schoolmasters,' held to be arrestable by the creditors of widows entitled thereto, in respect of its not being expressly declared in the statute to be alimentary.

Jan. 24. 1829.
2D DIVISION.
Ld. Mackenzie.
R.

AN act of the 47th Geo. III., intituled 'An act for raising and securing a fund for the relief of the widows and children of burgh and parochial schoolmasters in Scotland,' sets forth in the preamble—'Whereas the burgh and parochial schoolmasters of Scotland, at their 'decease, often leave their widows and children in indigent circumstances, 'and it is therefore expedient and necessary to raise a fund, by individual 'and annual contribution, under the name of 'the Fund of the Burgh 'and Parochial Schoolmasters of Scotland for the Relief of their Widows 'and Children;' and it then provides for the formation of a fund by annual contribution from each schoolmaster, to be applied 'for the payment of annuities to widows and provisions to children, as after mentioned;' which fund is vested in public trustees for the purpose of securing their provisions. It is further provided, 'that every receipt 'from an annuitant shall have annexed to it an attestation, dated on or 'after the day on which the annuity becomes due, signed by the minister 'and two elders of the parish in which the said annuitant shall reside, 'bearing that at the same date such annuitant appeared personally be-'fore the subscribers, and declared that she continues unmarried, of the 'truth of which declaration the subscribers have no reason to doubt.'

Under this act the suspender Mrs. Shepherd, the widow of a schoolmaster, was entitled to an annuity of £15. Having contracted a debt of £30 to the charger M'Laren, he, upon letters of horning and arrestment, proceeding on a decree in absence, used arrestment of a term's annuity in the hands of the suspender Irvine, the cashier of the schoolmasters' widows fund. Another creditor having also used arrestment, Mrs. Shepherd brought a process of multiplepoinding before the Sheriff of Stirlingshire, who found the annuity arrestable, and preferred M'Laren thereto. M'Laren having thereupon charged Irvine on the decree of preference, he and Mrs. Shepherd brought a suspension, which the Lord Ordinary reported to the Court on informations.

Pleaded for the Suspenders.—The purpose and object of the statute was to secure a provision to indigent widows, and both in respect of the object, and also of the tenor and provisions of the act, it necessarily imports the provision to be one of an alimentary nature; and therefore, although the act does not expressly declare that it shall not be subject to arrestment, the general rules of our law as to alimentary provisions will apply to protect it from being attached by creditors, in the same way as it was

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held with reference to the Ministers' Widows' Fund that it could not be assigned, although the Act of Parliament by which it was established did not declare that it should not be assignable, but only that it should not be subject to arrestment. Besides, the annuity can only be paid, under the statute, on the receipt of the widow, accompanied by a declaration by herself, which no third party can make, and which had not been made here; and the cashier, therefore, cannot be compelled to pay it without such declaration.

For the Chargers.—This provision is exactly similar to an annuity purchased by the husband, or obtained by contribution to a friendly society affording provisions to widows, which, unless expressly constituted as alimentary, would not, from its own nature, be considered to be protected from the diligence of creditors; and although the statute makes it compulsory on all schoolmasters to contribute to the fund, so as to acquire such an annuity for their widows, the circumstance of the contribution being compulsory does not alter the character of the annuity from what it would have been, had the contribution been voluntary. The annuity, then, not being alimentary in its own nature, and there being no declaration in the statute that it shall be so, it must be subject to the diligence of creditors; and as to the Clergymen's Widows' Fund, although there is in the act no clause prohibiting assignment, yet, as the fund is declared not to be arrestable, the Court justly held that to allow assignment would be to sanction an evasion of the express provision of the Legislature. With reference to the objection that the annuity is only payable on the annuitant's receipt, and on a declaration of the annuitant herself, that cannot prevent the creditor attaching a right legally open to him, especially as the widow is a party to the process, and the necessary certificates by the minister and elders are produced.

Lord Glenlee.—The preamble of the Act of Parliament is for the relief of widows and children of schoolmasters in indigent circumstances, and it introduces a compulsory obligation on the parties to contribute to a fund for annuities. I do not see that the case is different from what it would have been, if the husband had voluntarily laid out the fund for the same purpose, and that would not have been alimentary. The decision as to the Ministers' Widows' Fund does not apply, as it was only found the widow could not assign before the term of payment, the act prohibiting arrestments. I have no idea that any one can make a fund alimentary without declaring it not to be arrestable and assignable, or using the words 'alimentary' expressly. And, on the whole, I am inclined to think that, the exception not being put into the act, the fund must be attachable by creditors who trusted to it.

Lord Justice-Clerk.—I take a different view. I am aware of the weight of the argument arising from the silence of the Act of Parliament as to these provisions relative to schoolmasters, while there is an express declaration in the act regarding the Ministers' Widows' Fund, that it shall not be arrestable. But we must look at the object of the act. It is for the benefit of a class of people very inadequately provided for, and it is only to create a pittance for the widow

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and family. I am aware also that in private grants they must be declared alimentary. But when we see that this is a compulsory contribution established by Act of Parliament to raise the fund, I am inclined to draw a distinction between a case of this kind, and a private grant by an individual who must do it in apt terms. It is necessary to look to the preamble, for I think that effect must be given to the policy of the act. It sets forth, 'that the 'widows and families of schoolmasters are often left in indigent circumstances'—meaning not comparative, but actual indigence; and the fund is not for bettering their circumstances, but for 'relief' of widows. I cannot get over the impression that this was intended by the act to be an alimentary provision. There is also a great deal in this, that it must be given to the woman personally, and that she must discharge by her own receipt, which shows the personality of the provision. Morrison's case is important here, that though the provisions there in question were declared not to be assignable, still it was held that it could not be assigned, which would defeat the object of the Act of Parliament.

LORD PITMILLY.—I confess I agree with Lord Glenlee, but should willingly reconsider the case. There is no sufficient authority for a Court of Law to declare annuities not to be arrestable; and it is of considerable importance that as to other provisions similar to this, it has been thought necessary to insert an express declaration to that effect. I must therefore conclude that its being omitted here cannot be supplied by the Court.

LORD ALLOWAY.—My opinion has been fully expressed from the Chair. I rather draw a presumption from the Act of Parliament as to the clergy, declaring the fund not arrestable, that this is also of the nature of an alimentary fund; for the provisions in that statute could not have been introduced, unless these annuities were held alimentary; and I conceive the insertion there to have been merely to prevent an expensive trial of the question.

THE COURT, being thus equally divided, required the opinion of the Judges of the First Division and the Permanent Lords Ordinary 'upon the 'point, whether the fund in question is arrestable?'

The following unanimous opinion was returned:—"WE are of opinion that this fund is arrestable. It is not a public fund, and cannot be assimilated to King's pensions, or the pay or half pay of officers, or salaries of Judges, or any other class of cases in which a service or duty is to performed to the public, in consideration of which the pay or salary is granted. This annuity is purchased by the husband out of his own funds, and must be governed by the same principle as jointures out of landed estates, or provisions to widows settled out of the personal funds of the husband. If the husband had left his widow the liferent of the interest of a bond, yielding an annual rent of the same amount as this annuity, it would have been arrestable, unless the husband had expressly declared that it should not. If the schoolmasters had intended that the same effect should be given to these annuities, they ought to have asked the Legislature to make the same express declaration as would have been necessary in a private bond of annuity. This was done in the act establishing the Ministers' Widows' Fund, and by the Writers to the Signet, which strengthens the above general principle. It is said that the Court found the Ministers' Widows' Fund is not assignable, though the act only says not arrestable; but

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this was because the Court considered that the act would otherwise be always evaded—for a creditor, by imprisoning the widow, would extort an assignation, and so render the provision against arrestment nearly useless. But here there is no evasion of any statute.

In respect of this opinion, THE COURT found that the fund was arrestable, and remitted to the Lord Ordinary to hear further as to any other points remaining for discussion.

Suspenders' Authorities.—Gordon, Nov. 26. 1697, (10394); Kilcaldron, March 8. 1639, (10372); Jameson, Nov. 14. 1770, (5898); 3. Ersk. 6. 7; Dick, Dec. 22. 1676, (10388); Mollison, March 18. 1707, (10398); M'Kenzie, May 19. 1791, (10415.)

Charger's Authorities.—3. Stair 1. 37; 2. Bell, 88; Smith, Dec. 13. 1815, (F. C.); Westnisbet, March 26. 1627, (10368); Spreull, Dec. 16. 1714, (10400); Urquhart, Dec. 15. 1738, (10403); M'Gregor, Jan. 22. 1820, (F. C.)

J. A. CHEYNE, W. S.—J. DICKIE, W.S.—Agents.

No. 154.

J. SKIRVING, Petitioner.—*Jameson—Neaves.*
J. STEWART, Respondent.—*Moir.*

Jan. 27. 1829. 1ST DIVISION. Lord Newton. D.

Judicial Factor.—Pending a litigation relative to the sale of the estate of Belladrum, the petitioner Skirving was, on the 18th May 1827, appointed judicial factor, in which office he continued till the 21st of September. He then claimed a factor-fee of £315, besides expenses; and this having been objected to by Stewart, a remit was made to the auditor, who reported that £270 should be allowed. But the Court, on the report of the Lord Ordinary, being satisfied that even this sum under the circumstances was extravagant, and that the pursuer's factorship had existed during a period when no very active labour could be required, restricted it to 100 guineas.

JOS. GORDON, W.S.—CARNEGY and SHEPHEARD, W.S.—Agents.

No. 155.

J. DUNLOP, Suspender.—*Rutherfurd.*
D. SUTHERLAND, Charger.—*Moir.*

Homologation.—A party against whom judgment was pronounced by an Inferior Court having granted his bill for the amount decerned for, and thereafter attempted to resist payment of the bill on a ground impeaching the judgment, found barred from doing so.

Jan. 27. 1829. 1ST DIVISION. Bill-Chamber. Lord Balgray. D.

SUTHERLAND, as collector of the road assessments in Ross-shire, raised an action before the Sheriff of that county against Dunlop, as tenant of certain lands, under certain local statutes, for payment of road-money. The Sheriff, after a litigation, decerned against Dunlop, who thereupon granted his bill for the amount, with interest and expenses. Having been charged on this bill, he brought a suspension on the ground that, by one of the road-statutes, the tenant was bound to pay the money to the landlord; that he had settled with his landlord, and therefore it could

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not be exacted from him. He, however, adopted no proceedings for setting aside the judgment of the Sheriff, nor did he pretend that he was at that time ignorant of this defence. The Lord Ordinary, 'in respect 'of the proceedings before the Sheriff, homologated by the complainer 'granting the bill in question, refused the bill of suspension;' and the Court adhered.

R. Roy, W. S.—Gordon and Stuart, W. S.—Agents.

No. 156.

Executors of the Duke of Queensberry.—*Rutherfurd.*
Crawfurd Tait, Esq.—*Jeffrey—Tait.*

Heritable Creditor.—An heritable creditor, who was entitled under his bond to a premonition of six months before payment, having raised an adjudication against the debtor's estate; and the debtor having thereafter tendered payment, and consigned the money—Held, in a question as to interest, that the heritable creditor could not insist on his right to six months premonition—the adjudication being an intimation of his readiness to take immediate payment.

Jan. 27. 1829.
1st Division.
Lord Meadowbank.
H.

On the 18th of April 1810 Mr. Tait borrowed £50,000 from William Duke of Queensberry, for which he granted over his estates an heritable bond, by which it was declared that the lands should be redeemable at Whitsunday or Martinmas, upon a premonition of six months. In 1817, the executors of the Duke, founding upon this heritable bond, raised an action of maills and duties, and an adjudication, against Mr. Tait's estates; but as Mr. Tait had a plea of retention, arising out of a cautionary obligation for behoof of the Duke to the tenants on the estates of his Grace in the event of their leases being set aside, the Court found that the executors were not then entitled to enforce these actions. The actions, however, were regularly kept awake by an annual enrolment, with the view that they might be proceeded in so soon as the questions as to the leases were decided. Early in 1825, Mr. Tait entered into a negotiation with the Globe Insurance Company for a loan of money; and, on the 15th of February, he gave notice to the executors that he was to pay their debt at Whitsunday then next. A great deal of correspondence took place, and several difficulties were started by the executors as to transferring their securities and granting a discharge, so that the matter was protracted till the month of August. On the 6th of that month Mr. Tait took a protest against the executors, stating that he was ready to pay the heritable debt, on the proper deeds being granted; and he thereupon consigned the money in bank. At last, on the 8th of October, the executors consented to receive payment, but made a claim for legal interest till that date. This Mr. Tait resisted, on the ground that he was liable in bank interest only since the 6th of August, when the money was consigned.

To try this question, a multiplepoinding was brought in name of the bank; and on the part of the executors it was maintained, that as the lands were redeemable at Whitsunday or Martinmas only, upon a premonition of six months, and as the notice had been given in February, they were

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not bound to receive the money till Martinmas, and therefore Mr. Tait was liable in legal interest till the time of actual payment.

To this it was answered by Mr. Tait, that the premonition was departed from by the institution of the action of adjudication; that he was entitled to pay, and the executors were bound to have received, the money so soon as he was able to give it; and therefore he could not be liable in more than bank interest.

The Lord Ordinary pronounced this interlocutor:—'Finds, that from 'the nature of the actions raised and pursued by the executors of the 'Duke of Queensberry against Mr. Tait, as also from the correspondence 'betwixt the latter and the agent of the Queensberry executors in the 'months of June and July 1825, as well as from the money being after-'wards received on the 8th day of October, the executors are barred 'personali exceptione from founding on the clause in the bond providing 'for six months premonition before payment: Finds that there was no 'error in the disposition and assignation to the Globe Insurance Company, 'as extended and transmitted for the signature of the executors, and that 'nevertheless the executors neither executed that assignation, nor offered 'to do so: Therefore prefers the claimants, Mr. Tait and his trustee 'Mr. Scott, to the part of the fund in medio arising from the difference 'between legal and bank interest upon the sum of £50,616: 8: 9, being 'the sum received by the executors from the Globe Insurance Company: 'Prefers the claimants, the executors of the late Duke of Queensberry, 'to the remainder of the fund in medio arising from the difference of 'interest between legal and bank interest upon the sum of £3146: 1: 5, 'being the balance of the price of Cumlodden received by them from 'Mr. Claud Russell on account of Sir Archibald Campbell, the purchaser 'of that estate; and decerns.'

The executors having reclaimed, the Court, without hearing the counsel for Mr. Tait, unanimously adhered.

Lord Balgray.—The action of adjudication was a dispensation with premonition. The executors were thereby insisting for their money; and as soon as Mr. Tait could get it, they were bound to take it. In transactions of this nature, creditors should lend their aid to facilitate the payment, where it is necessary to have recourse to raise the money, and execute collateral deeds.

Lord President.—The adjudication was just an intimation by the executors to Mr. Tait that they were ready to take payment as soon as he thought fit.

The other Judges concurred.

J. Gibson Jun.—A. Murray, W.S.—W. Clark, W.S.—Agents.

F. Gordon, Pursuer.—*D. of F. Moncreiff—Robertson.*
Douglas's Trustees, Defenders.—*Skene—Clephane.*

No. 157.

Sale—Error.—A party having bought lands with reference to a rental, among the deductions from which was erroneously stated a sum of converted multures payable by the tenants in addition to the rental exhibited; and having stipulated that he was to have relief at the rate of 20 years purchase for any excess, beyond a certain amount, of public burdens forming a deduction from the rental—Held that, in estimating these burdens, the sum of converted multures payable by the tenants in addition to their rents was not to be taken into account.

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Ld. Cringletie.

The defenders, as trustees of the late Mr. Douglas of Tilquhilly, sold to the pursuer Gordon the estate of Kincardine O'Neil for the price of £12, 800. There was exhibited to the pursuer, prior to the sale, a rental containing the names of the tenants, and the rent actually paid by each, together with an estimated rental. From this there were deducted the public burdens, stated to amount to £69: 14: 7¼; but among these was included a sum of converted multures, amounting to £32: 14: 4½, which did not properly form a deduction from the rents thus exhibited as paid by the tenants, being payable by the tenants over and above these rents. The price given by the pursuer was offered as a slump sum, but it exceeded 20 years purchase of the nett rental merely by a trifling amount necessary to make up an even sum; and in the missive offer there was the following stipulation as to the public burdens:—'It being understood, that if the public burdens forming the deductions from the rental 'shall exceed the sum of £69: 14: 7¼ as given up to me, I shall be allowed for such excess, from the foresaid price, at the rate of 20 years 'purchase.' It turned out, from circumstances to which it is unnecessary to advert, that, in addition to the public burdens specified in the rental exhibited to the pursuer, there was a further sum of £26: 12: 2, for 20 years purchase of which (amounting to about £522) the pursuer raised the present action against the defender.

In defence it was pleaded, That in reality there was no excess of the *public* burdens 'forming the deductions' from the rental according to which the pursuer bought the estate, because, from error, the converted *multures*, amounting to £32: 14: 4½, had been specified as a deduction from that rental, although not paid by the landlord out of the rents as *given* up, but by the tenants in addition to these rents; that this error fell to be corrected just as an ordinary error calculi, whereby, even with *the* addition of the burdens not specified in the rental exhibited to the pursuer, the whole forming deductions from that rental did not amount *to* £69: 14: 4½; and that, consequently, the pursuer having bought the estate with reference to that rental, and stipulated for relief against such excess only as formed a deduction from it, was not entitled to relief of any excess of burdens which were not a deduction from that rent, and could not in justice demand, as he now did, deduction of the same sum twice over.

To this it was answered, That the pursuer having bought, not by so

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many years purchase, but by a slump sum, and under a stipulation for relief against any excess of burdens above a certain amount, and this sum of £32: 14: 4½ being in reality a deduction from the true rent of the estate which could be drawn by the proprietor, he was entitled to relief under the stipulation in his missive,—the rental alluded to in the missive not being that specified in the state exhibited to him, but the real annual produce of the property.

The Lord Ordinary reported the cause on Cases to the Court, stating his own opinion that 'the public burdens, for excess of which the pursuer 'was entitled to relief, were only such as formed a deduction from the 'rental as given up to the pursuer; and that the pursuer's demand is 'very unjust, and therefore very unfounded.'

The Court unanimously sustained the defences, and assoilzied.

Lord Glenlee.—The opinion of the Lord Ordinary is right. The description of burdens, for any excess of which the pursuer was to have relief, was those forming deductions from the rental; and this sum of converted multures could be no deduction, because the tenants paid it. It appears to me to be much in the same situation as if, in summing up the items of the burdens, an error had been made which must have been corrected. There is here a gross and palpable error in the data on which the public burdens given up were calculated, and I can have no doubt but that the defences must be sustained.

The other Judges concurred.

J. Gordon, W. S.—Thomson and Ferguson, W. S.—Agents.

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J. and W. Dixon, Suspenders.—*D. of F. Moncreiff—Marshall.*
R. C. Buchanan, Respondent.—*Forsyth—Jeffrey—Tait.*

Coal—Reserved Right.—A party having a reserved right of lordship in the coal of certain lands, and it being implied, from the terms of the reservation in the titles of the disponee, that the coal should be worked by pits situated on the lands themselves—Held that the disponee was not entitled to work them by pits situated on other lands.

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T.

The late Mr. Houston of Clerkington conveyed to the late Mr. Colt of Auldhame 210 acres of land in Lanarkshire, called Hows, Muirend, and Dundyvan, with the coal and minerals, under this reservation, that whenever the gross output of coal from the lands in any one year should exceed 4000 tons, Mr. Houston should have right to one tenth of such excess, 'and that free of all cost and expense whatever;' it being provided, in order that the quantity of output might be accurately ascertained, that Mr. Houston and his successors should be allowed, if they thought proper, at their own expense, 'to keep a hillsman or overseer 'upon the said coal,' who should have power at all times to inspect the operations, either below or above ground; and that the disponees should be bound to keep regular books of the output of coal, and give inspection thereof to the overseer at all times. On this disposition Mr. Colt was infeft, these reservations and provisions being inserted in the instrument of sasine. Thereafter Mr. Colt executed a deed of declaration and ob-

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ligation, binding himself and his successors in the lands to lay down and set aside the tenth of the excess above 4000 tons reserved to Mr. Houston, 'and that at the pit-mouths on the said lands;' and declaring, inter alia, that Mr. Houston and his successors should have liberty to keep a hillsman or overseer 'upon the coal-hills of the said lands.' It was provided in this deed that the declarations and provisions therein contained should be inserted in the titles of the lands; but this was not done. The deed itself, however, was recorded in the General Register of Sasines. Mr. Colt's son, at a subsequent period, sold these lands in three portions,—Mr. Dixon, the father of the suspenders, acquiring 100 acres, and Mr. Carrick Buchanan, father of the respondent, 70 acres, being that part called Dundyvan. The reservations in the original disposition were inserted in Mr. Buchanan's titles, but not the declarations of the subsequent deed executed by Mr. Colt. Mr. Dixon thereafter acquired from Mr. Houston his right to the reserved lordship, whereby he became entitled, whenever 4000 tons of coal had been raised from the lands in one year, to a tenth of the further output. Mr. Buchanan was the proprietor of certain other lands adjoining Dundyvan, called Merrystone, part of the estate of Drumpellier, over the coal in which lands there was no lordship. Having worked the coal in these lands till a communication was opened up with the Dundyvan field, he began to raise the Dundyvan coal through the Merrystone pits. The suspenders thereupon brought a suspension and interdict against him, (since his death carried on against his son, the present respondent,) to have him interdicted from raising the Dundyvan coal by any pits not situated on the lands themselves.

Pleaded for the Suspenders.—Under the reserved burden in Mr. Houston's disposition the suspenders have a real right in the Dundyvan coal, and are entitled to insist on drawing their lordship in the exact terms of the reservation. By these they are entitled to keep a hillsman at the pit-mouth, and to have access to the pits at all times; and from this it is clear that, under the reservation in the disposition, it was intended that the coal should be raised by pits sunk in the lands disponed alone, as Mr. Houston could never have stipulated for right to keep a hillsman on other lands, or to enter other pits. But, besides, by the subsequent deed of obligation, which, being relative to the reserved right, and recorded in the Register of Sasines, must be binding on singular successors, though not engrossed in the titles, it is specially provided that the lordship should be delivered at pit-mouths on the lands themselves, and that the hillsman should in like manner be kept on the hills upon the lands themselves. The respondent, therefore, is not entitled to violate the terms of the contract,—the more especially as the raising of the Dundyvan coal by a pit on other lands would render it very difficult for the suspenders to ascertain the exact output of the Dundyvan coal, so as to determine when this lordship became exigible, and the amount of it, and would afford means for the evasion of his right.

For the Respondent.—The deed of obligation not being inserted in the

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titles, cannot be binding on singular successors, and the extent of the suspenders' burden on the respondent's rights must be determined solely by the terms of the reservation in the original disposition to Mr. Colt. This, however, reserves no right whatever to the coal till after 4000 tons have been raised; and it contains no provision that delivery shall be made at the pit-mouths on the lands only, and nothing inferring a restriction as to the manner in which the disponee is to work the coal. Unless, therefore, the suspenders can show that their reserved right cannot be securely enjoyed except by working the coal by pits on the lands of Dundyvan, they are not entitled to prevent the respondent from working the coal by pits on other lands. Now the respondent is willing (as he is bound) to allow the suspenders to have a hillsman at the pit-mouth of Merrystone, and to have free access by that pit to the coal. He is also willing to carry the lordship coals to the lands of Dundyvan, and deliver them there; and to allow any precautions which a man of skill may suggest, to protect the interests of the suspenders. There is, however, no risk of evasion which would not equally exist, were the coal worked by pits on Dundyvan; because, as the respondent is undoubtedly entitled to work to the march of his coal, both in Merrystone and Dundyvan, so as to open the communication between the two fields, there would always be the same facility of raising Dundyvan coals by the Merrystone pit, whether there was a working pit on Dundyvan or not; but to avoid the possibility of any evasion, he would consent that the whole coal raised by the Merrystone pit should be considered, with reference to the reserved lordship, as Dundyvan coal.

The Lord Ordinary suspended the letters, and granted interdict. Buchanan having thereupon reclaimed, the Court, before answer, remitted to a professional man to report on the proposals made by the respondent as to the mode of working the coal with security to the suspenders.

A report was accordingly given in, stating that, at an additional expense of about £20, the quantity worked might be equally well ascertained as if the coal was worked by pits not on the lands; but that this mode of working might give rise to many disputes; and that the proprietor of the coal would have more opportunities of putting the proprietor of the lordship to inconvenience, if worked through other pits, than if worked by pits on the lands themselves.

The Court adhered to the Lord Ordinary's interlocutor.

Although the Court allowed the remit to a professional person mentioned in the report, they were of opinion that the principle on which the case fell to be decided was, that the terms of the contract contained in the disposition by Mr. Houston (as correctly explained in the subsequent deed of obligation by Mr. Colt) must be adhered to; and that under it the party having right to the reserved lordship was entitled to have the coal worked by pits on the lands themselves, and the lordship coal delivered there free of expense.

Tod and Romanes, W. S.—G. Dunlop, W. S.—Agents.

A. B. Petitioner.—*Innes.* No. 159.

Judicial Factor.—The Court, in appointing a judicial factor, refused to give him any special or extraordinary powers as to leasing—observing, that if any thing required the exercise of such power, he might make a special application to the Court.

In a petition for appointment of a judicial factor loco absentis, it was craved that special powers should be given to him to let leases for periods of moderate endurance. The Court refused to make the appointment with any special powers, and nominated the party recommended with the ordinary powers—observing that if the leases proposed to be granted did not fall within these powers, a special application might be made by the factor. Jan. 27. 1829. 2D DIVISION.

BANK of SCOTLAND, Pursuers.—*Walker.* No. 160.
J. SMITH, Defender.—*A. Murray.*

PENDING the reduction mentioned ante, No. 118, of a bond of caution granted by the defender Smith and others to the Bank of Scotland, the Bank brought a process of adjudication of the defender's lands, founding on the bond; and in this process he craved decree, reserving all objections contra executionem. Jan. 27. 1829. 2D DIVISION. Ld. Mackenzie. M'K.

The Lord Ordinary reported the cause on Cases; but the Court having in the mean time reduced the bond, they now dismissed the adjudication, with expenses.

H. DAVIDSON, W. S.—THOMSON and FERGUSON, W. S.—Agents.

J. LEVICK and Others, Suspenders.—*Skene.* No. 161.
W. CADELL, SONS, and COMPANY, Chargers.—*Jameson—A. Murray jun.*

Sequestration—Pactum Illicitum—Arrestment.—1.—Question raised, but not decided, whether a stipulation made openly by one creditor in a sequestration for an advantage over the others, as the price of his acceding to the composition, and agreed to by the creditors, is pactum illicitum.—2.—Such a stipulation will not be presumed, if in ambiguous terms.—3.—A discharge by an arresting creditor to an arrestee, on obtaining a decree for less than the actual debt, does not subject him in any responsibility to the common debtor, as the arrestee is only discharged qua such.

THE estates of the suspender Levick were sequestrated, under the Bankrupt Statute, in March 1829. The chargers, Cadell, Sons, and Company, were creditors to the amount of £229: 4: 5, being nearly one third of the debts ranked; but, beyond the sixty days from the date of sequestration, they had executed arrestments in the hands of two of Levick's debtors, and they thereafter instituted processes of forthcoming thereon. It being uncertain, however, what amount would be recovered under these arrestments, Cadell and Company lodged a claim on Levick's estate for the full amount of their debt, without any deduction in con- Jan. 27. 1829. 2D DIVISION. Ld. Mackenzie. T.

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sideration of the sums expected to be recovered. After some procedure in the sequestration, Levick offered a composition of twelve shillings in the pound, payable by four instalments. This was agreed to by all the creditors, and, among the rest, by Cadell and Company, who, however, only concurred under the express reservation contained in their letter, addressed to the trustee, accepting the offer of composition of 'such pre-'ference as we have secured by arrestment.' This letter was laid before a meeting of creditors, and the reservation contained in it agreed to by them; and the offer of composition was thereafter carried through,—Levick, and the other suspenders as his cautioners, granting bond for payment of the composition. In the mean time Cadell and Company recovered £40 under their arrestments, making a compromise with one of the arrestees, whereby they accepted a smaller sum than the debt alleged to be due, and granted him a discharge.

When the last instalment, amounting to £34: 7: 7¼, became due, Levick and his cautioners refused to pay it, on the grounds, 1. That Cadell and Company were not entitled to have discharged the arrestee; and, 2. That they could not legally stipulate any thing over and above the composition, in which case no part of the last instalment would be exigible, as the sums recovered under the arrestments would fall to be imputed in payment of the composition; or, at all events, that the reservation only amounted to this, that they should be entitled to the sums secured by arrestment, and draw the composition on the balance of their debt, under deduction of those sums which they were bound by the statute to have deducted in their claim to be ranked; but that it never could mean that they were both to receive these sums and rank for their full debt; and that, in this view, only £10: 7: 7 of the instalment would be due. On this Cadell and Company having charged Levick and his cautioners for payment of the instalment, they presented a bill of suspension, which was refused to the extent of the £10: 7: 7, and passed quoad ultra. In the answers to the reasons of suspension, Cadell and Company set forth generally, in their narrative of the transactions, that they had stipulated, that 'besides getting the composition upon their whole debt, 'they should further be entitled to draw the funds secured by their pre-'ferable arrestments;' and they then mentioned the letter to the trustee as containing this reservation, and its having been agreed to by the creditors.

The record was thereupon closed without any further statement by Levick &c.; and thereafter the Lord Ordinary, 'in respect it is stated, and 'not denied in the record, that the respondents (chargers) stipulated that, 'besides getting the composition on their whole debt, they should further 'be entitled to draw the funds secured by their preferable arrestments, 'and that this was openly agreed to by the creditors,' found the letters orderly proceeded.

Levick and his cautioners reclaimed.

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Skene in support of their Reclaiming Note.—The Lord Ordinary assumes that the suspenders have not denied that the chargers were both to draw the funds secured by their arrestment, and to rank for their whole debt. This is, however, a mistake. The statement in the answers is merely an inference from the facts set forth of the letter having been written; and we were not bound to contradict on the record this inference, which is not supported by the letter or special facts averred,—the true inference from the facts and letter being, that the chargers merely reserved to themselves to draw the arrested funds, and to rank for the composition according to law, which compels them to deduct any payment or preference. But even if the reservation were such as the chargers now maintain it to be, it is clearly an illegal stipulation which cannot be enforced.

Jameson in answer.—The record fixes parties to the fact assumed by the Lord Ordinary, and it is impossible to get over the non-denial of the charger's statement by saying that the evidence produced does not support that statement; and if the Lord Ordinary had taken a different view, he would have allowed further investigation as to it. But, besides, the letter to the trustees implies that this was the reservation, because the chargers having already a preference over the arrested funds, were entitled to draw them, and rank for the balance, without any reservation; and it is clear, therefore, that they meant to stipulate something more as the price of their concurrence, without which the composition-contract could not have been carried through. Then, if this was the stipulation, although private stipulations for additional advantage by one creditor may be illegal, there is no ground of objection to such as are made openly. In the case of Arrol and Montgomery, Lord Glenlee states this to be the law as to private compositions; and the bankrupt statute contains nothing to alter the case in regard to sequestrations, § 60 only referring to private and collusive agreements, thus leaving room for the inference that open stipulations were not intended to be prohibited.

Lord Glenlee.—I have no inclination to disagree with the law of the Lord Ordinary's interlocutor. But, then, in order to support such a stipulation as is there assumed, it requires that the stipulation be unambiguous; and if it be ambiguous, we must interpret it according to what is reasonable. Now it appears to me that Cadell and Company merely meant to accept the composition, reserving to operate payment so far by their preference, and to take the composition on the rest; otherwise they might have got 25s. instead of 20s. in the pound. But, on the other hand, it is as absurd to maintain that what was recovered under the arrestments should be imputed in payment of the composition; and I think the sums so obtained should be deducted from the general amount of the debt on which composition is to be paid. As to the discharge of arrestments, Cadell and Company could only discharge the debtor as arrestee, and could not affect the common debtor's claim.

Lord Pitmilly.—I agree entirely. No doubt, an open stipulation is good; and it was so decided in the First Division in the case of Cliffe, (ante, Vol. III. No. 94.) But I concur as to the view taken of the stipulation by Lord Glenlee.

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Lord Alloway.—I think the case in the First Division was wrong decided; for I hold that the object of the sequestration statute is to prevent any advantage being taken by one creditor over another. Supposing Cadell and Company had ascertained the amount of their preference, they were bound to have deducted it in their claim. Then, when we come to interpret the meaning of their offer, I cannot suppose they meant any thing unlawful; and if there had been enough to pay the whole debt out of the funds arrested, they could have claimed no part of the composition; and when they come to draw the composition, they must value their preference, and deduct it, and only claim composition on the remainder. This is the fair construction; but even if they had stipulated an additional advantage, I should have doubted if it could have been allowed.

Lord Justice-Clerk.—We may decide this without interfering with the general question argued, as to whether, if clearly and openly made, a stipulation of additional advantage, so as not to exceed the full debt, would not be valid? I reserve my opinion on that; though certainly, at present, I am not convinced that there is any thing illegal in it. But I agree that this reservation is not expressed, so as to lead to any other construction than that Cadell and Company reserve their preference, and draw the composition on the balance.

The Court accordingly altered the Lord Ordinary's interlocutor, and suspended simpliciter, with expenses, since the passing of the bill.

Suspender's Authorities.—Arrol, Feb. 24. 1826, (Vol. IV. No. 324); Kerr, Feb. 14. 1828, (Vol. VI. No. 96.)

Chargers' Authorities.—Lord Glenlee in Arrol, ut supra; Irving v. Cliffe, June 12. 1824, (Vol. III. No. 94.)

J. Henderson, W.S.—A. Snody, S.S.C.—Agents.

No. 162.

J. Stewart and Curators, Pursuers.—*Sol-Gen. Hope—Henderson.*

J. Baikie and Others, Defenders.—*D. of F. Moncreiff—Skene—Rutherfurd.*

Process—Tutor and Curator.—1.—Circumstances under which a party was held barred from objecting to a judicial report, and to the opinions of the consulted Judges, as not regularly taken.—2.—A gift of tutory to three parties does not fall by the death of one of them.

Jan. 28. 1829. 1st Division. Lord Newton. H.

In 1811 James Stewart of Burgh died, leaving the pursuer, an only child, in infancy, without having named tutors or curators. A factor loco tutoris was appointed, but the appointment was afterwards recalled; and, on the 2d of July 1814, Mrs. Stewart, (the mother of the pupil,) Thomas Strong, and Alexander Stevenson, applied to Exchequer for a gift of tutory, and at the same time the defender Mr. Baikie became cautioner for them. A gift was accordingly granted, which was expressed in these terms: 'Nos facimus, constituimus, et ordinamus dilectos nostros Magistram 'Marionam Stewart, Thomam Strong, et Alexandrum Stevenson, tutores 'dativos dicti Jacobi Stewart, ac administratores omnium et singularum 'terrarum suarum, hæreditatum, possessionum, bonorumque omnium,

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'mobilium et immobilium, usque ad ejus legitimam ætatem pervenerit; 'proviso tamen quod dict. Magistra Mariona Stewart, Thoma Strong, 'et Alexander Stevenson faciant et perimpleant dicto Jacobo Stewart 'omnia et singula quæ tutor dativus de jure, seu regni nostri consuetu- 'dine, facere et perimplere tenetur. Et cum ad ipsius legitimam ætatem 'pervenerit, sibi et propinquioribus suis amicis, de dictis terris, firmis 'reditibus et bonis fideliter computum et ratiocinium reddat.'

The bond of caution was, that the tutors should 'make just count, 'reckoning, and payment to the pupil, when he shall arrive at the age 'prescribed by law, of all intromissions,' &c. The tutors immediately entered upon the management of the estate, and intromitted with the effects of the pupil. Mr. Strong died in August 1820, at which time the pursuer was still in pupillarity. Subsequent to that event, it was alleged that Mr. Stevenson was the sole intromitter. Mr. Baikie, the cautioner, soon after Strong's death, brought an action of count and reckoning, relief and exoneration, against Mrs. Stewart and Mr. Stevenson, to which the pupil was called as a party, and in which Mr. Baikie obtained decree on the 23d of June 1823, finding that the gift had terminated by the death of Mr. Strong, and exonerating him from his obligation as cautioner. On the 23d of February 1825 the pursuer entered puberty, and in the course of that year made choice of curators. An action of reduction of the decree was then brought, in which various pleas were maintained; but the point which fell under the more immediate consideration of the Court was, whether the gift of tutory had come to an end by Mr. Strong's death? On that point the Lord Ordinary ordered Cases, which he reported to the Court; and their Lordships, considering the question attended with difficulty, transmitted, on the 11th of March 1828, this query for the opinions of the other Judges—'Whether the 'tutory in this case fell by the death of Mr. Strong?'

A note was thereupon sent to the Court by the consulted Judges, stating 'that, before giving an opinion on the question submitted to them in 'the case of Baikie v. Stewart and others, they were desirous of obtaining 'information with regard to the practice of the Court of Exchequer 'both as to the particular terms on which gifts of tutory have been 'granted where more than one person is nominated, and whether, where 'a plurality have been appointed, applications for new appointments have 'been made in consequence of death or other incapacity.

'The consulted Judges therefore wish that the necessary order should 'be made by the First Division to obtain a report from the King's Re- 'membrancer.'

A remit was in consequence made, on the 7th of June, to the King's Remembrancer, who, on the 17th, returned the subjoined report.* This

* "1. That tutory datives and curatory datives, where more than one person is nominated, generally, but not always, specify a quorum; and it is the practice, when the number of the quorum is reduced by death, to apply for a new gift. An instance of this kind took place in

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report was boxed to all the Judges on the 21st. The report was moved a few days thereafter in the First Division; but no new remit was made to the consulted Judges. The case was, in July, inserted in the rolls of the First Division, to be advised, on the 10th of December, with the opinions of the Judges, expected to be then ready. As, however, they were not lodged, the case was delayed till the 13th of January 1829, when, for the same reason, it was again postponed. On these occasions no objections were made to the regularity of the procedure, or to the report. The opinions were afterwards transmitted.

Lord Corehouse stated, 'I am of opinion that the tutory dative did 'not fall by the death of Mr. Strong. The authority of Lord Stair and 'Lord Bankton upon the subject is express; and the return of the King's 'Remembrancer seems to be sufficient evidence that that authority has 'been uniformly acted upon.'

Lords Justice-Clerk, Glenlee, Pitmilly, Alloway, Meadowbank, Mackenzie, Newton, and Medwyn, stated that 'we are entirely 'of the same opinion with Lord Corehouse.

Lord Cringletie stated, that 'in consequence of the practice, as re-'ported by the proper officer of the Exchequer, I am also of opinion that 'the tutory did not fall by the death of Mr. Strong.'

When the case returned to the First Division for judgment—

Dean of Faculty, for the Defenders, objected, That as the opinions proceeded upon the report of the King's Remembrancer, which he had had no proper opportunity of previously seeing, and which, although accurate so far as it went, was not complete; and, as there had been no interlocutor retransmitting the case to the consulted Judges after they had sent it back, and after the remit had been made to the King's Remembrancer, the proceedings had been irregular; and therefore the Court could not go upon the opinions of the other Judges.

Lord President.—The consulted Judges do not rest their opinions upon the practice. Lord Corehouse, with whom the majority concurs, puts his opinion upon the authority of Lord Stair and Bankton; and merely says that the report of the King's Remembrancer seems to be sufficient evidence that that authority has been uniformly acted upon. It is true Lord Cringletie rests his opinion on the practice, but the other Judges do not.

Lord Gillies.—In regard to the objection of irregularity, observe

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the year 1806. But the records of this Court, in so far as I can discover, do not afford any instance, where a gift of tutory is granted to more persons than one, and where, by the terms of the gift, the nomination is neither jointly, nor to a quorum, of the Barons having been applied to for a new gift, in consequence of the incapacity or death of one or more of the tutors first named.

"2. When a gift is granted to two persons jointly, and one of them dies, or refuses to act; or in the case of a lady afterwards marrying, by which she becomes in law incapacitated, a new gift becomes necessary, and would be granted upon the tutors observing the rules and directions of the statute 28th of 1672. A case of this last kind took place in Whitsunday term last. Henry Jardine, *King's Remembrancer*."

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how the case stands. We sent a query to the other Judges; they were desirous of further information, and a report is then made by the proper officer. Of this the parties could not fail to be aware, nor that it was intended for the consulted Judges. No objection was then made to the report, and it was sent to their Lordships; and a solemn consultation was thereupon held, and an opinion returned. It is impossible now to listen to this objection. But the opinions of the majority do not rest upon the report. Lord Corehouse expressly puts his opinion upon the law of the case, and refers to the report as showing that there was no practice contrary to that stated by Lords Stair and Bankton. In that opinion I concur.

LORD CRAIGIE.—It is of importance to attend to the point of form; for, in the event of the case going elsewhere, it may be remitted back to us.

LORD PRESIDENT.—But the opinions rest upon the law, independent of the practice.

LORD CRAIGIE.—On looking into the other editions of Stair, the paragraph founded upon appears to be inaccurate.

LORD PRESIDENT.—But we must be guided by the original edition.

LORD CRAIGIE.—It is well known, however, that that edition was not published with much accuracy.

LORD BALGRAY.—There is certainly a difficulty in point of form.

LORD PRESIDENT.—The other Judges might have sent for information to Exchequer, or gone there themselves; and could it, in that case, have been held that there was any objection to their opinions? Besides, the party here was aware of this report, and that it was before the Judges. They do not even aver that there has been any contrary practice, but merely that there is not sufficient evidence of the practice.

Dean of Faculty.—My objection is, that the report was never remitted to the Judges, and therefore was never lawfully before them.

LORD PRESIDENT.—As to the merits of the case, I have my doubts; but I must be ruled by the opinions of the other Judges, whom I hold to have been regularly consulted.

LORD CRAIGIE.—I submit to their opinions, but cannot concur in them.

Dean of Faculty.—But your Lordships are not bound to give your opinions agreeably to those of the other Judges. We are entitled to know what your opinions are.

LORD GILLIES.—The Act of Parliament says that the decision is to be governed by the opinions of the majority of the Judges; and therefore, as there is a majority in favour of the pursuers, their opinions necessarily form the judgment of the Court.

THE COURT thereupon pronounced this interlocutor:—'The Lords, 'upon the report of Lord Newton, and having advised the mutual revised 'Cases for the parties, and consulted with the Judges of the Second Division and the Permanent Lords Ordinary, and heard counsel for the 'parties on the objection stated by the defender, that the report of the

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'Remembrancer, although accurate as far as it goes, is not complete,—'find that, on the 11th of March 1828, this Division, on advising Cases 'for the parties, remitted the same to the Judges of the Second Division 'and Permanent Lords Ordinary to give their opinion 'whether the 'tutory in this case fell by the death of Mr. Strong, and to give in the 'said answer quam primum;'—find that the consulted Judges, before 'answering the above question, desired that this Division should give 'the necessary order to obtain a report from the King's Remembrancer 'in Exchequer as to the practice in such cases;—find that this Division, 'on 7th June 1828, did remit to the Remembrancer accordingly;—'find that, on the 17th of June 1828, the Remembrancer made his re-'port;—find that this report was printed and boxed to all the Judges 'on the 21st of June;—find that this report, being a return to the requi-'sition of the consulted Judges, necessarily and properly became matter 'for their consideration, under the original remit by this Division of 11th 'March; and that no new order or remit was necessary to entitle the con-'sulted Judges to resume the case, and answer the question put to them 'in said remit;—find that the said report by the Remembrancer was 'printed and boxed, and moved in Court, nearly three weeks before the 'end of that session; and therefore, when said report was moved in Court, 'and still more before the Court rose, the parties had opportunity and 'time to object to it, as either imperfect or inaccurate;—find that the 'case was put out in the printed rolls on the very first days in the long 'vacation, in July 1828, to be advised on the 10th of December 1828, 'along with the opinions of the consulted Judges, expected to be put 'in;—find that the case accordingly was called on the 10th of December, 'but the opinions not having come in, it was delayed;—find that, on this 'occasion, the parties had another opportunity to have objected to the 'Remembrancer's report;—find that the case was again put out in the 'roll to be advised on the 13th of January 1829, but was again delayed, 'as no opinions had been given in, except by Lord Corehouse;—find 'that, at moving the case on the 13th of January, the parties had an-'other opportunity of objecting to said report of the Remembrancer;—'therefore find that they cannot now be heard to object to said report, 'or to the manner in which it was brought before the consulted Judges, 'and considered by them; and having resumed consideration of the case, 'with the opinions of the consulted Judges, find, in terms of the opinion 'of the majority, that the tutory in question did not fall by the death of 'Mr. Strong, and decern in the reduction accordingly; and appoint 'parties to debate on the consequences to follow from this judgment.'

Pursuers' Authorities.—1. Stair, 6. 14; 1. Ersk. 7. 30; 1. Bank. 7. p. 178; Mack. p. 72; 1. Ersk. 7. 8; Young, Nov. 7. 1740, (16346); Fisher, Aug. 2. 1758, (16361); Ellis, Feb. 14 1672, (14596); Trail, June 21. 1821, (ante, Vol. I. No. 160.)

Defenders' Authorities.—3. Ersk. 44; 1. Ersk. 7. 3. and 30.

W. Howison jun.—Penn and Pitcairn, W. S.—Agents.

W. Douglas, Pursuer.—*Cuninghame.* No. 163.
D. Turnbull, Defender.

Reclaiming note for defender refused, in respect of no appearance in support of it.

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2d Division.
Ld. Mackenzie.
T.

W. Douglas, W. S.—J. Adams,—Agents.

J. Laing, Advocator.—*Greenshields.* No. 164.
Mrs. C. Robertson or Harper and Husband, Respondents.—*D. of F. Moncreiff—Carlyle.*

Landlord's Hypothec.—A party who had the charge of the sale, by public auction, of the furniture of a house, having allowed to be sold along with it a few articles which were part of furniture of another house belonging to the tenant of that house, and which had been sequestrated by his landlord for rent; and having received the money, and paid it, in ignorance of the sequestration, to the tenant—Held not liable in repetition to the landlord.

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Ld. Mackenzie.
F.

The respondent Mrs. Harper was proprietor of a house in Jamaica street, tenanted by one Watson at a rent of £24; and in December 1824 she executed a sequestration of his furniture for the current half year's rent to fall due at Whitsunday 1825. A few days before the term, Watson, through the intervention of a third party, obtained permission from the advocator Laing (who had charge of a sale of the furniture of a house in Howe street, which was to take place on the 13th of May) to send certain articles of his furniture to be sold along with that of the house in Howe street. These articles were accordingly brought to the house in Howe street, and sold by public auction (along with the furniture of that house) for the sum of £13 : 8 : 8. Laing did not himself sell the furniture, the sale being conducted by a licensed auctioneer employed by him; but the price, after being collected by the clerk of the roup, was handed to Laing, who, a few days thereafter, paid it to Watson. In the beginning of June, the respondents, finding their sequestration thus disappointed, presented an application to the Magistrates of Edinburgh against Watson, and also against Laing and the auctioneer, concluding, as to the two latter, that they should be ordained to restore the furniture, or to pay the current rent for which it had been sequestrated, or at least the value of the articles. The respondents did not specially aver that Laing or the auctioneer was in the knowledge that the furniture had been sequestrated and removed in breach of sequestration, but contended that the circumstances led to the inference that they did know this to have been the case. The Magistrates having decerned against Laing and the auctioneer for the half year's rent, an advocation was brought by Laing—the auctioneer having in the mean time died in bankrupt circumstances.

Pleaded for Laing, the advocator—

Although a landlord may certainly recover the sequestrated effects of his tenant, into whatsoever hands they may come, he cannot make the

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advocator responsible merely for allowing the articles to be sold along with other furniture under his charge, unless he can show that he had been in the knowledge of the sequestration, and been accessory to the evasion of it. Now the advocator was perfectly unacquainted with Watson, and knew nothing as to where the furniture came from, nor of the existence of any sequestration; and there was no ground of suspicion from the furniture being brought in the manner which was done here; as it is extremely common, when there is to be a general sale of the furniture of a house, for individuals who have only a few articles to dispose of, to send them to be sold in this way. The advocator, therefore, can be no more liable than the porter who may have carried the furniture from the sale to the purchaser's house. Besides, the sale here, being by public auction, must be held to have the same effect as a sale in open market; and at all events it was incompetent for the Magistrates to decern for payment of the rent, as the only competent decerniture was for restoration of the furniture, or its value.

Pleaded for the respondents—

The furniture having been carried off in breach of sequestration, and the price having been received by the advocator, he is liable to repeat it to the landlord as the surrogatum of the furniture, notwithstanding his having already paid it to the tenant, even although he had acted bonâ fide; but considering that the sale was only two days before Whitsunday, the advocator must at least be held to have subjected himself to the risk of the furniture having been carried off in breach of sequestration, by taking it in the circumstances in which it was brought to the sale, and selling it covertly as part of the furniture of the house in Howe street, if he be not presumed to have been in actual knowledge of the sequestration. Nor can the advocator be protected by the articles having been sold by auction, for a sale by auction is not equivalent in its effect to a sale in public market; and it was irregular in the present instance, no notice having been sent to the Excise of the articles to be sold three days prior to the sale, as required by 19th Geo. III. c. 56, § 9. At any rate the advocator did not get the furniture into his possession by public sale, and it is only the purchaser who can be thereby protected. As to the decerniture being expressed for the half year's rent, it is of no importance to the advocator, as the price of the furniture received by him exceeded the amount of the rent.

The Lord Ordinary advocated the cause; and 'in respect it has not 'been sufficiently instructed that the advocator knew of Watson's seques-'tration,' assoilzied him, and found him entitled to expenses.

The Court adhered.

Lord Glenlee.—It is quite plain that there is no specific averment of any facts from which we can deduce that this man was in the least aware of the sequestration, and I am therefore for adhering.

Lord Pitmilly.—I am clearly of the same opinion. Not only is there no proof of Laing's knowledge of the sequestration, but there is no averment of it on

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record. The furniture was truly never in his possession at all, so as to afford any ground whatever for making him liable. I think the interlocutor is right.

Lord Alloway.—I entertain great doubts. Sequestration in urban tenements produces the same effect as in rural. In the case of Lord Dalhousie there was no sequestration, and the most perfect bona fides; and the danger of evasion is a thousand times greater in a town than in the country. I conceive, therefore, that if bona fides were to protect from actions of this kind at the instance of the landlord, sequestration would be of no use in the law of Scotland. But I cannot hold Laing to have been in complete bonâ fide; for I consider that the person who voluntarily undertook to sell furniture only two days before Whitsunday, subjected himself to the whole risk of its proving to have been carried off in breach of sequestration. It is said Laing was never in possession; but although he employed an auctioneer, the sale was properly by him, and he received the price, and I doubt if this sort of sale can be held equivalent to a sale in open market; but at any rate it is only the persons who buy, and not the party who sells, to whom the protection of a public sale can be available. In these circumstances, I cannot concur in the interlocutor of the Lord Ordinary.

Lord Justice-Clerk.—Supposing these articles had been stolen, Laing could not, on the facts appearing on this record, be held liable as the resetter; and in the same way here I do not think he can be made liable to the landlord. There is no sort of proof to indicate that Laing knew any thing of the goods being under sequestration. If there was any averment to that effect on the record, I should be for allowing investigation; but there is no such averment; it is merely inference, and there is nothing suspicious in his having allowed the sale in the way he did. A landlord, no doubt, is entitled to recover sequestrated goods from persons receiving them; but I do not think that merely assisting in selling while in ignorance of the sequestration can subject a party in payment of the price; and I cannot therefore disturb the interlocutor.

J. Gray, W. S.—R. Lockhart, S. S. C.—Agents.

Isabella M'Master, Pursuer.—*Jeffrey.*
T. Brown, Defender.—*More.*

No. 165.

Judicial Examination.—The judicial examination of a defender, his wife, and a party who had been his agent, as to the constitution and subsistence of a debt alleged to arise from a loan of money, held irregular.

Jan. 28. 1829.
2d Division.
Ld. Cringletie.
R.

This was an action at the instance of Isabella M'Master, as executrix of the deceased Jane M'Master, against Brown, for payment of a sum of £100, alleged to have been lent to Brown by the deceased. In support of it, certain documents, said to be holograph of the defender, were produced; but these being objected to as not duly stamped, the Lord Ordinary, after the defender, his wife, and Mr. Gifford, (who had been formerly his agent,) had been examined as havers, appointed them to be judicially examined. The declarations of these persons were accordingly taken, and the record was thereafter closed on the summons and defences. The declarations were contradictory of each other; but the Lord Ordinary, considering that there was no admission on the part of the defender,

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(except as to £30, for which an interim decree had been given,) and that there was no legal evidence otherwise to constitute the debt against him, assoilzied.

The pursuer thereupon reclaimed; and the Court, holding that the cause was not yet fit for decision, and that the judicial examinations had been irregular, without deciding any thing on the merits, recalled the Lord Ordinary's interlocutor; found that the whole proceedings, since the defences were given in, were irregular and inept; and remitted the cause again to his Lordship, reserving all questions of expenses.

LORD JUSTICE-CLERK.—The record is in a most unsatisfactory state; and we cannot decide the case as it stands. It is clear that we must throw out of view Gifford's judicial declaration, and his deposition as a haver, so far as it is evidence against his clients. The other declarations are contradictory; and I can find no grounds on which to decide, and would remit to the Lord Ordinary.

LORD GLENLEE.—It would be very dangerous to allow a proof of a loan otherwise than by writ or oath; and I always understood that there could not be a judicial examination on points which can only be proved by writ or oath.

LORD ALLOWAY.—I disapprove entirely of the judicial examination of the agent, and of the examination of the wife, both judicial and as a haver, and of the havers being examined as witnesses, which appears to have been the case here. The whole proceedings have been irregular.

J. GEMMELL,—D. GRAY, S. S. C.—Agents.

No. 166.

MRS. SCOTT, Pursuer.—*Jameson—Shaw.*

J. NAPIER and Others, Defenders.—*Greenshields.*

Process.—Reduction.—Held competent for a pursuer in a supplementary summons of reduction to state the facts more fully than in the original summons, and to libel new reasons not inconsistent with the former—the conclusions in both being the same.

Jan. 29. 1829. 1st DIVISION. Lord Newton.

THE pursuer Mrs. Scott having granted to the defender Mr. Napier two heritable bonds, the one as manager of the Galloway Banking Company, and the other in his individual capacity, in security of debts alleged to have been contracted by her husband, brought an action of reduction against Napier in the above characters. In defence, he pleaded that she was bound to have called the partners of the Bank; and the Court, accordingly, on the 23d of Febuary 1827, 'sustained the dilatory 'defences in so far as the defender is called, and concluded against him 'as manager of the Galloway Banking Company; and remitted to the 'Lord Ordinary to sist the present process to that extent, until the proper 'persons are called and made parties to the action,—reserving the question 'of expenses relative to the present discussion until the issue of the 'cause.' (See ante, Vol. V. p. 414, No. 284.)

In consequence of this judgment, Mrs. Scott raised a supplementary summons of reduction against Napier, and the other partners of the Bank, in which she entered into a much fuller statement of the circumstances

on which the action was founded than were contained in the original summons, and libelled three additional reasons of reduction. The conclusions, however, were precisely the same in both cases. A motion having been made for conjoining these two summonses, Napier opposed it, and insisted either that the original summons should be dismissed with expenses, or that Mrs. Scott should be ordained to pay the expenses, as a condition of getting conjunction. No. 166. Jan. 29. 1829.

The Lord Ordinary, 'having heard parties on a motion for conjoining 'this process with a supplementary action since brought into Court, and 'having compared the respective summonses in each, conjoined the pro-'cesses,' and his Lordship at the same time issued the subjoined note. *

To this judgment, for the reasons specified by the Lord Ordinary, the Court unaminously adhered.

J. Donaldson, W. S.—R. Rutherford, W. S.—Agents.

Earl of Rothes and Curator, Pursuers.—*Jeffrey—Rutherfurd.* Countess of Rothes and Lady Elizabeth Leslie, Defenders.—*D. of F. Moncreiff—Skene.* No. 167.

Provisions to Children.—Circumstances under which the amount of provisions to children, granted in virtue of an entail, was held to be regulated by the rental at the death of the granter, and not at the date of the bonds.

Jan. 29. 1829. 1st Division Lord Meadowbank. H.

The late George William Earl of Rothes succeeded to the estate of Rothes under a strict entail, which, after certain prohibitions, declared that, 'Notwithstanding the foresaid limitation and restriction, it shall be 'lawful to the said John Lord Leslie and his foresaids, and remanent 'heirs of tailzie and provision above mentioned, to provyde their hus-'bands, wyffes, bairnes, and children to competent and convenient life-'rents, portions, and provisions, such as the said estate may conveniently 'bear and allow, and as shall be agreed to by two of the nearest friends, 'the one on the father's side, and the other on the mother's side, the saids 'liferents in favour of the husbands and wyffes not exceeding

* "Had it appeared to the Lord Ordinary that the new summons contained conclusions, or grounds for conclusions, which could not have been competently insisted in under the original action, he would have refused the motion, and would have thought that the latter ought to have been dismissed; but he does not think this the case. The conclusions are the same in both actions,—that the deeds ought to be reduced; and the only difference is, that the narrative of facts is a little more specific in the second, and that there are three additional reasons of reduction stated there. But a more specific detail of the facts might have been made under the first action in the form of a condescendence; and as to the new reasons of reduction, it appears, at least under the former practice, by the common style of summonses of reduction, that it was competent to introduce new reasons not specified there; and by the new forms, the admission of condescendences, and of notes of pleas of law in addition to the summons, seems to authorise the statement of additional grounds in support of the conclusions, whether drawn from fact or law."

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'at an time, and the said portions and provisions in favour of the child-'ren not exceeding the sum of ; and to grant wadsets, infeftments, 'bonds, and other securities requisite thereanent, and wherewith the 'foresaid lands and estate shall stand affected, notwithstanding of the 'foresaid provision and restriction.'

In 1810 there were two Countesses Dowager alive, viz. Countess Jane and Countess Mary; and his Lordship, having married, had two daughters, Lady Elizabeth and Lady Georgina Leslie. Being desirous to avail himself of the above clause, and William Evelyn, Esq. and Viscount Melsintoun, being his nearest relatives, the Earl caused a rental of the estate to be made up in 1810; and, on the 20th of February 1811, he executed two bonds of provision, with consent of the above relations, one in favour of his two daughters, and the other in favour of his Countess. On these bonds was indorsed a state of the rents; and by the one in favour of his daughters, he granted to them, 'equally between them, and failing 'either of them by death during her minority and unmarried, to the 'survivor, the sum of £12,400 sterling, being, in terms of the state an-'nexed, within three free years rent of the lands &c., after deducting 'public burdens, feu-duties, and interest of debts affecting the same.' The bond in favour of the Countess was for an annuity of £1366: 13: 4. Both bonds were qualified with a declaration, that if they should be found disconform to the entail, they should be restricted, so as to be precisely conform to the powers given by the deed of entail, and not otherwise; and warrant was granted for infeftment, both in his entailed and unentailed lands. They also contained a power to revoke, and a dispensation with delivery. His Lordship died in February 1817, and had been predeceased by his daughter Lady Georgina. The bonds had not been delivered during his life, and were found in his repositories. In the course of the same year, Countess Dowager Jane died; and in 1818 Countess Mary (who was infeft in a provision out of the estate) brought an action of reduction of the bonds on various grounds, but particularly that the requisite consent had not been properly obtained, and that they exceeded the sums permitted by the entail.

The Court, on the 21st of January 1823, (see ante, Vol. II. No. 130,) found that the consent had not been properly obtained; and, on the 3d of February 1824, they further found 'the defenders entitled to 'provisions competent and convenient, and such as the estate may con-'veniently bear, and allow in terms of the clause in the entail to that 'effect, and sustained the bonds to that extent, to be payable proportionally out of the entailed and unentailed estates, according to the 'rents of the same.' Thereafter their Lordships remitted to the Lord Ordinary to ascertain and adjust the rentals for 1810 and 1816; and his Lordship remitted to an accountant, who reported that the free rental of 1810 was £4162: 16: 1, and that of 1816 £1639: 11: 5; but against this report various objections were stated.

In the mean while Countess Mary had died, and the present pursuer

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was dsted in her place. The Lord Ordinary then reported the case to the Court. In the course of the discussion which took place, several points were argued; but the main one related to whether, in fixing the amount of the provision, the rental of the year preceding the date of the bonds, or that preceding the death of the Earl, should be taken as the ground of judgment.

On the part of the pursuer it was maintained, That the bonds were truly of a testamentary nature, being characterized as such by the power of revocation, and the dispensation with delivery, and therefore were not intended to take effect till the death of the granter,—that, besides, it had been fixed, by numerous decisions, that, in relation to provisions to children, the death of the father, and not the date of the bonds, must be taken as the rule for ascertaining the amount,—and that the cases founded on by the defenders related to jointures or localities in favour of widows, on which they had been infeft during the lives of their husbands; and, consequently, could not apply to a case of this description.

On the other hand, the defenders contended, That it was the manifest intention of the Earl that the provisions should have reference to the rental of 1810, which he had indorsed on the bonds; and, therefore, although the bonds were not to be delivered till his death, yet this could not affect the question.

The Court pronounced this interlocutor:—'Find, that the free rental 'must be estimated as at the death of the late Lord Rothes, and that 'super totam materiam, the same may be taken as having been equal to '£2500 per annum: Find, the Countess Dowager Charlotte Julia is en-'titled to a liferent of £800, and Lady Elizabeth Jane Leslie to a pro-'vision of £6000, both out of the entailed estate of Rothes, from and 'after the term of Martinmas last, as being in the circumstances of the 'case, such provisions as are competent and convenient, and such as the 'said entailed estate can conveniently bear and allow; the said provisions 'being payable in future in terms of the bonds libelled on respectively, 'as herein restricted: Reserving to the said Charlotte Julia Countess 'Dowager of Rothes, and Lady Elizabeth Jane Leslie, to claim for any 'further sum under the bonds of provision, out of the unentailed pro-'perty, and to the pursuer and all concerned, their defences as accords: 'Find, that the sums awarded by the interim decreets of the Lord Ordi-'nary and of the Court, and paid to the said ladies jointly and without 'division, shall be held to have been and to be in satisfaction of their in-'terests respectively under the said bonds, to the said term of Martin-'mas; and decern.'

Lord President.—Upon the whole case, I think that the accountant has made too great deductions from the rental; and, on the other hand, I think that the late Lord Rothes, the granter of the deeds, stretched the rental to the utmost. But then, if he had proceeded with the legitimate consent of the two nearest of kin, we could not have gone very nicely to work, but must have abided by what is the law of this entail. But we have to a certain extent cut down the bonds,

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because the consent was not legitimately obtained; and if the transactions had been with third parties, to whom he was noways bound, and to whom he had granted gratuitous deeds, we would not have supplied the defect at all, but would have entirely annulled the bond, the same as in the case of leases where the term of endurance has exceeded that permitted by the entail. In such cases we do not sustain them to any extent whatever. But here there was an equitable and natural claim to provide for the widow and children; and therefore we sustained them, though it was rather a curious phrase in the interlocutor to sustain the bonds. But what was meant was, that they were sustained so far as they were for reasonable and competent provisions. I am convinced that the rental, on which the Earl proceeded, was quite wild; and the consents not being properly obtained, we set the provisions aside. Upon the whole, I think we may take the rental at £2500. I do not think the proprietor would touch more; and what occurred to me was, £700 or £800 a year to the widow, and £6000 to the daughter.

Lord Craigie.—I agree in general with the opinion delivered by your Lordship; but I differ in taking the rental rather at the death of the granter, than at the date of the deed. I think, from the terms of the entail, it was meant to be fixed at a period during the life of the granter. How otherwise could you settle it with the approbation of those friends mentioned in the entail? If, at the date of the settlement, it was a reasonable provision, I deny that any after proceedings can operate against it. If he had made it as a locality, where the party would have the benefit of the increase, that would be right. But where the provisions are limited in extent, they ought not to be subjected to any loss. In most cases the Court have gone beyond the mark in favour of the heir. I think we ought to place ourselves in the situation of referees in the entail, and give our opinion as at the time they did; and we cannot listen to any after abatement.

Lord Balgray.—I agree in opinion with your Lordship. Perhaps, since the other two ladies are dead, the widow should have £800 a year.

Lord Gillies.—I agree with your Lordship. I am only sorry that it appears we have no settled point in the law of Scotland. I thought it a settled point that the time of the death of the granter was to be the period for fixing the provisions.

Pursuers' Authorities.—4. Ersk. 1. 34; Borthwick, Dec. 27. 1706; Borthwick, Feb. 1730, (15556); M'Gill, June 13. 1798, (15451); Elliot, Nov. 17. 1813, (F. C.); Douglass, May 15. 1822, (ante, Vol. I. No. 465); Glencairn, Jan. 26. 1804, (see case of Agnew in note to Gordon, Jan. 27. 1811.)

Defenders' Authorities.—Agnew, Dec. 12. 1810, (see note to Gordon, Jan. 27. 1811); Kintore, May 14. 1813, (F. C.); Malcolm, Nov. 21. 1823, (ante, Vol. II. No. 501.)

Tait and Young, W. S.—Phin and Pitcairn, W. S.—Agents.

No. 168.

D. Sinclair, Pursuer.—*W. Bell.*
J. Sinclair, Defender.—*M'Neill.*

Property—Retention—Jus Tertii.—A party having got into possession of a feu belonging to another, without any title but by the sufferance of the superior, and having paid the feu-duties for many years, and expended money in ameliorating—Held,—1.—That his having done so afforded no defence against an action of property by the true owner;—and,—2.—That it was jus tertii to him to found on alleged violations of the feu-contract, whereby, it was contended, the feu was forfeited to the superior.

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2D DIVISION.
Lord Medwyn.
F.

In 1765 the late John Sinclair, father of the pursuer, entered into a feu-contract with Mr. Campbell of Shawfield, whereby the latter feued to him certain lots of ground in the island of Islay, it being provided that Sinclair should erect a house on the property, and possess the same by himself or tenants; and that in the event of his not building such house, or not so possessing the same, or of his deserting it and not returning for two years, or allowing two years feu-duty to remain unpaid, the contract should be null and void, and the superior should be entitled brevi manu, and without order of law, to sell or dispone the property to any person he chose. No infeftment was taken on the feu-contract; but Sinclair entered into possession, built a house, and continued to possess till towards the year 1794, when he went to Ireland and died, leaving four children, the pursuer and three daughters, resident in Islay. After this event, the defender John Sinclair, a nephew of the deceased, obtained possession of the property, according to his own account, by verbal grant from the superior Mr. Campbell in consequence of the desertion of the feu, and, according to the pursuer's account, in consequence of a verbal agreement with him (the pursuer.) However this might be, the defender obtained no written title to the property; but he continued to possess for thirty years, drawing the rents, and paying the feu-duty to the superior, and in the course of his possession he expended considerable sums in the amelioration of the subjects. In 1826, however, the pursuer, having served heir in general to his father, raised the present action, concluding to have his right to the feu declared, and for delivery of the original feu-contract, of which the defender had also got possession, and concluding likewise for count and reckoning against the defender; but the latter having raised a counter action of accounting, the pursuer passed from the last-mentioned conclusion, reserving it in any after process, and insisted only in the declaratory conclusions, and those for exhibition and delivery.

Pleaded in defence.—The superior was entitled, under the feu-contract, brevi manu to give the feu to the defender on the desertion of the original feuar and his family, and at all events he ought to have been made a party to this process; and further, the defender having made great improvements on the property, the pursuer was not entitled to deprive him of it, without first remunerating him for his advances.

Answered for the Pursuer.—As the superior granted no written title to the defender, it is jus tertii to him to plead the right of the superior in consequence of the alleged violation of the contract, or to insist on the superior's being made a party to this action; and as to ameliorations, the defender will obtain decree for whatever he may be entitled to in his action of accounting; but having no title whatever to the subjects in question, he cannot be allowed under such a claim to keep the pursuer out of his property.

The Lord Ordinary decerned in terms of the conclusions of the libel, except that of accounting, and the Court adhered.

J. MALCOLM,—A. CLASON, W. S,—Agents.

No. 169. J. SCOULLER and J. BROWNLEE, Advocators.—*Cockburn—Monteith.*
J. ROBERTSON, Respondent.—*Sol.-Gen. Hope—Jameson—A. M'Neill.*

Servitude—Reparation—Process.—1.—A property in a town being burdened with the servitude of receiving and carrying off in a sewer the ordinary waste water from a neighbouring tenement—Held that the proprietor of the dominant tenement was not entitled, in erecting a distillery on his premises, to discharge on the servient a large quantity of additional water introduced artificially for the supply of his distillery.—2.—The proprietor of the dominant tenement having, at his own hand, turned this additional water in a new direction, whereby it flooded an adjoining house and injured it, held not entitled to recover from the owner of the servient tenement the consequential damages thus arising, nor the expenses incurred in disputing it;—and,—3.—The proprietor having passed from all other claims of damages in the Inferior Court, not entitled to revert to them in the Court of Session in an advocation by the other party.

Jan. 29. 1829.
2D DIVISION.
Ld. Cringletie.
T.

THE advocators Scouller and Brownlee were proprietors of certain premises in Gorbals of Glasgow, in use to be occupied as a malt-steep and dye-work. The water from the malt-steep ran off by an open sewer or drain through a close called Picken's close, belonging to the respondent Robertson, into a sunk drain, whereby it was conducted into the river Clyde; while that from the dye-work was carried off in a different direction. In 1818 Scouller and Brownlee erected on the scite of the dye-work a distillery, for the use of which they obtained an artificial supply of water from the Clyde, which was afterwards discharged in great quantities into the sewer in Picken's close. Robertson being at this time in the course of erecting a new house, and alleging that the increased quantity of water was so great that the covered drain could not receive it all, in consequence of which it had flowed into the foundation of his new house, greatly injuring it and exposing it to danger, erected, at his own hand, a sort of embankment in his close, which sent the water in a different direction. In consequence of this, the house of a neighbouring proprietor Anderson was flooded, and some injury done to it. Anderson brought an action of damages against Robertson, in which, after great litigation in the Inferior Court and Court of Session, he obtained decree for £15 and expenses, amounting, with Robertson's own costs, to upwards of £800. Pending this process, Robertson presented a petition to the Magistrates of Gorbals, praying to have Scouller and Brownlee prohibited from discharging their additional supply of water into Picken's close, and found liable in damages. The Magistrates having allowed a proof, from which it appeared that the water discharged from the distillery was greatly beyond what had been in use to be discharged from the malt-steep, (there being, according to some of the witnesses, as much now discharged in a day as formerly in a month,) pronounced an interlocutor finding that the servitude with which Picken's close was burdened, was merely to the extent of carrying off the water from the malt-steep, together with the eaves-drops of the houses, and that 'the defenders (advo-'cators) are not entitled to increase the said servitude by discharging 'into the pursuer's property the water from the said distillery, or to dis-

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'charge any other water from their premises upon those belonging to 'the pursuer (Robertson) than the water of the said cistern or steep of 'the said malt-barn;' and therefore decerned in the conclusions of the petition, and appointed a condescendence of the damages claimed by Robertson. A condescendence was accordingly given in by him, claiming the damages in which he had been subjected in the action with Anderson, and the expenses incurred in that action; but not setting forth any other damage as actually suffered by him in consequence of the increased quantity of water. The Magistrates, with reference to this claim, found 'that whatever may have been the character of the pursuer's (Robert-'son's) act, as referable to Anderson, in diverting the water referred to 'in process from his own property, and throwing it on that of Anderson, 'it still had its origin in the illegal act of the defenders in discharging 'the said water from their property on those of the pursuer and Ander-'son, neither of whom were bound to receive it,' and accordingly decerned against Scouller and Brownlee for the damages and expenses sustained by Robertson in the action with Anderson; and Robertson thereafter passed from all claim of damage on any other ground. In the mean time Scouller and Brownlee had the water from the distillery carried off in another direction; but being dissatisfied with the above judgments, they brought an advocation, in which the Lord Ordinary, being satisfied that the Magistrates were wrong in awarding as damages against Scouller and Brownlee the damage and expenses incurred by Robertson in the action with Anderson, occasioned by his own unauthorized act in turning the water on Anderson's property, advocated the cause, and recalled the interlocutors of the Magistrates; and holding also that the sewer in Picken's close was in the situation of any common sewer in a large town, liable to the influx of whatever increased quantity of water the uses and operations of the inhabitants might require, his Lordship assoilzied Scouller and Brownlee, and found them entitled to expenses.

Robertson thereupon reclaimed; and the Court, while they agreed with the Lord Ordinary as to the consequential damages arising from Robertson's own improper act, which had been awarded by the Magistrates, taking a different view as to any other claims of direct damage from the increased quantity of water, which might be substantiated by Robertson, (Dec. 13. 1825,) recalled his Lordship's interlocutor, and repelled the claims of damage which had been awarded by the Magistrates; but remitted to his Lordship to hear parties as to all other claims of damage, reserving all questions of expenses. When the cause returned to the Lord Ordinary, his Lordship ordered a condescendence of damage, in which Robertson founded in a great measure on the alleged noxious quality of the water discharged from the distillery, as to which no complaint had been made in the original petition to the Magistrates.

To the claim of damages contained in this condescendence, it was objected by Scouller and Brownlee that none could be demanded in this action, except in respect of the quantity of water; and besides, that Ro-

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bertson had, in the Inferior Court, passed from all claims of damage, other than those awarded by the Magistrates,—a circumstance which had been overlooked by the parties when the cause was in the Inner House.

The Lord Ordinary pronounced this interlocutor:—'In respect that 'the pursuer in the Inferior Court (John Robertson) did in that Court 'distinctly pass from any claim of damages on account of the water from 'the distillery having been sent down Picken's close, and flowed into the 'foundation of the house which was then building, and limited his claim 'to other damages unnecessary to be here mentioned, finds that he can-'not now recur to these damages, which, having been passed from, formed 'no part of the judgment of the Inferior Court under review. 2. In re-'spect that the said John Robertson has, in his condescendence, en-'deavoured to convert this action into one for removing a nuisance, not 'owing to the water alone being sent down Picken's close, as was the 'original cause of his action, but owing to its now alleged offensive quality, 'which was, by his counsel at the Bar, admitted to be incompetent in this 'advocation; and, lastly, that no other ground of damage is relevantly 'alleged; dismisses this remaining part of the action; assoilzies the de-'fenders from the whole conclusions of the action; finds them entitled 'to the expenses of the whole proceedings in this Court, and remits to the 'auditor of Court to tax the same; and decerns.'

Robertson again reclaimed, and contended that the abandonment of his other claims of damage, having been in consequence of the considerable sum awarded by the Magistrates, must be considered as having been conditional on that award being ultimately sustained; but, at any rate, that he was entitled to have a decree, in terms of the prohibitory conclusions of his original petition, against Scouller and Brownlee, discharging the additional quantity of water into his close, and to a proportional share of the expenses relative to that point.

The Court pronounced this interlocutor:—'In so far as regards that part 'of the prayer of the original petition of the respondent (Robertson) to the 'Magistrates of Gorbals, craving that the advocators may be prohibited 'from making any illegal use of their servitude in the manner therein set 'forth, find in terms of the interlocutor of the Magistrates, and decern, 'in this respect altering the interlocutor of the Lord Ordinary reclaimed 'against; and in so far as regards the claims of damage that have been 'maintained by the respondent, adhere to the interlocutor of the Lord 'Ordinary, and refuse the desire of the note; find the respondent en-'titled to such part of the expenses of process, whether in this Court or 'the Inferior Court, as can be shown to relate to the claim in his original 'petition for prohibiting the advocators from making any illegal use of 'their servitude in the manner complained of in that petition; find the 'advocators entitled to the expenses of process, whether in this Court or 'the Inferior Court, which have been occasioned by the litigation of the 'parties on the claims of the respondent to damages, in so far varying or 'altering the interlocutor of the Lord Ordinary; allow the parties to give

'in their respective accounts of expenses, as referable to these findings, 'to be taxed by the auditor in common form.' No. 109. Jan. 29. 1829.

At the first advising, 13th December 1825—

Lord Justice-Clerk.—I cannot reconcile myself to the interlocutor of the Magistrates of Glasgow. This, no doubt, was a novum opus, producing a great additional flow of water. But admitting all this, was Mr. Robertson entitled to take the means he did to turn off the water, and then demand the expenses of defending himself from the consequences of an erroneous act? If he had drowned the distillery, he might perhaps have had a good case; but he turns it in a totally different direction, where it never went before. It is impossible to assume that as the datum of damages. The Lord Ordinary could do nothing but assoilzie from this, which was the only decerniture of the Magistrates. My difficulty was, whether we should not reserve any relevant claim of damages, from the water sent into his own house. I have some little hesitation also as to giving the whole expenses against him.

Lord Glenlee.—I concur, and would adhere so far; but we must allow the respondent to be heard on any competent claim.

Lord Pitmilly.—I am of the same opinion. I do not think the advocators were entitled to send the distillery water down Picken's close. The right was of the nature of a private servitude, and tantum prescriptum quantum possessum is the rule. The servitude, too, was confined to a particular part of the property; the dye-work had no servitude, and on it the distillery was built; and so far he is entitled to whatever direct damage has been occasioned, though not to the expense of Anderson's litigation.

Lord Alloway.—I view it in the same light. It is often difficult to distinguish what are direct and what are consequential damages. It is clear that though there was a servitude of eaves-drops and water, the water was of but very trifling extent, and the dominant tenement had no power of increasing it by the introduction of foreign water in a great body. Besides, the water from the dye-house went a totally different way. It is clear the distillery company had no right to send the additional quantity of water, and are liable in damages. But then comes in the question of consequential damages, which the Magistrates had no right to give. Robertson was not entitled to turn the water over on Anderson. If Robertson's action with Anderson had been well founded, he would have been entitled to the expenses of it; but having failed, and being wrong in that action, he cannot demand them here. The most distinct case as to the question of consequential and direct damages is Dunlop v. M'Kellar, May 31. 1815, (F. C.)

At second advising, 29th January 1829—

Lord Justice-Clerk.—I have a note of the opinions formerly delivered, and we were all clearly of opinion that the mode of giving damages adopted by the Magistrates could not stand, because he was not entitled himself to raise a mound, and turn the water on Anderson. But we were told there was a general claim of damages, and we reserved to the respondent to substantiate that, independent of the claim found by the Magistrates, and remitted to the Lord Ordinary, who ordered a condescendence of damages. When given in,

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the Lord Ordinary's attention was called to the proceedings in the Inferior Court; and it is then found that Mr. Robertson had abandoned any claim of damage, other than the particular claims sustained by the Magistrates. Then we are called to decide whether the Lord Ordinary's interlocutor is well founded; and I am clearly of opinion that, quoad the damages, we cannot find any remaining question, after what passed in the Inferior Court. But there remains the other consideration, whether the respondent is foreclosed from insisting in the original conclusion to have the advocators decerned to cease from sending down water. Now he has a decree of the Magistrates that he is not bound to submit to this. I hold this decree impregnable; and when I look to the opinions of the Court, we were unanimous (differing from the Lord Ordinary) that a party cannot increase water to any extent, when he has a servitude to a certain extent; and I think the interlocutor of the Magistrates right as to that, and that the respondent is entitled to have the benefit of it. The object of this is as to the question of expenses. I cannot concur in that part of the interlocutor. Mr. Robertson must be liable in the expenses relative to his claim of damages, but he must be entitled to them in so far as he is found right as to the prohibition.

Lord Glenlee.—I agree with your Lordship.

Lord Pitmilly.—I think your Lordship has proposed an arrangement that will do justice to all parties. I have no hesitation in concurring in the first finding of the Lord Ordinary, but cannot go into the conclusion he draws. When the case was before us formerly, we had two questions—1. As to consequential damage, as to which Lord Alloway referred to Dunlop v. M'Kellar; and, 2. The claim of damage in general, as to which we could not concur with the Lord Ordinary that this drain was a common kennel. We thought this a question of private servitude, and that the rule 'tantum prescriptum quantum 'possessum' applied. When the case went back to the Lord Ordinary, it was clearly made out that Mr. Robertson had passed from any claim of direct damage, and confined himself to the consequential damages. As to the second ratio of the Lord Ordinary, it is not necessary to go into it, as the first is sufficient to decide the case as to damages. But I agree that Robertson has a right to insist to have it declared that the other party are not entitled to send the increased quantity of water down the close. He is right on that point, and therefore I cannot come to the Lord Ordinary's conclusion of dismissing the action with expenses. The other party should not be totally assoilzied; and, on the whole, I concur with your Lordships.

Lord Alloway.—The whole now comes to the matter of fact, whether this man abandoned his claim. The only question in this Court was the claim of damages, as the water had long before been taken into a new course; and this is of importance in considering the expenses. The Lord Ordinary has assoilzied from the whole conclusions; and as the water was removed long before, we could not properly go into the general conclusion for prohibition. But I would not find the interlocutor of the Magistrates right as to that, unless it was shown that there was some damage from the increase; for I am not prepared to say that some additional water is not admissible. Suppose water brought into a town, so that each inhabitant gets a more ample supply for his

ordinary purposes, is that increase of water not a reasonable exercise of right of servitude, if the sewer is sufficient for it? Therefore I would at least have some further argument before giving a decision to that effect. But, at any rate, the only question in this Court was of damage, and therefore I would not alter the award of expenses.

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Lord Glenlee.—We are not laying down a general rule; there was a proof of facts here on which we went.

Wotherspoon and Mack, W. S.—J. Court, S. S. C.—Agents.

C. Ferrier (Lyell's Trustee,) Petitioner.—*Ro. Bell.*
J. Mudie, Respondent.—*Keay—Jameson.*

No. 170.

Process—Stat. 48th Geo. III. c. 151.—*Res Noviter.*—1.—A party acquiescing in an interlocutor for several years not entitled to have it opened up under the above statute, on an allegation that it had originally become final by mistake.—2.—A judgment of a Court of Law, finding that under a deed a party had not a right which he supposed he had, is not res noviter, so as to entitle the party to have a final interlocutor opened up, finding him bound to warrant that supposed right.

Jan. 31. 1829.
1st Division.
Lds. Gillies and Corehouse.
H.

Mr. Lyell of Kinneff conveyed his estates to trustees for behoof of his creditors. In 1812 these trustees sold part of his property, called Dickmontlaw, to James Ford and the respondent Mr. Mudie, by a minute of sale, and to which Mr. Mudie thereafter acquired the sole right. This estate consisted of two portions—the one called the Sunny, and the other the Shadowy half. In relation to the Shadowy half, it was conceived that the proprietor had right to the teinds under a clause cum decimis inclusis, et nunquam antea separatis. In the disposition by Mr. Lyell to his trustees, he conveyed the lands, 'with the teinds of the 'Shadowy half thereof included, as well as the Sunny half thereof;' but in the minute of sale the trustees disponed the lands 'with the teinds of 'both Sunny and Shadowy halves of said lands, both parsonage and 'vicarage, which were never known to be separated from the stock, with 'the teind fishes included,' &c.; and they bound Mr. Lyell 'to warrant 'this minute of sale, and the conveyances to be granted in consequence 'thereof, at all hands, and against all deadly,' and themselves from fact and deed. A dispute thereafter arose as to the respective rights of the parties; and in particular Mudie contended that he was entitled to deduction of a part of the price corresponding to an annual burden of £19. 19s. created upon the lands, and which, he alleged, had been concealed from him at the time of the sale. A charge having been given to him upon the minute, he presented a bill of suspension; and in the course of the discussion in the Bill-Chamber, a question was raised as to the effect of the warrandice relative to the teinds. The bill having been passed, the expede letters came to be debated before Lord Gillies; on which occasion it was alleged by Mr. Ferrier (who was one of the trustees) that they were taken by surprise in regard to the teinds, and that their counsel, not being prepared, was not in a condition to give the necessary explanation. On the 17th of May 1816, Lord Gillies pro-

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nounced an interlocutor, by which he appointed a condescendence to be lodged relative to the burden of £19. 19s.; and found that in respect 'the teinds are expressly conveyed by the minute of sale as never sepa-'rated from the stock, the trustees are bound in warrandice thereof,' and allowed Mr. Mudie 'to give in a state of the value of these teinds, before 'ascertaining the deduction to be allowed on that account.' One of the trustees acted as their agent; and after two short representations had been refused, he lodged a full one, in which the question as to the teinds was discussed, but which, on answers, was refused on the 17th of January 1817. At this time it was alleged that the agent of the trustees was in extremely bad health, and died soon thereafter, in consequence of which no petition was, per incuriam, lodged. The estates of Ford were about the same time sequestrated; and a gentleman, who was a near relation of Lord Gillies, having been appointed trustee, the process was remitted to Lord Alloway. Thereafter Mr. Ferrier was elected trustee, in place of that gentleman. A long discussion then took place relative to the burden of £19. 19s., in the course of which about twenty orders and interlocutors were pronounced by Lord Alloway; and he having given judgment against the trustees, they brought the question before the Inner House, by whom four interlocutors were pronounced affirming the judgment, against which an appeal to the House of Lords was entered by Ferrier; but they were affirmed on the 9th of June 1823. (See 1. Shaw's Appeal Cases, p. 455.) In the Case for the respondents it was stated, that, 'in so far as regards the teinds, the respondent's right to have a 'deduction on account of the inability of the appellant to convey one half 'thereof cum decimis inclusis has been finally decided by the Court of 'Session;' and that 'in this part of the judgment the appellant acquies-'ced, and did not bring it under the review of the Court.'

When the case returned to the Court of Session, Lord Alloway renewed the order for the condescendence in regard to the teinds, in terms of the interlocutor of 17th May 1816; and thereafter the case having been remitted to Lord Eldin, and subsequently to Lord Corehouse, sixteen interlocutory orders were issued in relation to this point; and on the 5th of December 1828 the record was closed, and parties appointed to debate.

In the mean while a question had been raised in a process of augmentation and locality, as to whether there was truly any such right in regard to the teinds as was supposed; and in November 1824 Lord Eldin found that there was no such right. Mr. Ferrier, on the 18th of December 1828, applied to Lord Corehouse, stating that the interlocutor of 17th May 1816, finding that he was bound to warrant the teinds, had become final by mistake, and therefore praying for leave to present a petition under the 16th section of the 48th Geo. III. c. 151. This having been allowed, he lodged a petition, in which he stated that all parties had been under a misunderstanding as to the nature of Mr. Lyell's right to the teinds; that the trustees could only bind him in warrandice to the

extent of the right actually held by him; that the interlocutor of Lord Gillies had been allowed to become final in consequence of the death of the agent, and of the process having thereafter gone amissing; and that the judgment of Lord Eldin, in regard to the matter of right, was of the nature of res noviter.

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To this it was answered, That it was impossible, after all the proceedings which had occurred, to suppose that the interlocutor had become final by mistake; that, on the contrary, it had been acquiesced in; and accordingly this was stated in the House of Lords, and, instead of being disputed, Mr. Ferrier, on the process returning to this Court, proceeded to make up a record on the footing of the judgment being final; and that the plea of res noviter, founded on the judgment of Lord Eldin, was utterly untenable.

The Court, being satisfied that the interlocutor had been acquiesced in, and that it was impossible to regard the judgment of Lord Eldin as res noviter, unanimously refused the petition.

Respondent's Authorities.—Brock, July 8. 1826, (ante, Vol. IV. No. 494); Town of Dumbarton, Nov. 18. 1818, (F. C.); Dundas, March 9. 1810, (F. C.)

R. Booc, S. S. C.—Fotheringham and Lindsay, W. S.—Agents.

A. Goodsir, Suspender.—*A. M'Neill.*
W. Fleming, Charger.—*Cockburn.*

No. 171.

Prisoner—A. S. 14th June 1671.—A party imprisoned for debt not entitled to be liberated by suspension, on an allegation that his health was in danger; but reserving to him to apply under the A. S. 14th June 1671.

Jan. 31. 1829.
1st Division.
Bill-Chamber.
Lord Balgray.
H.

Goodsir, having been incarcerated by Fleming for payment of a bill, presented a bill of suspension and liberation, on the ground, 1. That he had been imprisoned in violation of an agreement, by which he was to give a security in satisfaction of the debt over certain property to which he had right, but which he could not grant in consequence of the opposition of other parties, which prevented him from making up his titles; and, 2. That his health was so bad, that his life was in danger by the imprisonment, in support of which he produced medical certificates.

The Lord Ordinary refused the bill, 'reserving to the complainer to 'apply in common form, to be liberated under the Act of Sederunt 1671, 'if so advised, and if he can show that he is entitled to its benefit;' and the Court, after giving the suspender time to execute the conveyance, which he failed to do, adhered.

G. F. Davidson, W. S.—G. Lyon, W. S.—Agents.

No. 172.

A. PRINGLE, Advocator.—*Cuninghame—Wight.*
D. M'RAE, Respondent.—*Sol.-Gen. Hope—A. Wood.*

Trespass.—The penalties of the act 1686, c. 11, held to apply to the case of trespass by sheep in unenclosed Highland farms.

Jan. 31. 1829.
2D DIVISION.
Ld. Mackenzie.

PRINGLE and M'RAE were tenants of two neighbouring sheep-farms. In the course of the year 1824, a number of sheep, with some lambs, belonging to Pringle, having trespassed on the farm of M'Rae, they were poindfolded by him, and an intimation was given that they would be detained until payment of the penalties under the act 1686, c. 11. Before, however, any such payment was made, the sheep were set at liberty; and all, except six sheep and four lambs, were secretly driven back to the farm of Pringle by his shepherd. Thereon M'Rae presented a petition to the Sheriff for warrant to sell these last sheep and lambs; and if the funds so raised did not amount to the penalties exigible under 1686, c. 11, to find Pringle liable in the balance. The defence was, that the Act of Parliament had no application to the case of an unenclosed Highland sheep-farm. The Sheriff-substitute found the act inapplicable, but gave expenses to neither party. Subsequent to this interlocutor, and while both parties were appealing to the Sheriff-depute, the sheep and lambs escaped accidentally from confinement. The Sheriff-depute recalled the judgment of the Sheriff-substitute, found that the statute was applicable, and subjected Pringle in expenses, but holding that as the sheep had been liberated, he could not grant warrant to sell them. This interlocutor Pringle brought under review by an advocation, in which he repeated his former pleas, and contended that, as in this case, there were no plantings, enclosures, sown grass, or crops, and as it was impossible, in an extensive tract of sheep-farm, to collect the stock nightly into any fold, there could be no liability in consequence of trespass, except for the damage proved to have been done, and no room for enforcing the penalties of the statute. He also argued on the analogy of the act 1669, c. 17, as to march-fences, that although the terms of it were equally broad with this, yet it had received a limited application from the Court in those cases where their operation would have been oppressive; and therefore, that here also, notwithstanding the generality of the terms used in the statute, they should not be held to apply to extensive and unenclosed Highland pastures, where the best herding could not always prevent a trespass, and an enclosure was out of the question. He further pleaded, as minor points, the non-detention of the sheep, and the fact that his farm had been duly herded.

To this it was answered, That the words of the act were not only so broad as necessarily to include the whole country, but that they expressly provided for the trespass of 'sheep,' and had a direct reference to a case like the present. It was added, that the exposed situation of some of these farms was rather an additional reason for enforcing the penalties of the statute, as a salutary incitement to vigilant herding; and, at all events

that a series of adjudged cases had completely decided, in favour of the respondent, every point raised by the other party. No. 172. Jan. 31. 1829.

Lord Mackenzie found 'that the Act of Parliament is applicable to this 'case,' and to that extent remitted simpliciter; but, quoad ultra, remitted to the Sheriff to allow a proof of certain allegations by Pringle that M'Rae, who had been his predecessor in the farm now occupied by him, had left, as stock on the farm, sheep not bred there, but belonging to his adjoining farm.

Pringle reclaimed; but, before the note came to be advised, he had died, and his trustees refused to sist themselves as parties.

The Court thereupon ordered intimation to be made to the cautioner in the advocation; and, on his making appearance, their Lordships resumed consideration of the note, and adhered to the interlocutor of the Lord Ordinary, with expenses.

Lord Glenlee.—I think the act applies to this case, and is indeed peculiarly applicable where it is necessary to excite to vigilant herding by the shepherds. I doubt whether the Lord Ordinary has not gone too far in favour of Pringle under the remit he has granted; but as M'Rae has acquiesced, it must receive effect.

Lord Pilmilly.—I am entirely of the same opinion; and I hold that both the terms of the act, and the course of decisions, have fixed that the act must apply to a case like the present.

Lord Alloway concurred upon similar grounds.

Lord Justice-Clerk.—I am of the same opinion. An act like this, so precise, accurate, and explicit in its terms, as to reflect credit on the Legislators of the time, must have full effect given to it by the Court. It might be most dangerous to Highland proprietors to hold that this act should not apply to Highland districts; and I concur with Lord Glenlee in holding the provisions of the act to be peculiarly applicable where it is necessary to excite to vigilant watching and herding of sheep, so as to prevent them from straying and trespassing. The act authorizes the detention of the animals brevi manu till the fine and the expense of keep be paid; but there is no necessity for poinding, or to maintain a constant detention, in order to found a claim for the penalties under the statute, provided there be adduced sufficient evidence of the trespass. I also doubt how far the Lord Ordinary should have granted such a remit as would open a field for new investigation in this case; and had there been a reclaiming note on the other side, I would have been for checking that investigation.

Authorities.—Govan v. Lang, Feb. 18. 1794, (10499); Loch v. Tweedie, July 3. 1799, (10501); Shaw and M'Kenzie v. Ewart, March 2. 1809, (F. C.); Turnbull v. Coutts, Feb. 23. 1809, (F. C.); Cases relating to 1669, c. 17, E. Peterborough v. Garioch, June 15. 1784, (10497); E. Cassilis v. Paterson, Feb. 28. 1809, (F. C.)

Cuningham and Bell, W. S.—J. Macdonell, W. S.—Agents.

A. Fullerton, Complainer.—*Christison.*
R. Wilson, Respondent.—*Clephane.* No. 173.

Tutor and Pupil.—A complaint by a tutor at law sustained against a maternal uncle for removing and detaining pupils from the place of residence assigned by the tutor.

No. 173.
Jan. 31. 1829.
2D DIVISION.
R.

FULLERTON, tutor at law of two female pupils, against Wilson, their maternal uncle, setting forth decoyed them to his own house, away from th tutor had selected as most beneficial to them, he was so detaining them at the time when the —and praying the Court to ordain Wilson to to him, and to prohibit his further interferenc denied that he had ever decoyed the girls awa residence, or wished to molest the petitioner in his powers and duties; and he alleged that th girls had come to his house without the petiti they had done so of their own accord, with that, in truth, he was just about to send them petition was served on him. The girls had been s At advising, it was at first proposed by the pe inquiry should be made, as the opposite stateme but afterwards, as it appeared eligible to avoid the case was disposed of by the Court awardi the petitioner, (modified to £5. 5s.)—the Lord time observing, that it could not be held that t in its origin, as the children were actually de respondent out of the custody of the tutor, trol the residence of the pupils; and if any his proceedings, it should only be enforced by

W. RENNY, W.S.—J. A. CAMPBELL, W

No. 174.

ROSS, Pursuer.—*Ivo*
HIS CREDITORS, Defender

Jan. 31. 1829.
2D DIVISION.

Cessio Bonorum.—On the oath of a pursue reported, it was stated on the part of a creditor pearance as a defender, as a reason why decre that he had withdrawn all opposition on seeing the pursuer, in which he specifically offered to reversionary right, if required to do so; th quired by him to dispone accordingly; but tion which had been executed were not fitte tion. The Court, however, being satisfied, sition, that its terms were broad enough to the cessio; but, at the same time, refused book, as was craved by the pursuer, observ that this rule should hold invariably.

P. M'ARA, Suspender.—*Cockburn—Cuninghame.*
M. GILFILLAN, Charger.—*Sol.-Gen. Hope—Skene—Russell.*

No. 175.

Jan. 31. 1829.
2D DIVISION.
Bill-Chamber.
Lord Newton.
R.

THE Lord Ordinary having passed the bill mentioned ante, No. 36, but on caution only, M'Ara reclaimed, in so far as caution was required; but the Court refused his reclaiming note.

J. CULLEN, W. S.—WOTHERSPOON and MACK, W. S.—Agents.

W. ALLISON, Suspender.—*Forsyth.*
M. ALLISON or MILLER, Charger.—*Napier.*

No. 176.

Jan. 31. 1829.
2D DIVISION.
Bill-Chamber.
Lord Alloway.
T.

Messenger's Execution.—Margaret Allison having obtained decree before the Sheriff of Renfrewshire, after considerable litigation, against William Allison, and given him a charge, he presented a bill of suspension on various grounds; but chiefly, 1*st*, Because the charge was irregular, as it did not contain the names and designations of the witnesses, in terms of acts 1681 and 1698; in evidence of which, a copy of the charge was produced; and, 2*d*, Because there was a contingency between the action in which the decree had been obtained, and another then depending between the suspender and the brothers of the charger before Lord Mackenzie.

Along with the answers, (in which the existence of any relevant contingency was denied,) a regular execution by the messenger was produced; whereon Lord Alloway, as Ordinary on the Bills, in respect caution was not offered, refused the bill; and his Lordship added in a note—

'1. The Lord Ordinary entertains no doubt that the objection stated by 'the suspender, with regard to the charge on the decree being irregular, 'is sufficiently obviated by the production of the regular execution in pro-'cess, which, until removed by reduction, must be sustained. 2. Even if 'there were a contingency betwixt the claims of the charger's brothers de-'pending before Lord Mackenzie, and that of the charger herself, an ad-'vocation on account of this contingency ought to have been presented at 'the very first, without allowing a final judgment to be pronounced by the 'Sheriff after long procedure; and the Lord Ordinary cannot allow a 'decree in such circumstances to be suspended without caution in the 'ordinary way.'

Against this interlocutor the suspender reclaimed; but the Court, without hearing the charger's counsel, unanimously held that without caution the bill must be refused; and they accordingly remitted to pass only on caution.

Charger's Authorities.—Calder, Dec. 20. 1825, (ante, Vol. IV. No. 332); Ersk. IV. 2. 5; M'Donald v. M'Leod, (3765.)
Suspender's Authority.—Stewart v. Brown, May 22. 1824, (ante, Vol. III. No. 56.)

J. STUART, S. S. C.—J. B. CORMACK, W. S.—Agents.

No. 177.

J. EADIE, (M'LUCKIE's TRUSTEE,) Petitioner.—*Cuninghame.*

J. How, Respondent.—*D. of F. Moncreiff—Jameso*

Cautioner—Sequestration.—Circumstances under which a caution questrated estate was held not liberated by the omission of the cre to observe certain provisions of the Bankrupt Act.

Feb. 3. 1829.
1ST DIVISION.
Lord Newton.
H.

ON the 4th of June 1806, the estates of John M' Glasgow, were sequestrated, and Andrew M'Kendri Part of the estate consisted of a property over whic able bond. During the administration of M'Kendr till 1812,) the proceedings were very irregular. office, Baird was appointed his successor in Decemb irregularities also occurred during the time Baird last he was removed in October 1821. James M Glasgow, was then chosen trustee, and, along with How, as his cautioner, granted a bond, 'that I t 'shall conform myself in all respects to the rule 'scribed as incumbent on trustees by the act pas 'his late Majesty King George III. entituled "the payment of creditors more equal and expe 'to such further rules and regulations as the Co 'in virtue of the powers committed to them for 'execution; and that I shall faithfully account 'to the said creditors of whatever sum or sums 'longing to the said estate: But providing and 'in so far as it concerns me the said James H 'the said sum of £1000 sterling, and no furthe 'Watson hereby bind and oblige myself, and 'successors, to free, relieve, and indemnify my 'tionary obligation for me above written, and 'ses he may sustain therethrough in any man

Prior to Watson's election, Robert Ande Walter Brisbane, had been chosen commissio election Anderson was dead, and his place wa In the course of his administration Watson re drick, and he sold the property over which the received the price, being £800. Two differen bond; and Watson represented to the creditor his hands. Neither of these sums was depos vember 1823 a commissioner died, and ano time unable to attend to his duties) resigned up till January 1825. In March of that y son was still in possession of the above s to him and How that they were to insist f

No. 177.
Feb. 3. 1829.

ing been complied with, the creditors interested in the bond presented, in April, a petition to the Court, praying that Watson should be ordained to consign the money. Decree was pronounced to that effect in June, and for twenty per cent. interest. Watson's estates were sequestrated in August, and he was removed from the office of trustee in September, and the petitioner Eadie elected in his place. To avoid diligence, Mr. How deposited £1000 in the Bank of Scotland, as cautioner for Watson, subject to the orders of the Court. A petition was thereafter presented by Eadie, praying for warrant on the Bank to deliver that sum to him. This was opposed by How, on the ground that the creditors and commissioners had so entirely neglected their duties under the statute, and violated its injunctions, and so completely failed to use those checks and remedies which were provided against the mal-administration of the trustee, that he was liberated from his obligation as cautioner. In support of this proposition he averred, 1. That the creditors neglected to call meetings for the re-election of commissioners in place of those who had died or resigned; that the commissioners never inquired into the acts of the trustee, or made any report to the creditors; that they never ascertained the value of the estate, nor called for periodical states, nor got them inserted in the sederunt-book; that the creditors never appointed the money to be lodged in any bank, nor did the commissioners take the necessary measures for seeing that the money was deposited; nor did they ever examine the books or accounts, nor require Watson to exhibit any scheme or states with a view to a dividend, nor for bringing the trust to a close;—and, 2. That, particularly with reference to the two sums of £160 and £800, although the creditors were aware, from November 1823, that he was in possession of them, yet they took no steps for compelling him to consign the amount, nor gave any notice to the respondent, but suffered Watson to keep the money in his hands; and the commissioners even allowed him a commission of £100, as if he had correctly performed his duties. These facts were not disputed by the petitioner, but he contended that they were irrelevant. The petition having been remitted to the Lord Ordinary to prepare the cause, he reported it upon Cases.

Pleaded *for the Petitioner*.—The allegations of the respondent merely resolve into this, that the creditors and commissioners had omitted to do certain acts with the view of controlling Watson in the performance of his duty. But the very object of the bond of caution is to have a party responsible to the creditors for any acts of negligence or mal-administration on the part of the trustee, and to relieve them of exercising a perpetual superintendence over him. A very important distinction exists between extrajudicial bonds of caution by one private party to another, and judicial bonds granted to the Court for behoof of parties interested. In the former case, the obligation may be terminated by the consent, direct or implied, of the private party; in the latter, the parties are not only

No. 177. Feb. 3. 1829.

numerous, but are often unknown. In particular, in may be infants, minors, absentees, indigent, or ignor the same strict rules cannot be applied in reference t be applicable to the acts of a single individual inter is impossible to require, in such a case, the same superintendence which may be demanded in the c private party. No doubt, if any positive act is c ceive or injure the cautioner, he may be liberated; to hold that the same consequences can follow The very object of a cautioner for a trustee in a he shall keep the trustee to his duty; and if h he must be liable for the consequences. In v. Porterfield, where the cautioner was liberated, t docqueted, as true, accounts which were false; so tinguishable from the present one. But even th cision has been doubted; for although the com been liable in relief to the cautioner, yet they c theirs, discharge him from his liability to the othe

Pleaded for the Respondent.—There is a mark a cautionary obligation for a debt payable, or a certain, and one for the general acts and intron official capacity, extending over a tract of time. cautioner may relieve himself at once by paying act to be done, so that he cannot be easily throw latter, as his obligation is contingent and uncer he can so protect himself. He must, therefor creditor performing his duty by not allowing commit any gross deviation from, or breach of apprising him of the principal having done this be not done, the cautioner must be libe ral rule in regard to cautioners for official a fortiori, to a case where it is a part of th or implied, that certain specific acts shall b creditor. The Bankrupt Statute imposes on the trustee, but on the creditors and c spondent was entitled to rely on the cr performing these duties. But they failed rant manner; and as it was impossible for of this, it would be contrary to equity tc sequences which, he is entitled to assume, negligence. Accordingly, in the case of Du ated under similar circumstances; and altho to a particular sum, the commissioners cei could only have had the effect to free the c not in toto. But the Court held that he wa

of the gross negligence on the part of the creditors.* Decisions upon a similar principle were pronounced in the case of Smith against the Bank of Scotland, and also in that of Thomson against the same Bank.

When the case came to be advised—

The LORD PRESIDENT was understood to say, that there was a distinction between a cautioner for a debt, and one for an office; that in the latter he relied upon the usual checks being kept in operation, and therefore was entitled to found upon this having been omitted.

LORD BALGRAY doubted whether sufficient had been condescended upon to liberate the respondent.

LORD GILLIES said, that it was impossible to require such a degree of vigilance on the part of the creditors as was here insisted upon.

LORD CRAIGIE.——There may be gross negligence, equal to fraud; and on that principle the case of the Bank of Scotland seems to have been decided. In Duncan's case, false accounts were certified. Here, however, the allegations merely relate to omissions; and this is the case of a numerous body of creditors.

LORD PRESIDENT.—It may perhaps be impossible to require exact diligence from the creditors, but then they choose commissioners as their delegates. Besides, there was here a sale of heritable property, of which they could not fail to be aware; and therefore they should have insisted for consignation.

Dean of Faculty.—By the 43d section of the statute there is an express injunction on the commissioners to audit the accounts of the trustee, and cause an entry to be made in the sederunt-book, 'certifying that they have made such comparison and examination, and whether they have found the money received regularly, and duly lodged by him in the manner herein directed, and whether the same has been duly drawn out and disbursed on account of the bankrupt estate; and in every case where it shall appear that the money received by the trustee shall not have been regularly and duly lodged by him in the manner herein directed, the commissioners are hereby required to make a summary application to the Court to compel the trustee' to pay the penal interest and consign the money. But this they failed to do, and they did not even point out a bank in which to lodge the money.

LORD BALGRAY.—But no accounts were ever lodged by him, which was a breach of duty on his part; and it was therefore impossible for the commissioners to audit them.

Dean of Faculty.—The commissioners, however, must have been aware that this was not done, and they were bound in justice to the cautioner to have given him notice.

Cockburn.—In point of principle, there is no material difference between

* It is stated in the Case for the respondent, and was not denied by the petitioner, that an appeal was entered against the judgment in Duncan's case, but was withdrawn in consequence of an opinion given by English counsel that there was no chance of success.

No. 177. Feb. 3. 1829.

us. We admit that where a party is cautioner for an persons are appointed to control the principal obligant positive act injurious to the cautioner, he may be lib the species facti in Duncan's case. The commissio false accounts, which was a positive act of the natu But here omissions only are alleged. In the case of was to the validity of the original constitution of th ground of concealment and fraud; whereas here the admitted to be effectual, but it is said to be discha the doctrine of the respondent, there can be no effect bankrupt estate. There is scarcely a sequestration some omission, and in which a skilful counsel may that is said here is, that the commissioners did no the trustee's accounts, or attend to the entries in th here there were truly no available funds. No d property; but then he asserted that the fund was and so there could be no accounts.

Dean of Faculty.—The very same line of a Duncan's case, but was disregarded. It is true ment there, but it applied only to a small sum.

Cockburn was about to reply, but was stopped.

Lord Craigie.—If a cautioner is to be libera omissions, there would be no need for a cautioner

Lord Balgray.—The reporters will observe on the special circumstances, and is not a decisio

Jameson.—There is a separate question as t tioner's liability, viz. Whether the trustee had po table debt, and whether it is not still effectual a

Lord Gillies.—That is an important quest served.

The Court accordingly found 'that the 'not relieved from his cautionary obligation b 'the part of the creditors and commissioners, expenses; but, as to the amount of the claim a Lord Ordinary.

Petitioner's Authorities.—3. Ersk. 3. 66; 1. Bell, 361; milton, June 18. 1706, (9091); Wallace, Feb. 20. 1707, (2089); Fell, p. 180; 6. Vesey jun. 734.

Respondent's Authorities.—3. Ersk. 3. 66; Smith, Jun son, June 11. 1824, (2. Shaw's Ap. Ca. p. 116); Fell, p. Vol. V. No. 74.)

Gibb and Morton, W. S.—W. Horsbu

PHILIPS'S TRUSTEE.—*Sol.-Gen. Hope—Robertson—Moir.* No. 178.
GEO. BELL, Esq. and Others.—*Murray—Ro. Bell.*

Expenses. — This was a question, under special circumstances, as to whether the raisers of a multiplepoinding were entitled to more than the expenses of raising and bringing the action into Court. The Lord Ordinary found that they were not; but the Court altered, and found them entitled to additional modified expenses.

Feb. 3. 1829.
1ST DIVISION.
Lord Meadowbank.
H.

J. MARTIN,—W. BELL, W. S.—Agents.

R. Ross, Pursuer.—*Skene—W. Bell.* No. 179.
W. BAIRD, Defender.—*Brown.*

Property.—Circumstances under which certain buildings erected by a party on his own property found to be in emulationem vicini, and ordered to be removed to another part of it.

THIS was a question as to whether the defender Baird, who had right by his titles to erect a dunghill and necessary at the west end of a court belonging to him, but was restrained from erecting any other buildings in order to preserve light to the pursuer Ross, the adjoining proprietor, had not erected the necessary in emulationem vicini, so as to block up an opening in a house belonging to the pursuer, which at one time, when the two properties belonged to the same person, had been used as a door at the end of a passage, but which, as Ross had no right of entry by the court, could now only be used for the purpose of admitting light into what was formerly the passage. There was some doubt as to how far the conclusions warranted any decerniture for removal of the necessary; but the Lord Ordinary found that the erection of the dunghill and necessary was emulous, so far as they blocked up the opening above mentioned, and that they must be taken away, so as to leave free access thereto, observing in a note, 'This is not the ordinary case of a proprietor building 'any where he pleases to the edge of his property. The defender has right 'to erect nothing else but a necessary and dunghill in the west end of 'this court, and therefore ought not to choose a position for these 'so injurious to his neighbour, in whose favour the limitation was constituted.'

Feb. 3. 1829.
2D DIVISION.
Ld. Mackenzie.
F.

Baird reclaimed, and offered to abide by the report of any professional person whether the situation of the necessary and dunghill was not the least inconvenient that could be fixed upon at the west end of the court; but their Lordships, by a majority, adhered, with this variation, that the defender be ordained to remove the necessary to the opposite side of the dunghill to that on which it presently stood, Lord Glenlee differing on the ground that any decerniture as to the removal of the necessary was ultra petita.

J. WHITEHEAD,—T. DARLING, S. S. C.—Agents.

No. 180.

R. STEWART, Pursuer.—*Sol.-Gen. Hope*—
Mrs. J. BLACKWOOD and HUSBAND, Defenders.—*D. Cuninghame.*

Property—Jurisdiction—Dean of Guild.—1.—The proprietor of has not the absolute right thereto, but the proprietors of upper in it.—2.—Question raised, but not decided, whether the proprie a house which has been taken down is entitled, on its re-erection, t out the concurrence of the proprietors of the upper flats.—3.— in the first instance, to the Dean of Guild.

Feb. 3. 1829.
2D DIVISION.
Ld. Mackenzie.
F.

THE pursuer Stewart, the defender Mrs. Blackw dividual, were proprietors of certain parts respecti formerly stood in Candleriggs street of Glasgow. T four storeys, viz. one level with the street, two upp the entry to the upper floors being by a passage goin floor from the street to the back of the house, from the end of the passage. The pursuer was pr ground-floor, and also of part of the second and fender, on the other hand, was proprietor of the wl and the other parts of the second and third floors, to her being situated over that part of the ground pursuer; and she was also proprietor of a cell situated under the stair which led to the upper building was taken down, as ruinous, by order After some ineffectual attempts to arrange the rig erection of a new building, the pursuer raised ar have it found that the solum of that part of the belonged to him was his exclusive property, s oneris ferendi in favour of the defender for her ri and that he was consequently entitled, in the er to make a sunk storey in that part of the area not passage, so as to give him both such sunk stor the new house. The defender, on the oth pressed her willingness to consent to this, if sh the additional value of the building correspond old house, pleaded in defence,

1. That the action was incompetent, the onl cedure, in the first instance, being by applicati

2. That the solum was not the exclusive p owner of the ground-floor; but that she had in virtue of her infeftment, the proprietors of holders of rights of servitude, but joint pro that, besides, she was not bound in law to s building merely a third storey, instead of a se the former tenement.

The Lord Ordinary repelled the objection to the competency, but o the merits sustained the defences, stating his opinion in the subjoined note.

Both parties having reclaimed, the Court adhered, 'reserving to th 'pursuer to ascertain his rights in the tenement in question in the Cou 'of the Dean of Guild, as Judge Ordinary, according to the rules of law 'and to the defenders any objections they may have to his applicatio 'as accords.'

Lord Glenlee.—We must attend to the precise conclusions of the summon The question before us is, not whether the party may or may not, in the gene arrangement of the new building, get a sunk storey, but only whether he be e titled to get decree of declarator that he is exclusive proprietor of the solum. shall say nothing about the first of these questions; but I am clear that he is n the exclusive proprietor of the solum. The right of the proprietor of the low flat is not a right of absolute and exclusive property in the solum, burdened wi a servitude oneris ferendi; and though the solum may not be, strictly speakin joint property, yet there is in it a joint interest sui generis, which prevents a one of the proprietors of the house from doing any thing to the prejudice of t rest. Accordingly, as the libel is founded solely on the conclusion of absolu right, I think that we should adhere to the Lord Ordinary's interlocutor, thou we may insert some reservation as to an application to the Dean of Guild.

Lord Pitmilly.—I am of the same opinion. The primary conclusion is, th the pursuer is absolute proprietor of the solum; and all the other conclusio depend on this. There can be no doubt but that the law is as laid down in the passa of Erskine, (2. 9. 11,) referred to in the defenders' pleas; and it is impossible decern in any such declaratory conclusions. The proper way is for the pursu to apply to the Dean of Guild.

Lord Alloway.—I agree. I am now satisfied (though at one time I h some doubts of the jurisdiction of the Dean of Guild in matters of this kind) th the decision in the case of the Magistrates of Stirling (Nov. 1752) is righ Instead, however, of going before the Dean of Guild, the pursuer comes with general declarator to have it found that he has an exclusive right to the solu I think the Lord Ordinary's interlocutor right, although I concur in the propriet of the reservation proposed by Lord Glenlee.

Lord Justice-Clerk.—I am quite of the same opinion. All the proprieto

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* "The pursuer's views of the rights of parties respectively seem too simple for the truth the case. 1. He has produced no exclusive title in himself to the solum, and there seems necessity for its belonging to the first flat, which can supply the place of such title. 2. The pa sage and stair, which are common, must occupy part of the surface of the ground; how, then, c it be said to be the pursuer's exclusive property? 3. The defender has been hitherto the pr prietor of the second &c. storeys above the ground, with the burden of having vents and chi neys for one storey below. Is this property, without consideration, to be changed into a th &c. storey above the ground, with the burden of vents and chimneys for two storeys below? so, it may equally be changed into the fourth or fifth storey above the ground, with additio burdens in proportion. After this was done, too, the pursuer might dispone these stor separately to different parties; so that the defender, instead of having only one proprietor a house below her, might have two, three, or four separate proprietors of flats under her, and each having as much right against the defender as the original single proprietor of ground-flat had. The Lord Ordinary cannot go so far."

No. 180.
Feb. 3. 1829.

of a house have a joint right to the solum. But, besides, thi
If in the procedure before the Dean of Guild there doe
heritable right, the parties must come here; but it is prem

T. Darling, S. S. C.—A. P. Henderson,—Ag

No. 181.

A. Strachan, Advocator.—Curr
Dr. F. Nicholl, Respondent.—*Sol.-Gen. F*

Feb. 4. 1829.
2d Division.

Expenses.—Question as to the expenses of the
No. 13. The Court awarded a certain sum of mo
respondent.

J. Burness, S. S. C.—D. M'Lean, W. S.—*A*

No. 182.

A. Dick and Others, Pursuers.—*Jeffr*
T. M'Ilwham and Others, Defenders.—*Sol.-Gen*
—*A. Wood*—*A. M'Neill.*

Pupil.—Held that a decree against a pupil undefended is null
titled to be restored against it in integrum.

Feb. 5. 1829.
1st Division.
Lord Newton.
S.

This was a branch of the case reported ante, V
From that report it will be seen that the question
a decree of irritancy of a contract of sale of ce
and of a decree of adjudication obtained agains
tutors, or a tutor ad litem. The property had
father, in 1799, at £504: 15: 6, payable by i
Whitsunday 1801. His father got possession, b
of the price. After his death, the original sell
assigned their right under the contract to Hill,
of irritancy, and Galloway and Anderson (wh
father) obtained the decree of adjudication. B
taken against Dick when in pupillarity, and
being appointed. Galloway and Anderson took p
dication; and an arrangement was afterwards e
and Hill, by which the subjects were sold pu
M'Ilwham, in 1807, at £605. In his title it
to take his risk of any objection which might
the property. He entered to possession, and
on meliorations upwards of £300. At the
years thereafter, Dick brought the present acti
accounting, and removing; and, on the other
a counter action of declarator to have it f
right.

'The Court, on the 15th of May 1828, fou
'titled to be reponed against the decreet o
'Hill, in the same way as if the same had

'absence, and that all parties should be restored to the stat
'they stood at the time the decreet was pronounced;' and, with
ing, remitted to the Lord Ordinary to hear parties further on th
rights under this deliverance.

When the cause came before his Lordship, he ordered Cases
afterwards reported to the Court.

On the part of Dick it was stated, that he was entitled to ha
cree set aside in toto, as taken against an undefended pupil; th
perty, when purchased by his father, was merely a building
he had erected houses upon it of the value of £700, so that
tenement was now worth upwards of £1200; that he was
be restored to the possession, and the case to be judged of as
never been put out of possession; that he was therefore only
pay the balance of the contract price, and the debt due to Ga
Anderson; that as they and Hill, and M'Ilwham as their repr
must be regarded as illegal possessors, he was entitled to requ
counting for all the bygone rents and profits of the property;
it was irrelevant to maintain that he had not sufficient funds, a
of the decree, to prevent it from being pronounced against hi
he had been reponed against that decree, so that his legal ri
be judged of as if it had never existed.

On the other hand, it was contended by M'Ilwham and
defenders, that although Dick might still be entitled to be he
merits of the decree, he could not insist on having it set asid
he was entitled to was the difference between the original con
being £504, and that which the property brought in market, b
while he was bound to account for the interest on the different
which remained unpaid, so long as he and his father were in
and also the debt due to Galloway and Anderson, with inter
When the case came before the Court,

The Lord President observed that there was a distinctio
party being reponed against a decree, and having it recalled, on a re
Where he has been reponed, it is incumbent on the pursuer to show
well founded; and if he does so, he may get it repeated; bu
defender is not reponed, it is incumbent on him to show that it is
so as to get it recalled.

Lord Balgray was of the same opinion, and observed that
was competent for M'Ilwham to insist on the decree being repo
had not shown sufficient grounds for this being done. The right
suer, therefore, must be judged of, and parties restored to the sit
time when the decree was pronounced. If a tutor ad litem had bee
quomodo constat that he would not have borrowed money upon
and paid off the debt? The parties must therefore go into an acc
these principles.

Lord Craigie was of the same opinion.

Lord Gillies thought that the effect of a party being repo
him to his original situation. If it had been proved judicially, whe

No. 182. Feb. 5. 1829.

was taken against the pupil, that it was utterly i
question might have been different; but this w
sible to say whether at that time he could ha
the case that this had been a decree of irritan
solutam canonem, could it be maintained that b
funds, but afterwards acquired them, he coul
effects of the decree? Clearly not.

THE COURT pronounced this interlocutor:-

'of the said Andrew Dick against the sa
'find that the decrees libelled having be
'a minor undefended, are, with all foll
'that the pursuer is entitled to be repon
'therefore to that effect sustain the r
'extent reduce, decern, and declare in
'Quoad ultra, remit to the Lord Ordinary
'tween the parties, and otherwise in th
'seem fit; and hoc statu reserve the q
'curred,' and assoilzied from the actio

CAMPBELL and MACDOWALL, S. S. C.—R. and A. KENN
CATHCART, W. S.—WOTHERSPOON and M

No. 183.

G. CONDIE, Pursuer—*Ske*
A. STEWART, Defender.—*D. of F. Mon*

Trust—Accession—Implied Obligation—Road.—Circ
a party, who had attended meetings regarding the ope
expense beyond the amount specially subscribed by hi

Feb. 5. 1829.

2D DIVISION.
Ld. Cringletie.
T.

SEVERAL years ago, a proposal was ma
county of Perth, from the village of Dunn
under authority of the local acts 51st Geo. I
c. 91, the former of which bears that truste
not to be held personally liable, upon any p
they have not directly bound themselves
preparatory meetings among the gentleme
line of road, a general meeting was hel
1818, at which the defender Stewart atte
appointed to circulate subscription-papers,
should be 'filled up to the extent of the es
meeting to be about £5000, to procure sp
road, and to advertise for estimates. The
at this meeting, and so directed to be circul
pay 'to the extent of our respective signatu
subscribed for £100. Another meeting w
at which also the defender appeared on the n
At this meeting Mr. Pitcairn, a leading m
on the table a list, entitled 'List of Conti
'from Dunning to Yetts of Muckart,' sett

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extent of £4500; but it afterwards appeared that this was merely a list of expected contributors, and that the sum actually subscribed never exceeded £3600. Mr. Pitcairn further stated to the meeting, that there was a prospect of obtaining further subscriptions, and that, 'from the very 'respectable subscriptions which have been received, the committee are 'of opinion that the object ought not to be relinquished, but proceeded 'in without delay, even although no further subscriptions should be pro-'cured from new subscribers. At the same time, the committee beg leave 'to suggest to the meeting that the present subscribers should agree to 'become bound for the deficiency in proportion to their original sub-'scriptions, such unsubscribed surplus being always held to be a pre-'ferable lien upon the road, till the same shall be fully paid up.' There was no resolution adopting this last suggestion; but the minutes bore that 'the meeting, after due deliberation, is unanimously of opinion that the 'road should proceed without delay;' and the meeting empowered the committee to procure a cash-credit with a bank for the purpose, 'the sub-'scribers to the present line of road being always bound to grant them 'back-bonds or other securities for the amount of their respective sub-'scriptions.' On the 13th of October 1829, the defender was present at a meeting of committee, (not as a member, however, but merely to give local information,) at which meeting a draft of a contract with the contractor was directed to be prepared, to be laid before the first general meeting; but it was not finally adjusted and signed till 20th August 1820. In the mean time, however, the work had been proceeding by order of the committee; and at a general meeting held on 11th February 1820, at which the defender was present, the clerk was directed 'to make out a 'new subscription-paper, to be signed by all the gentlemen concerned, 'and containing a clause bearing, that in case of any deficiency for com-'pleting the road, the same should be made up by the subscribers in 'proportion to their respective subscriptions, as recommended by the 'minute of date 27th April 1819.'

Subsequent to this meeting, the committee for the first time obtained a cash-credit for £6000 with certain bankers; and a bond of relief was drawn up, bearing the title 'Bond of Relief &c. among the Trustees of 'the New Turnpike Road between Dunning and the Yetts of Muckart,' and binding the parties to it to pay not only the sums subscribed by them, but such further sums as might be expended by the committee on the road. The defender's name was inserted as a party to this bond, but he refused to sign it, or any subscription-paper binding himself for a share of the deficiency; and, at a meeting on the 28th of August 1820, it was resolved that he was not qualified under the statute to act as a trustee on the road, after which he ceased to take any interest in the completion of the road. At this period the committee had advanced to the contractors £3300; and at Whitsunday 1823, when the whole expenses were defrayed, the amount expended by them was £9200, there being thus an expenditure beyond the sum specially subscribed (£3600) of £5600. For £225, as the defender's original subscription of £100, to-

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gether with the share of that excess effeiring was raised by the pursuer Condie, as treas tended that the defender, by his attendan cified, had become liable in his share of carried on with his concurrence and autho

The defender expressed his willingness tion of £100, and he consigned the same further demand, he maintained that the not evidence of his presence and concurren meetings, in the sederunt of which his na rate, that mere presence at a meeting of r are directed, does not infer personal liab the defender had restricted his subscriptio though the operations were authorized to in the hope of future subscriptions being but there was no authority to finish it wi clear from the whole proceedings that no p yond his subscription, unless he had signe the defender refused to do; and further, t tee, yet acting as such in the belief of his t tection of the statute, which declares that t liable, unless they clearly bind themselves

The Lord Ordinary, 'in respect the de 'ness to pay £100 sterling, and consigned granted warrant to the pursuer to uplift t soilzied with expenses; and the Court adh

Lord Justice-Clerk.—Looking to the case must be decided, the pursuer has totally of April 1819, which is the foundation of the the works are to begin before the funds have done here in regard to the national monumen plete it; and the committee only 'suggest' t selves for any deficiency. They, however, d that the works shall be set agoing, trusting to them on. Not a word is said approving of but quite the reverse; for instructions as to to open a credit to the extent of the subsc meeting, it is proposed to adopt the recomme they had understood that the former proceed would have acted so. The defender at once ciency, or to sign the bond; and I am clear, t any part of it. I do not find it necessary to of Parliament; I found on the broad princip the pursuer is not entitled to demand what th

The other Judges concurred.

Defender's Authority.—Higgins in H. of L.

Pelin and Pitcairn, W. S.—A. M.

No. 184.

R. DALE, Suspender.—*Cuninghame.*

DUMBARTON GLASS-WORK COMPANY, Chargers.—*Forsyth—Dixon.*

Master and Servant.—A workman holding himself out as bound with an English company for a term of years, having entered into an agreement in England with a Scotch company to exchange with another workman in their employment, and having entered on his service accordingly, not entitled to plead the rule of Scotch law, that a verbal contract of service is only binding for one year.

Feb. 5. 1829.

2D DIVISION.

Ld. Mackenzie.

T.

IN February 1825 the Dumbarton Glass-work Company presented a summary complaint to the Sheriff of Dumbartonshire, setting forth that, in the month of July 1823, James Sims, then in their employment under an engagement, of which four years were yet to run, deserted their service, and entered into that of the Nailsea Glass-work Company at Bristol;—that, at the same period, the suspender Dale, who had formerly been a workman with them, was under an engagement to the Nailsea Company for seven years from the 16th of September 1819, and had applied to the Dumbarton Company to receive him back into their employment;—that they had obtained a warrant for apprehending Sims, and bringing him back to fulfil his engagement; but that the Nailsea Company being desirous to retain Sims, an arrangement was entered into between the two companies for an exchange of Sims for Dale;—that Dale having agreed to this, 'it was arranged and stipulated with and by the 'said Robert Dale that the petitioners should procure a discharge in his 'favour from the said Nailsea Glass-work Company of his engagement 'with them, for the purpose and to the effect of enabling him to complete 'the term of Sims's engagement at the Dumbarton works, and that he 'should accordingly enter and be received into the service of the peti-'tioners in the room of Sims;'—that they accordingly granted a discharge to Sims, thereby purchasing from the Nailsea Company a discharge of Dale; and that they further paid him a sum of £15, and removed him and his family at their expense to Dumbarton, but that, after serving for about a year and a half, he had now intimated an intention of leaving their employment. They therefore prayed the Sheriff to find 'that the said Robert Dale is bound and liable to serve the peti-'tioners, the said Dumbarton Glass-work Company, until the expiration 'of the term of the said James Sims's engagement with the petitioners, 'or at least until the expiration of his the said Robert Dale's engagement 'with the said Nailsea Glass-work Company;' and to ordain him to continue in his said service, and discharge the duties thereof accordingly. Dale in the mean time deserted his service, and went into the employment of the Leith Glass-work Company; and having denied his engagement, the Sheriff allowed a proof, and granted commission to have it taken in Bristol. A partner of the Nailsea Glass-work was accordingly examined, who deponed that Dale had been engaged with them by a verbal agreement for seven years after September 1819;—that in the course of 1823 he had intimated an intention to leave their service, where-

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upon they had him taken before a Justice
of Somerset, who found his engagement
that thereafter the agreement was entered
Company, as set forth in their petition, w
the service to which he was bound to th
Dumbarton Company. Other witnesses c
the agreement of Dale with the Dumbart
should serve out with them the period o
Nailsea Company,—the agreement, howev
schoolmaster further deponed that he h
certain letters, produced in process, addres
barton Company. From these letters it
proposed to return to Dumbarton in room
to the Nailsea Company accordingly that
consequence of this, he had been summon
of Peace; and one of the letters bore as
'you, that in consequence of my giving no
'summoned before the Magistrates, and it
'bound to serve this company for seven y
'to them, by a late act of Geo. IV. Mr
'time, and produced the act. You will
'possibly leave.' It was further proved th
of the Dumbarton Company, and continued
tion. On this proof the Sheriff-substitute
locutor, which was adhered to by the She
'lished that the defender did, in October 1
'to serve the pursuers, the Dumbarton Glas
'then unexpired of his the said defender's
'Glass-work Company in the county of S
'commencing on the 16th September 181
'was entered into at the desire of the d
'poses thereof, and in terms of the agreem
'the defender from the said Nailsea Con
'by the pursuers by their releasing Jam
'favour of the said company, and the sui
'fender, besides other outlays by the pu
'that the defender came to Dumbarton in
'entered into the pursuers' service accor
'till the date of this process;—finds the s
'defender, and therefore decerns and orda
'the pursuers' service, and continue therei
'until the expiry of the said term of seven

Of this judgment Dale brought a suspe

1 That, by the law of Scotland, a verb
only be binding for a single year; and th
transference of the engagement with the

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being binding by the law of England, even if it could be proved by parole, the evidence of the partners of that company was incompetent to establish an engagement with themselves, and there was no evidence adduced of the law of England; and,

2. That the narrative of the summons did not support the judgment, in so far as the chargers libelled an agreement on the part of the suspender to serve them, not for the period of his own engagement with the Nailsea Company, as found by the judgment, but for the period of Sims's engagement with the Dumbarton Company.

To this it was answered,

1. That a verbal engagement was binding, by the law of England, (4th Geo. IV. c. 34. § 3.) for a term of years, if followed by actual commencement of the service; and that the engagement with Dale having been completed in England, and having been followed by entry to the service of the Dumbarton Company, they were entitled to enforce it; and that it was proved that Dale was bound to the Nailsea Company for seven years, not merely by the depositions of the partners of that company, but by the letter written by direction of Dale, stating that the Justices had found it to be binding; and,

2. That the circumstances set forth in the summons were sufficient to support the judgment, the conclusion in the original petition being alternative to have Dale ordained to serve out the period of his own engagement with the Nailsea Company, or of Sims's engagement with the Dumbarton Company, as might be held, from the facts set forth, to be the true nature of the agreement with him.

The Lord Ordinary found 'in terms of the findings in the interlocutor 'of the Sheriff, with this addition, that the agreement between the sus-'pender and chargers took place in England, by the law of which it 'appears that an agreement for service during more years than one may 'be completed by oral words, if followed by actual commencement of the 'service;' and therefore found the letters orderly proceeded, with expenses. The Court adhered.

Lord Glenlee.—As to the objection to the libel, I do not think it well founded. It sets out generally that the agreement was for an exchange of Sims for Dale, and so there is a general allegation that there was an agreement to exchange services, without stating explicitly what time Dale was to serve with the Dumbarton Company; but it goes on to state merely their apprehension of the meaning of the agreement that he was to serve out Sims's time with them; and it concludes for implement according to their sense of it; or at least, if their construction of it be considered wrong, that Dale should serve out with them his own time with the Nailsea Company; and therefore I think the objection not good. We know nothing of the law of England as to this matter; but Dale, by the letter written at his desire, held himself out as bound to the Nailsea Company for a term of years, and entered into the transaction for an exchange on that footing; and, after that, there is not much room for

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consideration as to the law of England, as this man was bound to warrant what he held out, when this was followed by a regular rei interventus.

Lord Pitmilly.—I agree. Looking at the proof, it is impossible to imagine an agreement more clearly made out. The only difficulty is as to the point of form, and in that I agree with Lord Glenlee. The summons is not very correctly expressed; but it is broad enough to cover what it is designed for. As to what the law of England is, we know nothing; but we have the evidence of what this man held out to be the law of England in this particular case; and that is sufficient to justify the finding of the Lord Ordinary on this point.

Lords Justice-Clerk and Alloway concurred.

D. Fisher, S. S.C. Agent.

No. 185.

W. Watt, Advocator.—*Cuninghame.*

T. Glen, Respondent.—*Cowan.*

Sale.—A party having sold grain to another by sample; and the buyer having ordered the grain to be delivered at a particular place, which was done; and having then objected to the grain, as not conform to sample; but having afterwards intimated that he would keep the wheat, and claim deduction from the price—Held that he was liable for the price.

Feb. 6. 1829. 1st Division. Ld. Corehouse. S.

William Watt, a farmer in the neighbourhood of Paisley, employed one Tannoch to sell wheat for him, of which he gave to him a sample. Tannoch accordingly waited upon Glen, a baker in Paisley, and showed him the sample. After examining it, and retaining a part of it, Glen agreed to purchase 24½ bolls, at 30s. per boll; and desired that it should be taken to Hawkhead mill, possessed by one Kelly, where he was in the practice of getting his grain ground.

On the following day Watt sent to Glen for sacks to put the wheat into, which Glen accordingly gave to him. On the next day Watt carried the wheat to Hawkhead mill, to which place Glen came; and having examined it, he objected that it was not conform to sample, and that it was inferior to that which he had expected to receive. A few days thereafter, Watt required Glen either to pay the money, or restore the wheat; but this he refused to do; and it appeared from the evidence of Tannoch (who was the person who carried the message) that Glen said that he would keep his bargain, but would take a few pounds off the price.

Watt then brought an action against Glen before the Magistrates of Paisley for payment of the full price; from which, after a proof, they assoilzied Glen, 'in respect that the wheat was not conformable to sample 'that it was moulded and sprouted, and that there was no evidence that 'Glen refused to allow Watt to take back the stock after it had been 'left at the mill, although Glen said that he would keep his bargain.'

Watt having brought an advocation, the Lord Ordinary pronounced this interlocutor:—'Finds it proved that the wheat in question was sold 'by sample; that the bulk was inferior to the sample, and that the de'fender, in presence of the pursuer, objected to it on that account on the

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'day when it was delivered at Hawkhead mill;—finds it proved and 'admitted that the defender refused to return the wheat some days after- 'wards, when the pursuer required him to give up the bargain, and that 'it is not alleged that he offered to return it, reserving his claim of 'damages; therefore remits to the Magistrates with instructions to 'assoilzie the defender from the conclusions of the libel, but to find no 'expenses due in the Inferior Court;—finds neither party entitled to the 'expenses incurred in this Court, and decerns.'

His Lordship at the same time issued this note:—'It is clearly proved 'that the bulk was inferior to the sample; and if Kelly is believed, the 'pursuer not only acquiesced in the defender's statement to that effect 'on the day of delivery, but attempted to persuade Kelly to manufacture 'the wheat so as to conceal the defect. James Tannoch depones that 'the defender vitiated the sample in his possession, by picking out the 'grains which were of an inferior quality; but Tannoch is a single wit- 'ness to that fact. He was the pursuer's agent inthe sale; and what is 'of more importance, another sample left in the hands of Tannoch him- 'self appeared also to be superior to the bulk, as it did not contain 'sprouted or moulded grains. The conduct of the defender, however, 'is not free from blame. It was his duty to return the wheat when 'required by the pursuer. The excuse offered, namely, that the pur- 'suer's message implied that the bargain was to be annulled, and conse- 'quently the defender's claim for damages abandoned, does not seem 'satisfactory, for he might have reserved that claim when he restored 'the wheat. His object was to keep the wheat, and to compel the pur- 'suer to give a deduction from the price, which he had no right to do. 'As both parties appear to have been in fault, the Lord Ordinary thinks 'the expense of the litigation should not be awarded.'

Watt reclaimed.

Cuninghame for Watt.—The wheat was delivered at the place appointed by Glen, and thenceforth it was at his risk. Suppose the mill had been burnt, would not the loss of the wheat have fallen upon Glen?

Cowan.—The wheat was never in our possession. It was sent to Hawkhead mill for examination, and we immediately objected to it.

Lord President.—But you should have allowed it to be returned. Hawkhead was clearly the place of delivery.

Cowan.—But the wheat was not conformable to sample.

Lord Balgray.—The question is, was there delivery or not? The wheat was clearly sent to Hawkhead mill, as the place of delivery. It is true that it appears from the evidence, that although the wheat was of the same sort as the sample, yet it was not so good. It was therefore quite competent for Glen to have rejected it. But, instead of doing so, he says, at the distance of several days, that he will keep his bargain, and that he will endeavour to take a few pounds off the price. It is clear, therefore, that he cannot now be permitted to avail himself of the objection to the wheat. Where goods have been purchased according to

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sample, and a different sort is sent, it is the dut immediately to return them, or intimate to the for his behoof.

The other Judges concurred.

THE COURT accordingly advocated the caus and decerned in terms of the libel, with expens

J. STUART, S. S. C.—W. PATRICK, W.

No. 186.

T. SIMPSON and Others, Petitioners

Public Records.—Held that the warrant of a Lord Ordin the Lord Clerk Register to transmit to the Court the grou decree.

Feb. 6. 1829. 1st DIVISION. D.

IN an action depending before Lord Newt Simpson and others were defenders, they ap his Lordship an order on the Lord Clerk Regi and warrants of an extracted decree. The l sidering this not to be a sufficient authority, and a petition was thereupon presented by Si the Court for warrant. Their Lordships a that a warrant from the Court was necessary.

J. SINGER, W. S. Agen

No. 187.

TRINITY-HOUSE of LEITH and Others, Pu MAGISTRATES of EDINBURGH, Defenders.- LEITH DOCK COMMISSIONERS, Defend

Title to Pursue—Process—Harbour.—1.—Held that private and trading bodies at that port, by whom th superintending the improvements of the harbour under title to insist in an action against these Commissioners proprietors of the harbour, and as having contracted wi compel them to proceed with the execution of improvem Question raised, whether it is competent to amend a pursuers.

Feb. 6. 1829. 1st DIVISION. Ld. Corehouse. H.

BY the 6th Geo. IV. c. 103, relative to vernment and the Magistrates of Edinburgh of Leith, for a loan of £24,000, the Magis £28,000 in extending the eastern pier, in c should, within a year from the date of th them and the Principal Officers and Commi An agreement was accordingly executed tc tween the Magistrates and the Commissi

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bound to advance the £28,000, certain Commissioners should be appointed to get the work accomplished, and 'to take the general superintendence, care, and management of the said harbour and docks at Leith, 'and works connected therewith, and to direct all matters in regard to 'the maintenance, repair, cleansing, and improving of the same, as fully 'and to the same extent as the said Lord Provost &c. were empowered 'to do by virtue of their charters and title-deeds,' &c. No authority was given to any other party to interfere in this matter. Three of the Commissioners were ordered to be elected by the Trinity-House of Leith, three by the Company of Traffickers of Leith, one by the Society of Shipowners, and one by each of the Society of Maltmen and the Incorporated Trades. Commissioners were elected, and a contract was entered into by them with Mr. Matheson, an engineer, for the extension of the eastern pier, but which the Magistrates declined to subscribe. Disputes having then arisen between the Commissioners and the Magistrates as to the expediency of extending the eastern pier, (which it was alleged was only to be done on the supposition that a western pier also should be erected,) and the Commissioners of the Navy having declined to sanction the erection of the western pier, the Magistrates applied for and obtained an interdict, prohibiting the Commissioners from extending the eastern pier beyond one half the contemplated length; and thereafter they got another interdict, prohibiting the engineer from proceeding at all with the work. An action was then brought by certain parties, setting themselves forth thus:—'The Corporation of the Trinity-House of Leith, in its cor-'porate capacity, as known in law by the name and style of the Masters 'and Assistants of the Trinity-House of Leith, and James Duncan, Esq. 'master, David Gourlay, Esq. assistant-master, and John Brown, Esq. 'deputy-master of the said corporation; the Corporation of Traffickers 'or Merchants of Leith, commonly called the Merchant Company of 'Leith, and John Macfie, Esq. the master of that corporation; the So-'ciety of Ship-owners of Leith, James Scarth, Esq. chairman thereof, 'and the said James Scarth, John Hutton, George Gibson, Andrew 'Bell Mabon, members thereof, for themselves as individuals; John 'Hardie, Esq. senior resident Magistrate of Leith, on behalf of the re-'sident Magistrates of Leith, and Masters of the four Incorporations of 'Leith, viz. of the Trinity-House, Maltmen, Convener of the Trades, 'and Master of the Traffickers, commonly called the Merchant Company, 'in terms of the Act of Parliament passed in the eighth year of our reign, 'entitled &c.; and Messrs. James Bairnsfather Scott, Robert Philip, 'James Reoch, and George Crichton, all heritors, merchants, ship-'owners, and underwriters in the town of Leith.'

After libelling on the above two statutes, and relative agreement between the Officers of the Navy, and the contract with the engineer, and stating that a great quantity of materials had been laid down at the extremity of the eastern pier, and that the Magistrates had interrupted the execution of the work, the summons further set forth—'That it is of

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'vital importance to the interest of the shipping
'the said port, and therefore to the kingdom
'lovites individually in particular, that the impr
'and harbour of Leith should now be proceed
'interruption; that it is plain that the contract
'said Kenneth Mathieson cannot be completed
'agreement betwixt the said Magistrates and C
'Officers and Commissioners of our Navy canno
'within the specified period, if further delay shal
'and that great damages are daily suffered by
'contemplated improvements not being carried
'mages to an incalculable extent may arise from
'finished state in which the harbour now is and

The pursuers, therefore, concluded that the
'and should be decerned and ordained, by dec
'Council and Session, forthwith to proceed to th
'thereby intrusted to them, in pursuance of the pc
'conferred and imposed upon them; or failing so
'be decerned and ordained to make payment tc
'sum of £20,000, or such other sum as shall be
'of the action to follow hereon, to be the amou
'sioned by such failure;' and that the Magistr
'be decerned and ordained, by decree foresaid,
'the obligations incumbent upon them by the
'and the whole obligations incumbent on and
'the said contract and agreement with the sai
'Commissioners of our Navy, in so far as the
'sistent with or in contravention of the said A
'the said Magistrates and Council ought and sh
'and ordained to desist and cease from hindering
'the said Commissioners in the due discharge of
'or from preventing, interrupting, or interferin
'any manner of way; and they, the said Magistr
'and should be decerned and ordained to mak
'lovites of the sum of £20,000, or such other su
'as shall be instructed to have been incurred in
'to follow hereon.'

After defences had been lodged, objecting to t
the pursuers proposed to amend their libel b
Scarth, and Hardie in their characters of Commis
statute. This having been resisted by the defend
reported the case to the Court 'as to the adm
'amendment of the libel, and upon the prelimi
'on the objection against the pursuers' title to ins

Pleaded for the Defenders.—1. *Title.*—The Ma

keep it in repair at the instance of any party having a proper interest, yet they cannot be obliged, at common law, to make any improvements. But it is not alleged that the harbour is in disrepair; and the object of the summons is to enforce the execution of certain improvements. It is manifest, therefore, that anterior to the statutes the pursuers could not have maintained this action. But under the statutes no title is bestowed upon them. The execution of the works is confided to Commissioners; and the only other parties who are recognised as having any right in relation to the matter, are the Magistrates and the Commissioners of the Navy. To permit the pursuers to interfere would be to sanction a popular action, and constitute an imperium in imperio. Besides, they set themselves forth as corporations, whereas no evidence of their possessing such a character exists; and although some of them are described in local statutes as corporations, yet this cannot bestow upon them that character, unless they truly possess it.

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2. *Amendment of the Libel.*—Although it may be competent to correct an erroneous libel in the narrative or conclusions, yet it is not competent to introduce new pursuers. They must come into Court under a summons which has passed the Signet in their names. But, supposing the amendment could be received, Mr Scarth is no longer a Commissioner; and the other two have no title to insist in an action of this nature against the other Commissioners.

Pleaded for the Pursuers.—1. *Title.*—The pursuers have a manifest interest, partly as deriving a direct revenue from the harbour, and partly as established traders at the port, to insist that effect shall be given to the contract with Government; and the relative statutes were made mainly on their application, and for their benefit. Their interest gives them a title; and besides, they are the constituents of a great majority of the Commissioners. But further, the harbour is, by the accumulation of materials at the mouth of it, rendered unsafe; and therefore they have both a title and an interest to insist that the work shall either be carried on, or that the defenders shall be found liable in damages, if they allow matters to remain in their present situation.

2. *Amendment of the Libel.*—It is quite competent, and it is matter of daily practice, to allow new parties to sist themselves as pursuers in depending actions; but in this case the pursuers do not wish to sist new parties. Their motion merely is to correct and amend the description of some of those who are already pursuers of the action, by describing them as Commissioners instead of individuals. If the amendment be received, then these Commissioners have a title under the statutes to see that they are duly enforced.

The Court 'sustained the defences stated to the pursuers' summons, 'dismissed the action,' and found the pursuers liable in expenses.

The Lord President observed, that he did not see what use the pursuers could make of their decree, even if they got one in terms of their libel. But their con-

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clusions are more extravagant than those in the case the Court refused to sanction. *

Lord Balgray. If the Court were to sustain t just be creating a new set of persons to carry the act i cannot do.

Lord Craigie—It is possible that these parties r an action of a different nature against the defenders, b to pursue the present action. In regard to the objec porations, they have been recognised as such in public

Lord Gillies.—The question before us is not, wh title to pursue an action, but whether they can pursue of opinion they cannot.

Lord President.—They wish to create an imperi which has already been very injurious to the port. A are not incorporations, it is not sufficient that they b tutes. The Legislature allows a party to make use of but that cannot bestow upon him the right.

Pursuers' Authorities.—(1.)—Goddard, Feb. 14. 1827, (a Dec. 21. 1809, (F. C.); Oswald, Feb. 17. 1827, (ante, Vol. 1825, (ante, Vol. IV. No. 152); Merchants of Edinburgh, A Brown's Sup. p. 629; Baillie, Feb. 28. 1822, (ante, Vol. I. N Meldrum, July 28. 1716, (12152); E. of Home, Feb. 6. 1634, 4. Bank. 38. 21; Sheriff of Teviotdale, March 24. 1730, (1. Su (16130); Morison, Dec. 5. 1822, (ante, Vol. II. No. 66.)

Defenders' Authorities.—(1.)—2. Erak. 6. 17; Christie, No. 284); Kames's Eluc. Art. 33.—(2.)—Jeffrey, Feb. 27. 18 gistrates of Edinburgh, 1624, (ante, Vol. III. No. 291.)

W. Bell, W.S.—MacRitchies, Bayley, and Henderson, W.

No. 188.

J. Cowan and Company, Advocators.—
A. Hamilton and Others, Respondents.—*D.* G
A. Galloway, Respondent.—J

Feb. 6. 1829.
2d Division.
Ld. Cringletie.
R.

Advocation of a question of expenses from th who had awarded them in favour of the responde altered, and assoilzied the advocators from the the Court returned to the interlocutor of the She

H. Gordon, W.S.—A. Hamilton, W. S.—Wotherspoon

* The case alluded to by his Lordship, although decided up under consideration of the whole Judges in relation to other p been reported.

T. JONES, Suspender.—*Boswell.* No. 189.
G. GOURLAY, Charger.—*Anderson.*

THIS was a suspension of a charge on a decree of an Inferior Court, on an allegation that the parties had made an extrajudicial settlement, by which no expenses were to be exacted by the suspender. There being no evidence of this agreement, the Lord Ordinary and the Court refused the bill.

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1ST DIVISION.
Bill-Chamber.
Lord Newton.
S.

R. CAIRNS, S. S. C.—J. MORISON, S. S. C.—Agents.

W. HUNTER, Suspender.—*Forsyth.* No. 190.
OVEREND, GURNEY, and COMPANY, Chargers.

THE Lord Ordinary having refused a bill of suspension of a charge on a bill of exchange in respect no caution was offered, the suspender reclaimed, and offered caution, whereupon the Court remitted to pass the bill.

Feb. 7. 1829.
2D DIVISION.
Bill-Chamber.
Lord Newton.
R.

D. FISHER, S. S. C.—CRANSTOUN and ANDERSON, W. S.—Agents.

J. JAMESON, S. S. C. Petitioner.—*Smythe.* No. 191.
A. WIGHT, Respondent.—*Cuninghame.*

Agent and Client—A. S. 6th February 1806.—Held competent for the Court of Session to remit to the auditor the account of an agent against his client relative to an action of damages before the Jury Court.

JAMESON was employed as agent by Wight in an action of damages before the Jury Court; and having applied, under the Act of Sederunt 6th February 1806, for a remit to the auditor to tax his account of expenses, and for decree, Wight objected that the petition was incompetent, seeing that it had reference to proceedings in the Jury Court, which was a separate Court, just as much as the Court of Exchequer. The Court, however, holding that the Jury Court formed a branch of the Court of Session, repelled the objection, and remitted to the auditor.

Feb. 10. 1829.
1ST DIVISION.
H.

J. JAMESON, S. S. C.—ADAM and BROWN, W. S.—Agents.

J. REEKIE and Others, Petitioners.—*Skene—Bruce.* No. 192.
J. GARDINER and Others, Respondents.—*D. of F. Moncreiff—Ivory.*

Burgh Royal—Interim Managers.—A burgh royal having been disfranchised, the Court appointed the persons interim managers who had been last lawfully elected Magistrates.

BY a judgment of the Court on the 5th of March 1828, (see ante, Vol. VI. No. 249, p. 693,) proceeding on the verdict of a Jury and a remit from the House of Lords, (see Vol. II. Wilson and Shaw, p. 531,) the election of Magistrates of the burgh of Kilrenny was set aside, so that the burgh became disfranchised. The grounds upon which this judg-

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1ST DIVISION.
H.

No. 192. Feb. 10. 1829.

ment rested, were applicable to all the elec
petition was then presented by Reekie a
Magistrates in 1823, praying that they, or
should be appointed interim managers of t
should be restored. The appointment of t
Gardiner and others, who had been success
tion, and who maintained that as the Cou
their nobile officium, they ought to procee
and appoint those who were best qualified
terim managers, and they suggested certai
perform the office.

The Court being of opinion that those
elected Magistrates should be appointed to
titioners to lodge a list of their names, wit
and one of them being dead, they remitted to
substitute.

J. Anstruther, W. S.—R. Mackenzi

No. 193.

J. and F. Lawson, Suspenders.—*D.* o
P. Murray, Esq. Charger.—*Sol.*-G

Reference to Oath.—Question raised, but not expressly to make a reference to oath involving a matter of law.

Feb. 10. 1829. 1st Division. Ld. Corehouse. H.

In 1796 the charger, Mr. Murray of Sim
toun to Alexander Lawson, whom failing, t
James and Frederick Lawson, for nineteen
A regular lease was thereafter executed, w
—'And with regard to the mill of Brydies
'millers' houses, and other houses upon the
'pied by the said Andrew Dalgairns, as th
'livered over to the said Alexander Laws
'tradesmen mutually chosen, and valued by
'16s. sterling, so the said Alexander Lawso
'and James Lawson, are hereby expressly tak
'keep these subjects in repair during the tack
'on the expiry thereof, they shall be again ap
'sons mutually chosen; and if the valuation at
'of the aforesaid valuation at the entry, the ten
'the short-coming or deficiency to the proprieto
'ation at the expiry shall exceed the foresaid
'entry, the tenant shall have a claim upon the
'orations, as the same shall in that manner be

Lawson, having died, was succeeded by the expiration of the lease in 1815, the mill and ma the value of the mill was stated to be £110: ever, alleged that the mill had been included

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Feb. 10. 1829.

of them to the suspenders. At this time they were owing certain arrears of rent, for which Mr. Murray gave them a charge; and they thereupon brought a suspension, on the ground that they were entitled to credit for the value of the mill, under deduction of £28. 16s., leaving a balance of £81:9:8. By the judgment of the Court, on the 16th of February 1825, it was found incompetent for Mr. Murray to prove the alleged mistake in the lease by parole, (see ante, Vol. III. No. 368); and a remit was made to the Lord Ordinary to proceed accordingly. Mr. Murray then offered to make a reference to the oath of the suspenders as to whether 'the sum of £81:9:8, claimed on account of meliorations, is justly due.'

To this the suspenders objected, because it involved matter of law; whereas a reference to oath, being merely a species of proof, ought to be confined to the establishment of facts, leaving it to the Court to apply the law to these facts.

To this Mr. Murray answered, that a reference to oath was not properly a mode of proof, but was a judicial transaction, and an appeal to the conscience of the party whether his claim were just; and accordingly, when a party was required to emit an oath of calumny, it was incumbent on him to depone quod lis sibi justa videtur, or the reverse.

The Lord Ordinary reported the question upon Cases, and at the same time issued this note:—'As this Case has been repeatedly under the consideration of the Inner House, it seems expedient that the terms of the reference should be adjusted there, with a view to save expense to the parties, and to afford an opportunity of fixing a general rule of law on a point very imperfectly treated in the books. A reference is not necessarily objectionable because it involves a question of law, for law cannot always be separated from fact before a proof, as long experience has shown. But the party to whom a reference is made, seems entitled to insist that the separation shall be made in so far as it can be clearly done, that he may not be called upon to give an opinion on what he is not supposed to understand. In the present case, the proper reference appears to be, what was the actual agreement of the parties with regard to the mill and houses upon the farm,—and whether that agreement is not erroneously stated in the written lease?'

The Court pronounced this interlocutor:—'Remit the cause to the Lord Ordinary to adjust the terms of the reference to oath, agreeably to his own note thereupon; and to proceed further as accords, and reserve all questions of expenses.'

Suspenders' Authorities.—4. Stair, 40. 4. and 9; 4. 44. 10; 4. 45. 2; Balfour, 352. 359. 362; A. S. Dec. 7. 1713, (Sir J. Campbell's edit.); A. S. July 15. 1692; 4. Bank. 92. 1; 4. Ersk. 2. 1; White, June 9. 1812, (F. C.); M'Eachern, Dec. 17. 1824, (ante, Vol. III. No. 296.)

Charger's Authorities.—4. Ersk. 2. 8; A. S. Dec. 7. 1713; Balfour, 362; 3. Ersk. 6. 16; 4. Bank. 32. 8; Husband, Nov. 30. 1678, (9422); Cowan, Nov. 21. 1811; see note to White, June 9. 1812, (F. C.); M'Lennan, July 1. 1826, (ante, Vol. 4. No. 473.)

Macmillan and Grant, W. S.—J. Dundas, W. S.—Agents.

No. 194. LADY ESSEX KER'S TRUSTEE.—*Forsyth*—
TRUSTEES of the Rev. C. B. HAMILTON and (
—*Fullerton.*

Destination. — Circumstances under which a destination guished, and one to heirs of tailzie revived.

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1ST DIVISION.
Ld. Corehouse.
H.

THE five merk and forty shilling lands of Sa those of Hownam, were held in feu of the famil superiority of which was included in the entail In 1729 John Duke of Roxburghe granted to hi of the entailed estate, (embracing this superiority of resignation. In 1737 Duke John obtained a d or dominium utile of Samieston from the feuars 'of tailzie contained in his rights and infeftme 'burghe;' whom failing, to his heirs and assignee sition contained a procuratory of resignation ad a declaration, 'that the property of the said la 'poned, with the pertinents to be resigned an 'shall not thereby fall under any of the prohibit 'clauses contained in the former tailzie infeftme 'burghe; but, notwithstanding thereof, it shall 'to the said Duke of Roxburghe and his foresa 'their pleasure, the right and property of the sa 'the pertinents, or any part thereof, to any per 'think fit.' Resignation, subject to this quali made. In 1740 Duke John granted a disposit son Robert, his heirs and assignees. Duke J thereafter his son, now Duke Robert, executed ation contained in the disposition of 1729, by riority had been conveyed to him, and on which h in 1747, Duke Robert executed a disposition in wards Duke John,) and his heirs and assignees, resignation of the whole lands forming the ori cluding those of Hownam.

On the death of Duke Robert, his son Duke curatory in the deed 1747, on which, in 1776 and was infeft; and on this title he thencefor Samieston. In 1790 he executed a mortis caus estates and effects in favour of John Wauchope inter alia, for the purpose of distributing the Reverend Charles Baillie, Sir John Scott, and gal; and he subsequently executed two other nature. He died in 1804; and his si-

were his heirs alioqui successuræ. Of these deeds they brought a reduction; and after a great deal of litigation they were set aside, in so far as the Duke had disposed of lands to which they were alioqui successuræ,—it being held that, quoad ultra, they had no interest to insist. No. 194. Feb. 10. 1829.

Several questions having been raised as to different parcels of land, a multiplepoinding was brought by Mr. Wauchope, as trustee, to have it ascertained whether these lands fell to the disponees, or to the Ladies Essex and Mary Ker? The question was ultimately limited to the lands of Samieston; and the point in dispute was, whether, from the nature of the titles, they were held by the last Duke John in favour of himself, his heirs and assignees, (in which case they would belong to the Ladies Ker as alioqui successuræ); or whether they were held under a destination to the heirs of tailzie, and fell to the residuary disponees?

The Lord Ordinary, 'having heard counsel for the parties with regard to the five merk and forty shilling lands of Samieston, which are stated to be the only subjects now in dispute, found that the dominium utile of these lands, by virtue of the consolidation in 1737, fell under the destination, though they were exempted from the fetters of the entail; that John Duke of Roxburghe, by resigning in virtue of the procuratory of 1747, and expeding a charter and infeftment on that resignation, renewed the tailzied investiture, and extinguished, with regard to the lands, the destination to himself and his heirs whatsoever contained in the general conveyances previously executed by his father Duke Robert;' and therefore preferred the residuary disponees.'

To this interlocutor the Court adhered.

T. Paul, W.S.—Tod and Romanes, W.S.—Agents.

Mrs. Hay Mackenzie and J. H. Munro, Pursuers.—*D. of F. Moncreiff—Sol.-Gen. Hope—Buchanan.* No. 195.

Magistrates of Dingwall, Mrs. Rose, and J. C. Stevenson, Defenders.—*Jeffrey—Robertson.*

Res Judicata—Grounds and Warrants—Expenses.—1.—An extracted decree in a process between the authors of two competing parties proceeding in a circumduction and failure produce a title, held res judicata so long as not set aside.—2.—An unextracted decree (but which was final) in mutual actions between the authors of the two competing parties, and which proceeded on the footing of the actions being conjoined and being awake, held res judicata, although there appeared no interlocutor of conjunction, and although one of the processes must have been at one time asleep, and did not appear to have been wakened,—more than twenty years having elapsed from the date of the decree;—and,—3.—After the Court have awarded the expenses of the discussion of one part of a case, it is incompetent to move for the previous expenses till the final issue of the cause.

The river Conon in the county of Ross takes its rise in Strathconon, and, after passing through various districts of the country, empties itself into that part of the sea called the Cromarty Frith, a little below the town of Dingwall. Although now generally called throughout its course Feb. 10. 1829. 1st Division. Ld. Corehouse. H.

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the Conon, it appears that anciently a part of from its junction with the sea to a point wh ascertained, was called the Staffack or Stavack forth, who possessed property on the banks, he in the Conon; and these having been adjudge 30th of September 1678, granted a charter of Great Seal, by which he gave to the adjudging 'inferiores salmonum piscarias de Conon, cum pi 'ejusdem aquæ de Conon.' This charter was rati infeftment taken. After certain intermediate trans to be vested in the Earl of Cromarty, who made resignation in 1722. The Earl having been eng 1745, his estates were forfeited, and vested in co they were restored to the heir-male of the famil mately came to be vested in the person of the p kenzie, who obtained a Crown Charter in 1819, In 1825 she granted a tack of the fishings to t Munro.

On the other hand, the Magistrates of Dingwal James the Sixth a charter of confirmation and n jects, 'nec non cum salmonum piscatione in aqu 'tinen,' &c. In 1618 the Magistrates granted 'et integram piscationem dimidii unius cimbi aq 'tatu dicti burgi.' This and two other similar termediate transmissions, were acquired in 172 flowed from him by a series of titles to the de Mrs. Rose.

In 1725 Colonel Munro raised an action of d against the Earl of Cromarty and his tenants, s violent possession of that part of the fishing be fore concluding to have his right declared, the these parties interdicted from troubling him i in damages. In defence, they pleaded that th to the fishings claimed by Colonel Munro; an signed to them for producing their title, the upon the term was circumduced against them pronounced in terms of the libel, which was ex

Again, in 1762, an action of declarator, mol brought by the Commissioners on the Forfeit Advocate on behalf of the Crown, setting fortl titles vested in the Earl of Cromarty, they ha ings in the Conon, yet the Magistrates of I 'fish salmon in the said water of Conon, and 'mouth of the said water, whereby the shoal 'prevented from coming up to the water as

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'be of verity that the said defenders, the Magistrates and Town Coun-
'cil of the burgh of Dingwall, have no right of fishing upon the said
'water of Conon, and that the pursuers have suffered great damage by
'their so doing, and are put to considerable expense in defending their
'just right against the illegal intrusion and encroachments of the defend-
'ers, and that the pursuers have often desired and required the defend-
'ers to desist from fishing on the said water, and to have made payment
'to them of the damages and expenses sustained by them as aforesaid;
'yet they refuse so to do, and still persist to vindicate a pretended
'right to the said fishing, without any foundation in law or equity:
'Therefore it ought and should be found and declared, by decreet of
'our Lords of Council and Session, that the pursuers, as commissioners
'and trustees foresaid, and their tacksmen, have the only good and un-
'doubted right to all and whole the salmon-fishings of the said water of
'Conon, with the cruives, corfehouse, and whole parts, pendicles, and
'privileges thereunto belonging; and that the Magistrates and Town
'Council of Dingwall have no right or title to fish upon the said water
'of Conon, or in the sea opposite to the mouth of the said water, by drag
'and stell-nets, or by cruives, yairs, or in any other manner of way what-
'soever: And it being so found and declared, the said Magistrates and
'Town Council of Dingwall, and their successors in office, for them-
'selves, and as representing the community of the said burgh, ought and
'should be prohibited and discharged from troubling and molesting the
'pursuers and their tenants in the quiet and peaceable possession of the
'said salmon-fishing in all time coming.'

To this action defences were lodged by the Magistrates, who contended that they had right to that part of the fishings in the Conon called the Stavack; and, after some procedure, they brought a counter action of reduction and declarator against the Commissioners and certain parties deriving right from them, in which they concluded for reduction of any titles held by these parties in that part of the Conon called Stavack, and that it should be found and declared 'that the said pursuers, and their 'successors in office, for themselves, and as representing the community 'of our said burgh of Dingwall by virtue of their rights above men-'tioned, have the only good, undoubted, and exclusive right of salmon-'fishing with their own proper boats or cobbles and nets, and all other 'fishings on the said water of Stavack, and whole parts, pendicles, and 'privileges thereunto belonging; and that the said defenders, nor none of 'them, have any right or title to fish upon the said water, or any part or 'portion thereof, or in the sea opposite to the mouth of the said water, 'in any manner of way whatsoever; and ought to be decerned, by decreet 'foresaid, to desist and cease from usurping any such right, and from 'troubling and molesting the said pursuers, or their successors in office, 'in the peaceable possession, bruiking and enjoying thereof, or any part 'thereof, in all time coming.'

On the other hand, the Commissioners denied that the Magistrates

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had any right to fish in the Conon, or that the S
that river. The process of reduction was remitte
rator at the instance of the Commissioners; but
edly mentioned in the pleadings that they had
locutor to that effect could be found. The cas
before Lord Auchinleck, who, on the 24th of
'that the limits of the fishings to which the conte
'require a further proof than has been hithert
'ment can be given upon them; and therefore
'prove what they shall think may be of use in
'ters in dispute between them.' A proof wa
reported, on which memorials were ordered.
asleep; but, in 1770, a summons of wakening w
missioners in relation to the action at their inst
accordingly. But it did not appear that any s
brought as to the reduction at the instance of
they had again fallen asleep, the Commissione
but there was no evidence that this was done b
whole case was then reported to the Court on
drawn on the assumption that both actions were

On advising these informations, their Lordsh
ary 1778, pronounced this interlocutor: 'The
'missioners of the Annexed Estates have not
'to the whole fishings of the river Conon; but
'and Town Council of Dingwall have produce
'fishings in the said river, opposite to their
'at Breakenord down to the sea; therefore n
'Magistrates and Council from the action brou
'said Commissioners, but decern to the effect
'their instance against the said Commissioners,
This interlocutor became final, but was not ext

In 1825, Mrs. Hay Mackenzie, founding o
favour of the Cromarty family (in the right
along with her tenant Munro, brought an actio
tor, and damages against the Magistrates of D
or Rose, and their joint tenant Stevenson, setting
of a right to fish in the Conon, the defenders
by net and cobble, but by illegal modes; and
have it found that she 'and her tacksman hav
'right of fishing with net and cobble, and in ev
'competent by law in the river Conon;' and
Mrs. Rose, and their tacksman, 'have no right
'in the said river Conon with net or cobble, o
they ought to be prohibited from fishing there i
in damages.

In defence, Mrs. Rose founded upon the j

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'1778 are demonstrative, and not taxative; an' 'Magistrates of Dingwall, and those in their rig' 'to the fishings in the river Conon from the m' 'to the sea, and to that effect assoilzies the de' 'sions of this action, and decerns; but in respe' 'as to the march between the lands of Balblair' 'the pursuers to put in a condescendence spe' 'be the situation of the march, and allows the' 'same, and in the mean time continues the i' 'spect the pursuers allege that the defender' 'ing, and is continuing to fish, in an illegal ma' 'in a condescendence of what they aver on this' 'fenders to answer the same,—the condescen' 'lodged within three weeks, and the answers by' 'mas recess.'

Both parties reclaimed,—the pursuers prayin decern in terms of the libel, and the defende limit the interdict, and find them entitled to exp

Lord President.—There is clearly a res j

Lord Balgray.—I am of the same opinion.

Dean of Faculty.—The case requires a grea before your Lordships can arrive at that conc in 1725 went not on the merits, but on a circun of the Lord Ordinary's judgment is, that we process. This part of the case, however, is of v other, relative to the judgment in 1778, being statement is, that there was no conjunction, a asleep when the judgment was pronounced. T of this objection by saying that this merely has of the judgment, and that they cannot be called years. But that proceeds on an evident mistak decree.

Lord President.—But there is a decree.

Dean of Faculty.—Not at all; it is a mere int with a decerniture.

Lord Gillies.—This is most dangerous this Court not a decree till it be extracted?

Dean of Faculty.—The question here is, wh judgment, not whether it is extracted or not? incompetent decree.

Lord President.—Do you mean to maint prescription on an unextracted decree?

Dean of Faculty.—There is no question be scription. The Lord Ordinary has not pronou that point.

Lord President.—But there is nothing to

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Dean of Faculty.—The Lord Ordinary has gone entirely on the defence of res judicata. Besides, there is another point of the case. If it be res judicata, it must receive effect according to its terms. The Lord Ordinary, however, has given it a more extensive construction than what either the titles or the judgment warrant.

The Court, however, being satisfied that the interlocutor was well founded, refused the reclaiming note for the pursuers, and found 'the 'defenders entitled to the expenses incurred by them since the date of 'the Lord Ordinary's interlocutor of the 12th November last.' And in regard to the note of the defenders, their Lordships simply refused it, and adhered to the interlocutor, without any mention of expenses.

When the case returned to the Lord Ordinary, the defenders moved him for the previous expenses; and a difficulty having been raised as to whether they were not excluded by the limited finding in the above interlocutor, they lodged a note to the Court for an explanation upon this point, and praying to remit to the Lord Ordinary to hear parties on these expenses, or to reserve them till the issue of the cause. This was objected to by the pursuers, who contended that it was in truth a reclaiming note against the interlocutor of the Court—that it was not competent for their Lordships to make any alteration or modification of their interlocutors, and therefore the note ought to be refused.

On the other hand, the defenders maintained that it was quite competent to ask for an explanation, and the Court to give it; and besides, that as the interlocutor was not a judgment exhausting the cause, but merely interlocutory, neither the Lord Ordinary nor the Court could, agreeably to the Judicature Act, decide upon the question as to the whole expenses of the cause until the final issue of it; and therefore, to obviate all future objection, this ought to be explained.

Lord President.—At advising the notes, it was not the intention of the Court to give the expenses; and if so, this application is quite incompetent, being nothing but a reclaiming note against the interlocutors.

Lord Craigie.—It is premature to make an application at present on the subject; for as expenses were not awarded at the advising of the notes, the point must remain for setlement at the final decision of the cause, in terms of the 17th and 21st sections of the statute; and therefore it is incompetent to apply for them till then.

Lord Balgray concurred with Lord Craigie. It never was the intention of the Court, at the advising, to settle the expenses of this action, further than what had been incurred since the date of the Lord Ordinary's interlocutor; but much of the case yet remained for decision; and the expenses could not be determined till it was finally decided. The application, in its present shape, is incompetent.

Lord Gillies.—There is nothing in any of these interlocutors to prevent the defenders getting expenses at the proper time, if they are entitled to them. This is a case in which there has been a great deal of litigation on both sides; and it will depend upon the result of the procedure which has been directed

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by the Lord Ordinary, which of the parties will be entitled to their expenses. But they must wait the final judgment on the merits, when the question of expenses will be decided in terms of the Act of Parliament. A simple refusal of the note 'as incompetent' will leave matters entire for both parties.

THE COURT accordingly refused the note as incompetent.

Pursuers' Authorities.—Malcolm, May 19. 1815, (F. C.); Cases in Morison, 12. 229; 12. 233; 12. 239; Napier, Jan. 17. 1824; (ante, Vol. II. No. 595. p. 622); Graham, 2. Dow, 314; 4. Ersk. 3. 3.

Defender's Authorities.—Maule, Jan. 31. 1827, (ante, Vol. V. No. 151. p. 256); 4. Ersk. 3. 3; 4. 1. 22; Brown, Feb. 18. 1675, (5169); Cockburn, Nov. 26. 1725, (5182); Wilson, July 6. 1757, (5184); Irvine, Feb. 28. 1771, (5187.)

H. MACQUEEN, W. S.—HORNE and ROSE, W. S.—Agents.

No. 197.

R. AITKEN and Others, Advocators.—*Skene.*

J. REID, (for TRUSTEES of STATUTE LABOUR, GLASGOW,) Respondent.—*Jeffrey—Reddie.*

Trust—Statute Labour.—Statute Labour Trustees having bound themselves to repay in advance as soon after the lapse of five years as the funds would admit of it—Held that they were bound to pay the claim, although without trust-funds, if they might have been in funds, had they not incurred expenses which they were not obliged to do, and paid debts not preferable to this claim.

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2D DIVISION.

Lord Medwyn.

R.

IN 1813, Aitken and certain other proprietors of houses in the Gallowgate of Glasgow, being desirous to have a sewer constructed to carry off the water which frequently collected in the street, applied to the Trustees of Statute Labour Fund for this purpose. The funds being insufficient at the time to accomplish the proposed improvement, a contract was made between the trustees and the proprietors, by which the latter agreed in the mean time to complete the work; and the former became bound that the expense 'shall be paid from the Statute Labour 'Conversion when and as soon as the state of the funds will permit, but 'not sooner than five years,' from the expiry of which period alone it was to bear interest.

The proprietors accordingly executed the sewer in question, which was completed in the course of the same year at an expense of about £400, whereof £300 was subscribed, and the remainder borrowed by them. In 1820 a new statute was obtained, giving authority for imposing a larger assessment than formerly, but declaring the funds burdened with all debts contracted under the former statute; and the trustees, with the additional funds thus obtained, opened several new streets, and executed several new drains, the expense of which considerably exceeded the funds. The proprietors had, after the lapse of five years, frequently applied to the trustees for payment of the sum subscribed by them, but were always met with the objection that the funds were not in such a state as to enable the trustees to pay it, although at the same time they offered to pay them ten shillings in the pound, without interest,

for a discharge. This the proprietors refused to accept; and at last, in 1826, an action was raised by Aitken and others before the Sheriff of Lanarkshire in name of the survivors of those proprietors who had signed the contract, and also of a committee appointed for the purpose of raising the action by the subscribers to the fund, concluding against Reid, the clerk of the trust, for payment of the sum in question, with interest since the lapse of the five years. No. 197. Feb. 10. 1829.

In defence, the trustees pleaded that the pursuers had no title; but this defence having been repelled by the Sheriff, the trustees acquiesced in his interlocutor, and on the merits contended that the sum in question having always been entered in their books as a postponed claim, and that the debt of the trust being at present £4000, they were not bound to pay the claim, which they maintained was not exigible under the contract until there should be a free fund over the expenditure with which to pay it. To this the pursuers answered, that the entry of the debt by the trustees in their books as a postponed claim could not affect the question, and that they were entitled to payment as soon as the funds, if properly managed, would have enabled the trustees to pay this claim; and they averred 'that the monies levied by the trustees 'under both of the said statutes, from the date of the contract in question 'downwards, have or should have yielded, after defraying the necessary 'expense of repairing and upholding the existing streets, lanes, roads, 'and common sewers within the said city, but exclusive of the expense 'of forming new streets, lanes, roads, and sewers therein, a balance 'adequate to the liquidation of the whole debt owing by the trust at the 'date of the foresaid contract.'

The Sheriff found 'that there is no fund or balance in the hands of 'the trustees which can warrant a decree in this action for the sum con-'cluded for,' and therefore sustained the defences, and assoilzied; 'but 'in respect it is set forth by the pursuers that the defender ought to be 'in funds sufficient for payment of the debt due by them,' he reserved action at their instance against the trustees, calling them to account for the management or application of the trust-funds. Of this judgment Aitken &c. brought an advocation, contending that they were entitled in this action to show that the trustees would have been in funds, had they not incurred other expenses, and paid other claims to which theirs were preferable; and therefore they were not bound to have recourse to another and a separate action.

The Lord Ordinary remitted simpliciter; but the Court recalled the interlocutor, advocated the cause, and, before answer, remitted to the Lord Ordinary to 'allow an investigation into the state of the defender's 'funds since the date of the contract,' with reference to the above aver-ment.

Lord Justice-Clerk.—Looking at this contract, I have no conception that it was left to the managers of the fund to postpone payment of this claim

No. 196.
Feb. 10. 1829.

by the Lord Ordinary, which of the parties will be
But they must wait the final judgment on the merit
penses will be decided in terms of the Act of Parl
of the note 'as incompetent' will leave matters entir

THE COURT accordingly refused the note as in

Pursuers' Authorities.—Malcolm, May 19. 1815, (F. C.); 233; 12. 239; Napier, Jan. 17. 1824; (ante, Vol. II. No. 5 314; 4. Erak. 3. 3.

Defender's Authorities.—Maule, Jan. 31. 1827, (ante, Vol. 3. 3; 4. 1. 22; Brown, Feb. 18. 1675, (5169); Cockburn, N July 6. 1757, (5184); Irvine, Feb. 28. 1771, (5187.)

H. MACQUEEN, W.S.—HORNE and ROSE, W

No. 197.

R. AITKEN and Others, Advocato
J. REID, (for TRUSTEES of STATUTE LABOUR,
—*Jeffrey—Reddie.*

Trust—Statute Labour.—Statute Labour Trustees having advance as soon after the lapse of five years as the funds wc were bound to pay the claim, although without trust-funds, i had they not incurred expenses which they were not obliged ferable to this claim.

Feb. 10. 1829.
2D DIVISION.
Lord Medwyn.
R.

IN 1813, Aitken and certain other propr Gallowgate of Glasgow, being desirous to h to carry off the water which frequently collecte the Trustees of Statute Labour Fund for this p ing insufficient at the time to accomplish the contract was made between the trustees and the latter agreed in the mean time to complete the v came bound that the expense 'shall be paid 'Conversion when and as soon as the state of t 'not sooner than five years,' from the expiry was to bear interest.

The proprietors accordingly executed the sew completed in the course of the same year at an whereof £300 was subscribed, and the remaind 1820 a new statute was obtained, giving autho assessment than formerly, but declaring the fun contracted under the former statute; and the tional funds thus obtained, opened several n several new drains, the expense of which c funds. The proprietors had, after the lapse applied to the trustees for payment of the but were always met with the objection that the a state as to enable the trustees to pay it, alt they offered to pay them ten shillings in the

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Lord Justice-Clerk.—Looking at this contract, I have no conception that it was left to the managers of the fund to postpone payment of this claim

No. 197. Feb. 10. 1829.

indefinitely to any time they pleased; and their enteri postponed claim signifies nothing. They cannot the beyond the time stipulated in the contract. Then the igible by the contract? I answer, that it is exigible sufficient, or would have been sufficient, had the trus claims, or incurred other expenses by works which the cute. Now it is averred that after deducting such other would have been a balance sufficient to pay this del be proved by the books and accounts of the trustees to be the proper course to remit to an accountant to averment was correct, for I do not doubt its relevanc the reservation, which in fact cuts down the rest of t There need be no more litigation in a new action, as th here for investigating the averment of the advocators.

Lord Alloway.—I am decidedly of the same opi entitled to interest after 1818, and to be ranked for after the debts then due. I would fix that as the ru and remit to the Lord Ordinary to proceed on that pr

Lord Glenlee.—I am of the same opinion.

Lord Pitmilly.—It appeared to me exactly in t servation by the Sheriff is both incompetent and unne ing competent to the parties may be made here; an than that proposed by your Lordship.

Macmillan and Grant, W. S.—Campbell and Macdow

No. 198. Sir J. A. Cathcart, Petitioner.—*D. of F.* J. Cathcart, Respondent.—*Sol.-Gen. Hop*

Sequestration of Land Estate.—An heir who had been in pc entail for nearly 40 years, having acquired right to an adjudica tained by him through the intervention of a friend, to alter made up titles under it; but his possession continuing to b having executed a new entail, which remained latent till his de arisen between the next substitute under the original entai the new entail, and no actual possession having been acquired application of the former, sequestrated the estate.

Feb. 11. 1829. 1st Division. D.

In 1717, Sir Hugh Cathcart of Carleton, on of his son John with Miss Catherine Dundas o entail in the form of a marriage-contract betwee he conveyed his estate to them and a series of su provisions, it was declared that they should poss no other title. In virtue of this entail, Sir An to the estate in April 1784; and having made Being advised that the entail was not sufficient tached for debt, and being desirous to alter the entered, (as was alleged) into an arrangement v

Mr. Cathcart rested his plea was not well founded; and that there had been no such actual possession by him as to prevent them from awarding sequestration. No. 198. Feb. 11. 1829.

Petitioner's Authorities.—1. Bank. 15. 15; 2. Ersk. 12. 55; Hume, June 24. 1698 (5235): Mackay, Feb. 19. 1741, (5239); Innes (Case of Roxburgh,) June 23. 1807, (App. No. 13. voce Taikie); Dunbar v. Grant, Nov. 14. 1815, (not rep.)

Respondent's Authorities.—2. Ersk. 12. 55; 1. Bank. 15. 15; Buchanans, Aug. 3. 1782, (14350); Douglas Case, Nov. 28. 1761, (3966); Mackay (Bargany Case,) Jan. 26. 1797, (14341.)

HUNTER, CAMPBELL, and CATHCART, W. S.—J. DONALDSON, W. S.—Agents.

J. BELLENDEN KER, Esq. and Others, Petitioners.—*D. of F. Moncreiff —Brown.* No. 199.

SIR COUTTS TROTTER and Others, Respondents.—*Rutherfurd.*

Inhibition.—An inhibition over an estate, proceeding on a decree cognitionis causâ for a debt constituted by an English bond, (but which was objected to in a suit in the English Court of Chancery,) restricted to part of the estate.

Feb. 11. 1829. 1ST DIVISION. S.

IN 1815, Ladies Essex and Mary Ker granted a bond in the English form to the late Mr. Nicol for £24,000, redeemable on payment of £12,000, and which Mr. Nicol afterwards assigned to Coutts and Company, bankers in London. These ladies having died, were succeeded by the petitioners as heirs-portioners in the estates belonging to them in Scotland, and by trustees in regard to the moveable effects situated in England. In 1825 Coutts and Company obtained a decree of this Court on the bond, cognitionis causâ, against the petitioners, and decree for payment against the trustees after appearance had been made, and defences lodged. On this bond and relative decree Coutts and Company executed inhibition; and certain other creditors having also inhibited and threatened to adjudge, the petitioners, in order to pay off the debts of these creditors, sold part of the estates; but the purchasers declined to pay the price until relieved of the inhibition by Coutts and Company. In the mean while the moveable estate had been made the subject of a lawsuit in the English Court of Chancery; and a claim having been there lodged by Coutts and Company, founded on the bond, objections were stated to it, which had not been disposed of. The petitioners therefore applied to the Court to restrict the inhibition on this bond to the other lands which had not been sold, so that they might be enabled to receive the price. This was opposed by Coutts and Company on the ground mainly, that it was incompetent for the Court to interfere with the diligence of inhibition proceeding on a liquid ground of debt, and a decree in foro. But the Court being satisfied that, under the circumstances, they were entitled to restrict the inhibition to the other lands, which were a sufficient security, granted the prayer of the petition.

A. GOLDIE, W. S.—J. DUNDAS, W. S.—Agents.

No. 198.
Feb. 11. 1839.

struggling to obtain possession of a bankrupt e
has been held competent; but that here there wa
character of heir, and he had an ex facie good titl
he had obtained actual possession.*

On other hand, it was contended by Sir John
impute Sir Andrew's possession to the adjudicati
ascribed to the original entail, in virtue of which
estate, and under which he was bound to posse
was plainly inept; that it was a mere burden
proper title, and might have been extinguished
there had been no actual possession by either
contrary, it was established that there had b
which the former factor was to act in the mean
parties.

The Court, after ordering Cases, sequestrate

The Judges were unanimously of opinion that th
could not be ascribed to the adjudication; that the

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* In support of the proposition that he was entitled to cc
Mr. Cathcart referred to several authorities, but particula
Hawley against the Earl of Dalhousie in 1712, reported by
but of which the ultimate judgment is not given. He, ho
port of it as given in the Douglas cause, and laid before t
"In the year 1712, the estate of Dalhousie was provided by
male. William Lord Dalhousie had a sister, but no childre
cumbered, he did not adventure to enter heir, but he acquir
which he made up a title by infeftment, and took the right t
after his death. The collateral heir-male, who came to be L
as heir-male to William's father, was thereupon infeft, and e
continued for about a twelvemonth, when the tenants of the
before the Court of Session to try the right of possession
above, and Lady Hawley, Lord William's sister, who had p
to her brother long posterior to the service of Lord Dalhou
in possession by virtue of a legal title, viz. a retour and infe
liam, my Lady's father; that he had entered to possession,
of right; that his title was preferable to any in my Lady's p
her brother, the last deceased Earl, his title, which was a
being an adjudication for a small sum satisfied within the
any doubt of his right and preference remained, the estate
point of right could be determined in a regular process.

"It was answered for Lady Hawley and her husband, th
service as heir-male to a remote predecessor, because Wil
infeft to himself and his heirs whatsomever, and having die
good right to continue his possession; nor is the pursuer o
her right and title be preferable to that of the defender or
brother, immediate predecessor, died in possession, which
cannot be removed, except by the force of a petitory ac
Earl's service is only as heir-male to a remote predeces
there can be no conjunction or connexion of possession.
in many papers by the most eminent counsel of that time; a
refused to sequestrate, and preferred Lady Hawley to the in

Mr. Cathcart rested his plea was not well founded; and that there had been no such actual possession by him as to prevent them from awarding sequestration. No. 198. Feb. 11. 1829.

Petitioner's Authorities.—1. Bank. 15. 15; 2. Ersk. 12. 55; Hume, June 24. 1698 (5235): Mackay, Feb. 19. 1741, (5239); Innes (Case of Roxburgh,) June 23. 1807, (App. No. 13. voce Tailzie); Dunbar v. Grant, Nov. 14. 1815, (not rep.)

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SIR COUTTS TROTTER and Others, Respondents.—*Rutherfurd.*

No. 199.

Inhibition.—An inhibition over an estate, proceeding on a decree cognitionis causâ for a debt constituted by an English bond, (but which was objected to in a suit in the English Court of Chancery,) restricted to part of the estate.

Feb. 11. 1829. 1ST DIVISION. S.

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A. GOLDIE, W. S.—J. DUNDAS, W. S.—Agents.

No. 200. CAPTAIN M'LEOD, Pursuer.—*D. of F. Mon*
J. N. M'LEOD, Defender.—*Jeffrey*—

Reparation—Landlord and Tenant—Process.—Held,—1.—That decrees awarding sequestration of a tenant's effects, in order to e of damages against his landlord for having obtained and executed —2.—That such an action ought to be remitted to the Jury Court of a process of count and reckoning by the landlord against the te

Feb. 11. 1829.
1st DIVISION.
Lord Meadowbank.

IN 1810 the pursuer Captain M'Leod obtained from Whitsunday 1811, from the defender Mr. M a farm upon his estate. In 1816 the defender app a sequestration of the pursuer's effects, on the alleg arrear of rent. This was denied by the pursuer, not got possession of the whole of the lands let to having repelled this plea, and granted warrant of sa an action in this Court, concluding to have it found ceived entire possession; that the defender should him full possession, and found liable in damages for and for having executed the sequestration. After t finding that full possession had not been given, and account, decree was pronounced, finding that in a s the tenant was entitled to credit for the damages quoad ultra, the defender was assoilzied of consent. the defender had repeatedly sequestrated the effects thereupon brought another action of damages, allegi trations, including that of 1816, had been resorted payment of the whole rent, while, as was now esta equivalent to the lands of which possession was withh

In defence, it was pleaded,

1. That the decree of absolvitor was res judicata questration of 1816.

2. That as no reduction had been brought of the the processes of sequestration, they must be held t and therefore the pursuer could not insist for damage

3. That the full rent was due, both because an ab pulated rent was not the form in which reparation the lands, either was actually sought, or could comp and because, on a statement of accounts between the that that reparation was fully paid aliunde before were applied for.

To this it was answered,

1. That although the decree of absolvitor might be far as the proceedings under the sequestration of 1 under the first action, yet it could not be so quoad ulti

2. That as the allegation was, that the sequestratio use of oppressively, it was no more necessary to set t

was to reduce horning and caption before obtaining reparation for wrongous imprisonment; and,

No. 200.
Feb. 11. 1829.

3. That the allegations as to the rent being fully due were both irrelevant and disputed.

In the mean while the defender had brought an action of count and reckoning against the pursuer, to ascertain the state of accounts between them; and he contended that the action of damages ought to be sisted till the result of the accounting.

The Lord Ordinary 'sustained the plea of res judicata in so far as the 'decree assoilzied the defender from the claim of damages under the 'sequestration 1816; but with regard to the other various subsequent 'processes of sequestration applied for and obtained by the defender 'against the pursuer, found that the pursuer's not having brought any 'action for setting aside and reducing the same upon any grounds of 'law which may have been competent to him, does not bar or preclude 'him from insisting in the present process of damages, and therefore 'repelled that objection to the competency of the pursuer's claim; but, 'quoad ultra, sisted procedure in this action till the action of count and 'reckoning betwixt the parties, presently depending before the Lord 'Ordinary, shall be discussed and brought to a final determination.'

Both parties having reclaimed, the Court adhered to those parts of the interlocutor sustaining the plea of res judicata, and finding it unnecessary to bring an action of reduction; but altered that part of it sisting process, and remitted the case to the Jury Court.

Lord President.—Diligence may be legal in itself, and yet be oppressively used, and so expose the party using it to a claim of damages, although the diligence cannot be reduced; and it certainly never was imagined that it was necessary, in the first place, to set aside that diligence, before claiming the damages.

The other Judges concurred on this point; and, with the exception of Lord Craigie, they were of opinion, that although this case had been in Court before the late Judicature Act was passed, they were bound, agreeably to the spirit of that statute, to remit the case to the Jury Court in the first instance; and that a landlord could not prevent a tenant from insisting for damages in respect of oppressive sequestrations, by bringing an action of count and reckoning.

Defender's Authorities.—Dun, March 11. 1824, (ante, Vol. II. No. 739); Tait, Nov. 19. 1825, (ante, Vol. IV. No. 170.)

C. M'Donald, W. S.—J. and C. Nairne, W. S.—Agents.

D. D. Kennedy, Pursuer.—*Skene—A. M'Neill.*
A. and J. Kennedy, Defenders.—*Jardine.*

No. 201.

Passive Title—1695, c. 24.—*Apparent Heir—Entail.*—An heir apparent of entail, possessing for more than three years, having executed bonds of provision over the estate, in favour of his younger children, in conformity with the entail, and his grandson having passed him by in making up titles—Held that these provisions were to be considered onerous, without regard to whether the granter possessed other estates out of which he might have the provisions, and that the heir passing by was bound by them under the act 1695

No. 201.
Feb. 11. 1822.
2d Division.
Lord Newton.
F.

In the year 1772, the great-grandfather of an entail of his lands of Craig and others in the c of himself—whom failing, his son David Kenne of his body—whom failing, certain other sub of this deed having died in 1782, leaving the tory unexecuted, his son David, instead of taki neral service, made up titles to part of the lan procuratory, as if he had been institute in the de after taking infeftment on the charter of resign maining part by infeftment on the unexecuted p deed of entail. This person, on the 11th of Nove bond of provision and disposition in security, by w and his eldest son to make payment to the defe John Kennedy, his younger sons, of a sum of years rent of the estate as at the time of his de amount for which the entail allowed the estate younger children;—and on this bond and dispo feftment was taken. David Kennedy possessed th above mentioned for upwards of forty years, and eldest son, who died in 1819. He was succeede grandson, the pursuer, then and still a minor, w serving heir in general to his great-grandfather, passing by his father and grandfather, thereby t cuted procuratory and precept in the original dee he took infeftment, and obtained charter of confir perior. Thereafter he raised the present action, cc bond of provision executed by his grandfather in the defenders set aside, on the ground that his gran up titles erroneously by resigning and taking infeftme procuratory and precept in the entail, without vesti to them by service to his father the institute in th dalty vest in the estate, and so could not validly gra position in security to the effect of burdening the sa

In defence against this action, (besides a plea aft untenable, that the titles made up by the granter o rect, or at least that they were validated by forty y defenders pleaded that the granter of the bond of p sessed the estate as apparent heir for greatly more t grandson, the pursuer, passing him by, was bound b under the act 1695, in so far as they were not contrary entail; and that the provisions in question, being l younger children, were onerous obligations, falling w of that statute.

The Lord Ordinary pronounced this interlocutor:- 'the terms of the deed of entail 1776, the entailer him 'and his son David Kennedy, the pursuer's grandfath

'finds that although the entailer did not complete his title under the entail by infeftment, the personal right under the disposition, and to the procuratory and precept therein contained, was vested in him, and could only be taken up by a general service; finds that the titles made up by the said David Kennedy, by using the procuratory and precept contained in the deed of entail, without taking up the same by a service, were inept; finds that these titles, which were made up in 1782, are not secured from challenge by the operation of prescription, the pursuer having, by the death of his father in 1819, become the next substitute to his grandfather, the heir in possession, before the forty years had run, and being then and still continuing to be in minority: Therefore repels the defences in so far as they regard the said titles; and reduces, decerns, and declares in terms of the conclusions of the action of reduction; finds that the said David Kennedy is to be held to have possessed the entailed estate as heir apparent of tailzie; and that the pursuer, by passing him by, and taking up the estate by service to the entailer, his great-grandfather, is bound, by virtue of the act 1695, by all such onerous deeds as his grandfather would have had power to execute, had he been validly infeft under the entail; finds that his obligation in regard to the bonds of provision, which make the subject of the action of reduction-improbation, depends on their being onerous deeds, and that their onerosity, in a question with the pursuer as heir of entail, depends on the granter having otherwise no sufficient means to provide reasonably and suitably for his younger children; finds that the statements contained in the record are not sufficiently explicit to enable the Lord Ordinary to judge of this matter, and therefore appoints the defenders to state in a condescendence the amount of the heritable and moveable estate settled on them by their father, the said David Kennedy, together with the burdens affecting the said succession, and this within fourteen days from this date; and the pursuer to see and answer the same within fourteen days thereafter.'

No. 201.
Feb. 11. 1829.

Both parties reclaimed,—the pursuer, in so far as the interlocutor found him to be liable for the onerous obligations of his grandfather,—and the defenders, in so far as it found the onerosity of the deeds to depend on whether the granter had other funds, and did not at once assoilzie them.

Skene for the Pursuer.—The act 1695 does not apply to heirs apparent of entail, but only to those in fee-simple; for it proceeds on the ground of assuming a personal representation to the heir passed over, and it is only through the personal representation created by the statute that the lands can be affected; for the obligations of the heir apparent do not affect the lands themselves, but the statute merely creates a personal representation to the heir passed by. There is, however, no room for this as to an heir apparent of entail; because the whole principle of the entail law is, that no personal representation is incurred by one heir to another, and without it the liability under the act 1695 cannot be created.

No. 201.
Feb. 11. 1829.

Jardine for Defenders.—We admit that an hei could not make a succeeding heir liable, except entitled to do under the entail; but the same pri an heir in fee-simple, applies to an heir of tailzie q he is not restrained from doing. Then, as to the deeds, we contend that the act 1695 extends to party was under a natural obligation to grant, a must be held onerous, even although the party mi out of other funds.

Lord Glenlee.—As to the first part of the interl is clearly right. As to the other matter, I own, from decision in the case of Graham,* I considered that the by his ancestor who had possessed on apparency, passing by in the same sort of debts which, if the heir ed, would have been effectual against the succeeding h only liable, if the heir apparent had no other funds. in possession could not make provisions to his children when he had other funds, this plea might hold; b this entail that it should not be in his power to do s And unless it is made quite plain to me that the purs this to the bonds in question, if the granter of them h the limitation in the Lord Ordinary's interlocutor, maki he had other funds, to be too strong; and I think the limit the bond would have been effectual against the heir, ha the fee.

Lord Alloway.—The case of Graham created a d was soon acknowledged to be well decided. I hold, i of entail who has power to burden, that the estate is u and it is of no consequence whether he had any other the power to execute this bond; and there are no pro prevent him doing so, if he has other estates. These a the heir passing by must be subjected to. The Lord principle, but erroneous in thinking that the circumsta ing other estates is of any consequence.

Lord Pitmilly.—I agree.

Lord Justice-Clerk.—I am of the same opinion; is, whether the pursuer admits these bonds to be in conf in the entail? For if so, we must assoilzie.

Skene.—We do not dispute that.

The Court accordingly recalled the last two fin dinary's interlocutor, adhered to the others, and, admitted that the bonds in question were grant the provisions of the entail, assoilzied the defend

J. Dunlop, W. S.—J. Bell, W. S.—Agent

* May 23. 1800, (No. 1. Ap. App. Heir.)

DUNCAN SINCLAIR, Pursuer.—*Jameson.*
WILSON and MACLELLAN, Defenders.—*Buchanan.*

No. 202.

Warrandice—Repetition.—A party having compelled the cautioner of a messenger to pay a debt constituted by a bill, on which there were indorsers, in respect of the messenger's failure to execute diligence raised upon it; and having assigned the bill and diligence to the cautioner, with an obligation of warrandice from fact and deed done or to be done; and it having been afterwards discovered that the bill was vitiated, and the diligence irregular—*Held* that the cautioner was entitled to repetition.

Feb. 12. 1829.
1st DIVISION.
Lord Newton.
D.

WILSON and MACLELLAN having, in the course of business, received a promissory note for £130 granted by Alexander Macra, dated 25th July 1820, payable three months after date, and indorsed by Duncan Campbell, James Park Harrison, and certain other parties, discounted it with the Greenock Bank. The bill fell due on the 28th of November; but not being paid, it was protested. It was retired by Wilson and Maclellan, who caused the instrument of protest to be recorded, and diligence raised. This diligence was transmitted to a messenger, for whom the pursuer Duncan Sinclair was cautioner, to be executed against the indorser Harrison; but he having neglected to do so, Wilson and Maclellan raised an action against him, and Sinclair as his cautioner, for the amount of the debt and expenses, under deduction of a partial payment. After some correspondence between the agents of the parties, they got decree in absence. On this decree they raised ultimate diligence against Sinclair, who, in March 1822, paid the amount with additional expenses. In April 1823, Sinclair's agent applied to the agent for Wilson and Maclellan to transmit to him the grounds of debt and diligence, in order to endeavour to operate relief against the obligants on the bill. They were accordingly sent; and after being in the hands of Sinclair's agent for six months, he required an assignation from Wilson and Maclellan, with the view to institute an action. An assignation was accordingly granted to Sinclair of the debt, bill, protest, and diligence, containing a clause of warrandice expressed in these terms:—'Which 'assignation above written we bind and oblige ourselves, our heirs, exe-'cutors, and successors, for our respective rights in the premises afore-'said, to warrant to the said Duncan Sinclair and his foresaids from all 'facts and deeds done or to be done by us in prejudice hereof.'

By means of this assignation and the diligence, Sinclair recovered from Campbell, one of the indorsers, the greater part of the debt. Campbell having also required an assignation, he discovered, in the course of examining the documents, that the bill was vitiated in the date, and that the instrument of protest, instead of bearing that the bill had been protested on the 28th of November, stated that it had been protested on the 28th of July 1820, being only three days after it was granted. He therefore raised an action of reduction and repetition against Sinclair, who immediately intimated it to Wilson and Maclellan; and, after a considerable litigation, the Lord Ordinary decerned in terms of the libel.

No. 202.
Feb. 12. 1829.

Sinclair then brought an action of reduction, against Wilson and Maclellan, founding on the which he maintained imported an obligation on th of the consequences of the bill being vitiated, anc gence irregular.

The Lord Ordinary found, 'That whatever im 'spect to warrandice the defenders might origin 'taking decree against the pursuer, and compellin 'balance of their debt, with the expenses of dilig 'pursuer, by afterwards accepting from them an a 'and diligence with warrandice from fact and deed 'recourse to the extent of this species of warranc 'fects which have been found to render the gro 'gence invalid, have not arisen from the fact or d 'they are not liable in repetition; therefore s 'founded on the limited nature of the warrandice 'the defenders, but found no expenses due.' His time, issued the subjoined note.*

Both parties reclaimed — Sinclair on the mer Maclellan as to expenses; and the Court, having that there were grounds for subjecting Wilson and tion, but that they had not been stated in the plea recalled the interlocutor, and remitted the cause t to allow Sinclair to amend his pleas, and to do as s clair accordingly added the following plea:—'If a 'perly protested, and the protest has been recorded 'diligence thereon, and then assigns the bill, with t 'randice from fact and deed, he is liable to repeat t 'bill has been rendered irrecoverable, and the dilig 'test illegal, in consequence of the nullity of the pr 'larly is the assigner liable to repetition, and for all 'the assignee has been compelled to pay the debt 'means of ultimate diligence used upon a decree in 'not have been obtained if the true state of the fa 'to and set forth by the party against whom the de 'to whom the debt and diligence were afterwards 'ment.'

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* "The Lord Ordinary has found no expenses due, because he t case. He conceives that the messenger could not have been subj glect, had it appeared that the document of debt was vitiated, or that when the defenders compelled the pursuer, as his cautioner, t of the debt, with the expense of the diligence, they were bound to a diligence with absolute warrandice. When he incautiously, howev ation bearing the limited warrandice from fact and deed, the *Lord O.* in terms of the doctrine laid down by Mr. Erskine, b. ii. tit. 3. § 2 must be superseded by the express one."

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The Lord Ordinary then reported the question upon Cases to the Court.

Pleaded for the Pursuer.—1. An obligation of warrandice from fact and deed done or to be done imports, not merely that the party has done and shall not do any act to prevent the right being made effectual, but that the right or claim actually exists. This is the rule, even where the party to whom the assignation is granted is a voluntary purchaser, and must apply a fortiori to a case like the present, where the pursuer was compelled as a cautioner to pay the debt. But as the bill was a vitiated document, and the protest and consequent diligence irregular, no claim existed, or could be made effectual, against Campbell; and accordingly this has been so decided. 2. Independent, however, of the obligation to warrant debitum subesse, the case falls directly under the warrandice of the defenders. The instrument of protest was blundered; but it could easily have been rectified by the defenders getting a new one extended, containing the true date of protesting. Instead of doing so, they raised diligence upon that blundered protest, so that the whole diligence was inept. But the money was recovered from the pursuer, on the assumption that the messenger had failed to execute regular diligence, whereas the diligence was not regular, and this irregularity arose from the act and deed of the defenders themselves.

Pleaded for the Defenders.—It is not alleged that the defenders were aware of the vitiation of the bill, or of the blunder in the instrument of protest, when they granted the assignation. At that period these documents had been in the possession of the pursuer's agent for more than six months, so that the pursuer must be held to have been aware of the nature of them, and to have taken the assignation on that footing. Besides, a clause of warrandice from fact and deed does not import a responsibility for the legal validity of the steps of diligence, or for the consequences of any technical error or inconsistency. It merely imports that the granter shall do no act prejudicial to the right of the grantee, who takes upon himself all other hazards. But in this case no such act has been done by the defenders.

The Court, 'in respect of the vitiation of the bill, and the illegality 'of the protest, and diligence thereon, find the defenders Archibald 'Wilson, James Jameson, and John M'Lellan, conjunctly and severally, 'liable in repetition to the pursuer of the sum of £116: 4: 9, paid by 'the pursuer to the defenders, with interest thereof since 12th March '1822, and decern accordingly; remit to the Lord Ordinary to hear 'parties on the other conclusions of the libel for relief; and find ex-'penses due.'

Lord Balgray observed, that an obligation of warrandice from fact and deed necessarily imported that the subject assigned was in existence.

Lord Craigie stated that it was a warrandice against both acts of omission and commission—against acts done or to be done.

No. 202. Feb. 12. 1829.

LORD PRESIDENT.—Even in the case of sales, the thing sold and warranted must exist. But here there was no lawful diligence in existence; and so far from the messenger being liable for not executing it, he would have been liable in damages if he had done so.

LORD GILLIES concurred.

Pursuer's Authorities.—Riddel, Feb. 9. 1706, (16615); Ferrier, May 16. 1828, (ante, Vol. VI. No. 285. p. 818.)

Defenders' Authorities.—2. Ersk. 3. 27.; 1. Ross, 195; Craig, Jan. 1722, (16623), Dick, Dec. 14. 1678, (16603); Gordon, June 15. 1815, (as rev.)

A. CLASON, W.S.—H. MACQUEEN, W.S.—Agents.

No. 203.

POLLOCK'S REPRESENTATIVES, Pursuers.—*Murray—A. Wood.*
D. C. BUCHANAN, Defender.—*Jeffrey—Greenshields—Tait.*

Feb. 12. 1829. 2D DIVISION. Ld. Cringletie. T.

THIS was a branch of the accounting mentioned ante, Vol. II. No. 650, and Vol. IV. No. 30. The question here at issue was, whether, in a partnership between the late Mr. Buchanan and the late Mr. Pollock, the share of the latter was one third or one half? This depended entirely on the correspondence between the partners, one of whom resided in this country, and the other in America.

The Court, holding it to be clearly established that Pollock's share was only one third, decerned accordingly.

R. COWAN, W.S.—G. DUNDAS, W.S.—Agents.

No. 204.

A. MURDOCH, Suspender.—*D. of F. Moncreiff—J. Miller.*
A. FULLERTON, Charger.—*Jeffrey—Christison.*

Landlord and Tenant.—Tenant of a coal-field, though never previously worked, entitled to be liberated, on the ground of sterility; and the landlord held liable in the expense of a judicial survey, not having been satisfied with less expensive evidence of the exhaustion of the coal.

Feb. 12. 1829. 2D DIVISION. Ld. Mackenzie. R.

SUSPENSION by a tenant of a charge for rents of property let as a coal-field, but which had not been previously worked as such, on the ground of total exhaustion. The landlord refused to be satisfied by the evidence offered extrajudicially; and when the cause came into Court, the Lord Ordinary remitted to an experienced coal-surveyor in great practise, who, at a considerable charge, inspected the field, and reported, as his decided opinion, that the coal was so exhausted, 'that no area remains of the 'least value for working.' The Lord Ordinary accordingly suspended the charge for rents from the period when the coal became so exhausted, and found the tenant entitled to expenses.

The landlord reclaimed, and contended that at all events he ought not to be subjected in the expense of the inspection by the surveyor, as it was incumbent on the tenant, before getting free of his contract, to establish the fact of exhaustion; but to this it was answered, that the tenant

No. 205. Feb. 12. 1829.

and the suspender's predecessor a dispute arose i craig quarry; but this was settled by Lord Keith it; and accordingly the suspender's father and t continued to occupy it, and let it for a considerable

In the year 1825 an Act of Parliament was obtai bour of Stonehaven in certain trustees and commissi to construct such works as might be deemed nece ment, and with power for this purpose 'to open qu 'common in the said county of Kincardine, (not 'than one mile from the high water mark,) or wi 'on the shores of the said county, and to dig, g 'therefrom stones, gravel, sand, clay, furze, heath, 'terials necessary for constructing any of the work 'act, without making any compensation for the sam 'quarries, and to dig, gather, and take away ther 'sand, clay, furze, heath, rubbish, or other material 'in and out of any grounds, whether enclosed or 'ground whereupon any house stands, nor a gard 'walk, lawn, or avenue to any house, or any piece o 'apart or used as a nursery for trees previous to the 'where the said materials can most easily be found 'the said harbour, for the construction of the said w 'pense for the damage thereby occasioned in manne 'tioned.' The Harbour Commissioners having, un statute, claimed right to take stones from the Redc compensation, Sir Alexander Keith presented a bill c terdict, praying generally to have them prohibited ' 'and opening quarries in the suspender's said lands 'nottar, or any part thereof, more especially his said 'and from quarrying or carrying away stones or otl 'from, without making good to the said suspender, a 'said lands and quarry, all damage occasioned by th 'tions, and paying for stones or materials used or ta 'from.' This bill was passed to try the question; b refused, on an understanding that the Commission whatever stones were taken by them from the Redc event of their being found not entitled to quarry ther ation. In support of their claim, the Commissioner braes in which this quarry was situated were unencl proper common or waste, and that the inhabitants of ways been in use to take stones from the quarry i their private purposes, and for repairing the harbour. by the suspender that the quarry was situated withi the Commissioners were authorized to open quarries made to the Jury Court to have the other facts deter pender having then given in a minute, admitting 'tha

No. 205.
Feb. 12. 1828.

The Lord Ordinary suspended the letters sim observing in a note—'The feuars of Stonehaven 'to any thing but the pasturage of the braes. 'words of their contract of feu when stated wit 'been too much neglected. And then there seer 'the suspender has title and possession sufficient 'and the chargers seem to be strangers; for the 'pears not applicable to quarries existing as oper 'its date.'

The Commissioners thereupon reclaimed, and, b cable to the Redcraig quarry, contended that the far in suspending generally, as there might be part nottar where they would undoubtedly be entitled t pensation. The suspender admitted that the onl be discussed was with reference to the Redcraig qu concurring with the Lord Ordinary, refused the re Commissioners, on the understanding that the int Ordinary applied to the Redcraig quarry alone.

Lord Justice-Clerk.—I certainly did not look on th ference to any thing but the Redcraig quarry; and if it is the interlocutor to that, and when so restricted, I cannot I As to the alleged right of the feuars, it is clear that there of common pasturage given in the contract with the Earl I of property in the solum. Then it is clearly made out tha between two of the purchasers of the Marischal estates, Lo right he could claim, and no person now disputes Sir Ale sides, the Commissioners have no right from the feuars, eve The question then comes to be on the Act of Parliament. regulation of all such cases, that powers and privileges grar though for public purposes, when a question of private right construed. I therefore hold that the rule of strict interpreta and looking to the words here, I can see nothing giving a ri ing open quarry in the course of working. The only power power 'to open' quarries; and though I am not prepared to missioners might not open some other corner of the same ro ing known quarry, I think they are not entitled under the s from it without making compensation.

Lord Alloway.—My difficulty is entirely removed by t posed by your Lordship, for it is clear that under the act th not entitled to enter this open quarry, which is a valuable pr pensation. I fear, however, that this will not decide all the q parties; and I think it would be desirable to settle in this between them.

Lord Pitmilly.—All the facts necessary to decide the q ing here must be held to be fixed by the minute of admission on which the cause came here for decision. The admission is 'of pasturage conferred on the feuars by the grant of Lord M

No. 206. Feb. 13. 1829.

meeting was adjourned till the 27th of January, or resolved that a company should be formed of the st tract should be framed, and directors appointed, (w 'the subscribers failing to sign the contract wit 'shall be liable to have their names expunged by t 'company, and their shares otherwise applied, a 'think fit;' and that the shares should be transfer vided the first offer was made to the directors. Ma this meeting; and in the mean while he had assign William Tod, W. S. On the 29th the secretary requ an instalment of £1 per share, which he did. In O second instalment was made upon him, to which he the contract was ready, he declined to comply. prepared for some time thereafter. It contained sev were either at variance with those announced in the been there mentioned. In particular it was decla shares were to be permissible without limitation, and relieved from responsibility for the company debts instead of merely compressing gas, should also man coal, or any other substance; that it should be cor additional number of shares, and so increase the cap extent; that the partnership should endure for six not be dissolved, except by the consent of two thir assembled at two different meetings; that the Portal London should have a vote at the meeting of the c controlling the votes of two thirds of the directors pre the directors were to be relieved from responsibili allowed a certain remuneration; that they should ha on the business not only in Edinburgh, but also wit it, and to bestow upon the secretary and other offic they thought fit. This contract was never submitt meeting of the subscribers.

Matheson having been required to subscribe this to the secretary that he had assigned his shares to Mr 13th of September 1826, the secretary wrote to that this circumstance, and that the directors of the compar 'accept of the signatures of the present holders of st 'ginal subscribers;' and therefore requesting him to si a certain day, 'as after that period the contract will l 'would preclude your again signing, and cause a forfe 'you hold, with all sums paid thereon.' Mr. Tod trai to subscribe the contract in regard to certain other sha acquired, but stated that he did not intend to subsc those derived from Matheson, till he should have an o ing the secretary. After some other correspondence, h so.

No. 207. J. M. PEARCE and Others, Pursuers.—*Ske*
D. TURNER and Others, Defenders.—*D. of F.*

Mandate—Registry Acts.—Circumstances under which the ov liable for the account of a law agent, although they alleged that register.

Feb. 13. 1829.
1ST DIVISION.
Lord Meadowbank.

THE question in this case was, Whether the de the ship Hero of Ayr, had authorized or sanction the pursuers, English solicitors, in regard to an act debt due to the owners, and so liable in payment of

In defence they stated, That although they held yet they were not registered owners, and they denie

But the Court, on the report of the Lord Ord from the evidence that they were fully aware that t employed by the acting owner, that they had not ployment, and had, on the contrary, sanctioned it, a the case, the plea of not being registered owners was against them in terms of the libel.

BOWIE and CAMPBELL, W. S.—W. MERCER, W. S.-

No. 208. BANK of SCOTLAND and J. HAMILTON, W. S. Peti
Hope—Skene—Marshall.
OGILVY'S TRUSTEES, Respondents.—*D. of F. Mon*

Sequestration of Land Estate.—Adjudging creditors of an estate the purpose, inter alia, of paying debts, having brought a process of tained decree of mails and duties, entitled to have the estate sequest

Feb. 13. 1829.
2D DIVISION.
T.

THE late Mr. Ogilvy of Gairdoch, by trust-deed veyed his estate to trustees for payment of his debts residue of his lands on a certain series of heirs. The t and entered into possession; but the Bank of Scotland amount, having obtained decree of adjudication, bro ranking and sale. Having also obtained decree of ma Bank, along with Mr. Hamilton, W. S., common age presented a petition for sequestration. This was oppos but the Court, in consideration of the Bank having o mails and duties, granted the prayer of the petition.

J. HAMILTON, W. S.—TAIT and YOUNG, W. S.—Ag

No. 209. D. RITCHIE, Suspender.—*D. of F. Moncreiff*
J. LANG, Charger.—*Sol.-Gen. Hope—Gi*

Insurance—Registry Acts.—Circumstances in which a party not en register held liable to reimburse a part-owner who had effected insu premiums.

No. 209.
Feb. 13. 1829.

To this it was answered, that although regist
a party to recover as owner, the non-registration
to protect a party from a claim against him; ar
had acted as owner, and held himself out as s
authorized the charger to effect the insurances in
he was consequently liable, whether a registered
clear that he had an interest in the vessel from
death, and it not being necessary, to infer lia
employment, that the party should be a registere

The Judge Admiral appointed the suspender
ence of the manner in which he had disposed of t
for the share which had belonged to his son, and
them to his own behoof, or accounted for them
and, on his failure to give a satisfactory account of
against him. The suspender thereupon presente
which having been reported to the Court with ar
unanimously refused the bill, with expenses.

Lord Alloway.—This is a very unpleasant case,
wishing to found on abstract legal pleas to get rid of
admit that unless a party gives authority to insure, th
claim against him; and also that if he have no such
to insure, so that there could be no recovery, the same
if any party having such interest, though not a registe
rized insurances to be made, or expenses to be incurred,
the person who has acted on the faith of his authority,
to it. Now here, whether the suspender was acting as
own interest, or as an administrator for his children, it
insurance made by the charger, recovery might have bee
and as to the rest of the case, it is very clear. This
the profits on the vessel, and he settles accounts, chargi
the loss during Sharp's management as ship's-husban
succeeds, and acts in the same manner; and the suspend
the balance of an account in which premiums of ins
effected by Lang are charged. This is enough of itself.
he approved and acknowledged the insurances effected
ficient, and there are also others which I will not det
going into. Where parties are on the same spot, we ca
dence of correspondence; but, without that, there is clea
pender having authorized the insurances, and I therefore
Admiral's interlocutor should be adhered to. As to the
form, that the summons is libelled against the suspender
called himself so in the other action, the charger was enti

The other Judges agreed.

H. Gordon, W. S.—R. Wells, S. S. C.—Agen

No. 211.
Feb. 14. 1829.

'of, and found that, in the division, no part of t
'letter B. on the plan ought to be allotted to Mr.
'separated or divided, or any portion thereof take
'remitted to the Sheriff to proceed on the above

Advocator's Authorities.—Hall, Dec. 7. 1774, (14141); Mo Gray, Jan. 17. 1782, (14151.)

Respondent's Authorities.—3. Erak. 3, 59; Her. of Inve Russel, Jan. 25. 1774, (14144); Chalmers, July 29. 1756, (104 (No. 2. Ap. Runrig.)

J. Wemyss, W. S.—W. and A. G. Ellis, W.

No. 212.

J. Pedie, W. S. Pursuer.—*Skene*—
J. Finlayson, Defender.—*Jameson*—

Feb. 14. 1829.
2d Division.
Ld. Cringletie.
R.

Action for implement of an obligation in specia Lord Ordinary and Court decerned, under a que by the pursuer.

J. Pedie, W. S.—J. Macdonell, W. S.—A

No. 213.

Officers of Ordnance, Pursuers.—*Sol.-Ge*
Heritors and Kirk-Session of North Leith, D
Monoreiff—*Cockburn.*

Poor—Assessment—King's Property.—King's property acquire cupied as a military fort, liable to be assessed for poor's rate at a r cupied ground in the vicinity for the time, and neither at the ren quired by the Crown on the one hand, nor an estimated rent, as if building, on the other.

Feb. 14. 1829.
2d Division.
Ld. Cringletie.
F.

After the cause mentioned ante, Vol. IV. No. turned to the Lord Ordinary, his Lordship appoin and answers as to the rental on which the ground Fort was to be assessed for poor's rates. Condescen were accordingly given in, containing the averments c value of ground in the neighbourhood at the time were acquired by Government in 1780, and at the their pleas in law, the Officers of Ordnance conten should be taken as it was when the property was acq ment; while, on the other hand, the Heritors and K tained that the ground must be valued as if it had be dwelling-houses or the like, which they alleged wou case, had it not been appropriated to the erection of a f

The Lord Ordinary reported the question on Cases, nion in the subjoined note.*

* "The Lord Ordinary heard parties fully at the bar yesterday. It i Court that the ground belonging to the fort is to be taxed, and bear

No. 213. Feb. 14. 1829.

should be estimated at £20 per acre, being som
of vacant ground in the immediate vicinity; t
cepted of by the Heritors and Kirk-session, t
following interlocutor:—'Find that the groui
'Leith Fort is built, is liable to be taxed for
'manner that it would have been, if it had con
'of a subject; but that, in estimating its valu
'pose the assessment, the meliorations thereo
'works for the public service, cannot be broug
'Of consent, find that the extent of the said
'roods and fourteen and a half falls, which, at
'per acre, is worth at present £111: 16: 3 o
'be assessed, and to that extent decern and
'quoad ultra, assoilzie the defenders; but finc
'expenses.'

J. and C. Nairne, W. S.—A. Douglas, 1

No. 214. Marquis of Queensberry, Suspender.—*D. g*
Rev. T. Gibson, Charger.—*Murr*

Jurisdiction—Presbytery—Glebe.—A Presbytery has no
tion as to whether the incumbent of a parish is entitled to c
at one time glebe, but which has for a considerable time pr
prietor of the surrounding lands as part of his estate.

Feb. 14. 1829. 2d Division. Ld. Mackenzie. R.

In 1826, the Reverend Mr. Gibson, minist
maben, presented a petition to the Presbyte
forth that he was only in possession of two acr
two acres lying at Rockhallhead, about four
the manse, formerly possessed as the remainde
quently to 1776, been lost sight of by being b
ing farm belonging to the Marquis of Queensb
and had for a considerable period of years bee
the Presbytery to take the petition 'into their
'ceed thereon to complete the glebe of Loch
'Presbytery shall judge right, either by desig
'two acres or thereby of land at Rockhallhea
'such other proceeding as shall seem to them
'of the case.'

Appearance was made for the Marquis of
ed to the jurisdiction of the Presbytery;
ceed, and having examined witnesses adduc
pronounced the following judgment:—'The
'do find that they are satisfied with the proo
'ward and the marches shown, and therefore
'the same; and, in conformity therewith, t

No. 214. Feb. 14. 1829.

pend simpliciter, reserving to the minister to bring an a it would be very wrong to countenance his plea. Such brought before Civil Courts.

LORD JUSTICE-CLERK.—This is clearly not a design incompetent before the Presbytery. The proceedings and we must throw the suspension out of Court, to di gularities.

LORD ALLOWAY.—I entirely agree.

THE COURT accordingly suspended the letters si reserving to the minister to bring a proper acti

WALKER, RICHARDSON, and MELVILLE, W. S.—P. Cou

No. 215.

P. BORTHWICK, (GRANT'S TRUSTEE,) Sus MARGARET URQUHART or GRANT, Charger.- *Thomson.*

Husband and Wife — Poinding — Assignation Retenta Poss the instance of a married woman, for a debt due to herself with sustained, he having subsequently concurred;—and,—2.—An as to a trustee for behoof of creditors, with an inventory of them, effects as the property of the debtor, he having been allowed to sion of them.

Feb. 17. 1829. 1ST DIVISION. Ld. Corehouse. H.

THOMAS URQUHART bequeathed £300 to the which John Peter Grant, Esq. of Rothiemurchu cutor. For this sum he gave her a bill, after whic Grant. Thereafter Mr. J. P. Grant obtained in the multiplepoinding; and having paid the hu a bond for £200, binding himself 'to repay and 'garet Urquhart, for her liferent, during all t 'and after her death to the child or children 'body in fee, but expressly secluding the jus m 'nistration of the said Alexander Grant, her hus declared that the money should belong to her as be discharged only upon her receipt. In 182 trust-assignation of his whole effects, 'including 'tures and library, cattle, sheep, horses, and s 'favour of the suspender Mr. Borthwick, for An inventory of these effects at the Doune was allowed to remain in possession of them. The the trust; and in November 1826 she raised own name, and without the concurrence of her poinded the crop and stocking at the Doun brought a suspension and interdict, during the husband intimated his concurrence in the dilig

Mr. Borthwick, however, contended,

1. That as the diligence was raised at the in

No. 216.
Feb. 17. 1829.
1st Division.
Lord Meadowbank.
S.

Andrew Bruce having, in 1694, as heritor a lands in Shetland, granted a bond to William M which contained a precept of sasine, but no dispos infeftment was taken; and it being alleged still t competition having arisen for it between the heir a a summons of multiplepoinding was raised in nan as the representative of Bruce, with consent of Joh She was a minor with several other curators, who consenters, and one of whom was a sine quo non. to Miss Robertson and Mr. Ross in terms of the It was then objected by Miss Robertson that the the ground that the libel neither bore to be rais of, nor had it been intimated to all or a quorum of ance, however, was made by the curators; and the the case to the Court upon the objection stated had 'been raised and executed in the name of Mi 'sent of John Ross of West Sandwick, her cura 'one of her curators, in place of being brought 'consent of the whole of her curators, or a quo 'that the said summons was not intimated to th 'but only to the said John Ross as one of their

When the case came to be advised, on the rep Fullerton, it was stated that Miss Robertson hac married, and therefore no proceedings could take was called. But the Court, after hearing coun and the report of the Lord Probationer, expres currence with that of his Lordship) that the founded; that a party raising a summons of mul another could not be required to state (contr summons was raised with consent of the guardi suer, especially as the summons, so far as it go ing in the minor's favour, viz. to obtain relief f if the curators had not appeared voluntarily, necessary to have ordered intimation still to be this was unnecessary, as the curators had appea

The Court sisted process till the husband sho

Robertson's Authorities.—Dalgleish, Feb. 18. 1752, (21 (F. C.); M'Turk, Feb. 7. 1814, (F. C.)

Niven's Authorities.—Robertson, Nov. 1787, (2184); Bi quhart, March 6. 1639, (840); Burgesses of Glasgow, Mar 1628, (2181); Fernie, Feb. 20. 1624, (2180); Lockhart, No

Dickson and Stewart, W. S.—T. Ranken,

J. GLASSFORD, Pursuer.—*Forsyth—Fullerton—Skene—Riddell.* No. 217.
MRS. HAY MACKENZIE and J. HAY MACKENZIE, Defenders.—
D. of F. Moncreiff—Jeffrey—Murray—Walker.

Prescription—Attainder—Entail.—An heir in possession of an entailed estate having, along with his eldest son, been attainted for accession to the rebellion in 1745; and the estate having been forfeited and annexed to the Crown under the Vesting and Annexing Acts; and a claim for it, after his death, having been made by his second son, (who was called to the succession under the same substitution with his father,) but not for any heirs under any of the other substitutions; and this claim having been dismissed; and the estate having afterwards been restored to the eldest son, his heirs and assignees, in virtue of an Act of Parliament, which, as well as the charter following thereon, referred to the Vesting and Annexing Acts, and mentioned the lands conveyed in the charter as having been forfeited &c. according to these statutes; and the eldest son having been thereupon infeft, and having executed a new entail differing in some of the substitutions from that existing prior to the forfeiture; and having thereafter died, whereby the substitution in the original entail, under which his father held the estate, failed; and forty years unchallenged possession having followed from the date of infeftment on the charter of restoration, but not from the date of the failure of the substitution, before a reduction of the new entail was brought by the substitute who would have succeeded under the original entail—Held,—1.—That the rights of the substitute heirs were lost by no claim having been made for them within six months, in terms of the Vesting Act. —2.—That the charter of restoration and sasine thereon formed a good title on which to prescribe an absolute right to the estate;—and,—3.—That prescriptive possession began to run from the sasine on that charter, and not from the failure of the substitution under the original entail.

Feb. 17. 1829.

2D DIVISION. Lord Newton. F.

BY the 20th Geo. II. c. 41, commonly called the Vesting Act, the estates, real and personal, of all persons attainted or to be attainted of treason between the 24th June 1745 and 24th June 1748 were declared to be forfeited to and vested in his Majesty. A register of the forfeited estates was directed to be kept; and 'that no person or persons whatsoever having any estate, right, title, or interest, in law or equity, in, to, or out of any of the forfeited or forfeitable estates, and previously, may be in any respect prejudiced by this act,' it was enacted, 'that all and every person and persons whatsoever, bodies politic and corporate, (other than and except all such forfeiting persons as aforesaid, and the heirs, executors, administrators, and assigns of every of them, and all and every person and persons having or claiming any thing in the premises, or any part thereof, to the use of or in trust for any such forfeiting persons, or their or any of their heirs, executors, or administrators,) having any estate, right, title, interest, use, trust, possession, reversion, remainder, office, annuity, service, rent, debt, benefit, charge, or encumbrance whatsoever, in law or equity, in, to, or out of, or upon any castles, honours, manors, messuages, lands, tenements, rents or hereditaments whatsoever, or to any real or personal estate, or any others the premises whatsoever, herein before or otherwise vested in his Majesty by or under any settlement, conveyance, judgment, statute, recognisance, extent, or other debt, charge, or encumbrance affecting or which was binding on the forfeiting persons, and might have affected the same

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'estate before the respective days and times whereo
'in his Majesty as aforesaid; and also all and ever
'bodies politic and corporate, pretending to have
'estate which shall have been seised and surveyed l
'behoof of his Majesty, and who shall pretend tha
'attainted since the 24th day of June 1745, and b
'June 1748, for high treason, was seised, or posse
'in, or entitled unto such estate in his, her, or t
'his, her, or their own use, nor any other perso
'any of them, on the said 24th day of June 1745,
'or that they have right or title to such estate, sha
'three months, to be reckoned from and after the
'shall be made in the register-book in the Exch
'estate, and, in case of real estates, within six mon
'register to be kept in the county or stewartry wh
'manner herein before directed, of his estate, or in
'which such claims and demands are to be made
'their respective claims and demands before the C
'land, in such manner as is herein after mentioned;
'every such estate, title, interest, use, possession,
'office, annuity, service, rent, debt, charge, or en
'of, or upon the said premises, or any part thereof
'by declared to be null and void to all intents and
'and the estate or estates so, as aforesaid, liable
'with, shall from thence be freed, acquitted, and d
'the same.'

Among the persons concerned in the rebellion third Earl of Cromarty, and his son John, Master called Lord Macleod. The Earl held the estate entail executed in 1714 by his grandfather Geo by the estates were destined to the entailer's gr Earl) as institute, and his heirs-male; whom f other grandsons, and their heirs-male seriatim; own second and third sons, and any other sons to b heirs-male; whom failing, to any heir to be named eldest daughter or heir-female, without division, of heirs-male of their bodies respectively; and whom female of the several substitutes previously called, their bodies respectively. In consequence of their lion, George third Earl, who had made up titles a entail, and John Lord Macleod, his eldest son, we period mentioned in the Vesting Act; and by th Geo. II.) it was declared, that the 'lands &c. whi 'his Majesty by the attainder of the several perso 'treason, and which were vested in his Majesty b 'act of the 20th year of his reign—that is to say

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of Lords; and, on the 17th of December 1751, this interlocutor:—'The Lords find that the lan 'were forfeited by the treason, conviction, and 'late Earl of Cromarty, not only for his own 'existence of heirs-male of his body who migl 'these lands and estate of Cromarty in case th 'not been attainted; and therefore they dismiss 'George Mackenzie, the claimant, and find that 'in hoc statu, to determine whether the estate w 'prejudice of the collateral substitutes in the enta 'entered by any of those substitutes; and decern

A petition against this judgment was given in, the interlocutor adhered to. The record could n the actual terms of the judgment of adherence; t of the Judges (Woodhall) there was written this 'serving to the other substitutes to *agé* as acc 'shall open;' while the report by Elchies bears, 'Mackenzie's claim simply; and as there had be 'Captain Mackenzie (Roderick,) we found that 'the rights of the remoter substitutes, for whom 'sented in their names; reserving to them to be 'sion should open to them, though we also thou 'liament alone could relieve them.'

Besides this claim on the part of George Ma of the attainted Earl gave in claims for payme the forfeited estate. These were resisted by th that the estate had been vested in his Majesty, of the Earl, protected by the clauses in the enta debt; but the Court, 'in respect that by the a 'of Cromarty, his estate, now vested in the Crow 'of all limitations, substitutions, and remainder 'tent to the Crown to found upon clauses pro 'solutive, which are intended for the benefit of 'only;' and they therefore sustained the claim sum of £19,010; Creditors of Cromarty, Feb.

Some time thereafter John Lord Macleod, e Earl, and who had himself been attainted, havi abroad, and having subsequently entered the pardon; and by the 24th Geo. III. c. 27. 'it shall and may be lawful to his Majes 'sors, to give, grant, and dispone to the 'enzie, commonly called Lord Macleod, eldes 'of Cromarty, and his heirs and assigns, all 'ships, baronies, tithes, patronages, fishings, 'which became forfeited to his said late Maje 'said George late Earl of Cromarty now dec

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'nuper Domini Regis supra recitatum, et quæ ex
'ab imperiali corona hujus imperii per aliud actu
'tum, anno vigesimo quarto regni nostri, in tam
'quam nos, virtute potestatum in supra recit
'quarto regni nostri collaturam, easd. dare et
'particulariter absque prejudicio generalitatis
'confirmatione et explanatione ejusd., accumul
And the charter further contains a specific desc
with their manner of holding.

On this charter Lord Macleod was infeft on th
and his infeftment recorded on the 29th of Marc
of May thereafter he executed a deed of entail c
in favour of a certain series of heirs, different fr
entail of 1714, particularly in so far as it calle
body of Lady Isabella Mackenzie (Lady Elib
Earl George, the institute in the entail, and si
preference to the heirs-male of the body of th
first called by the entail of 1714. Lord Macle
1789, when the estate devolved on his cousin
heir first called in both entails. On his death h
Elibank, who was likewise next in succession un
having died without issue-male, was succeeded
fender Mrs. Hay Mackenzie, who made up titl
and thereafter conveyed part of the estate to the
son, as the next heir of entail.

In the month of April 1826, a few weeks aft
from the infeftment of Lord Macleod on the
pursuer Mr. Glassford, only son of Lady
younger daughter of the attainted Earl, and a
the entail of 1714 in preference to the daug
Lady Elibank, executed a summons against
her son, concluding for reduction of the ent
subsequently made up under it, and to have
he had the legal right and title to the estate of

The ground of reduction was, that (accordi
case of Park) all which was vested in the Cro
Earl of Cromarty was the estate during the
particular substitution under which the Earl
which substitution by the death of Lord
issue, the right of the other substitutes in the
operation; and that Lord Macleod, holding
under the charter of restoration, could not ex
the prejudice of these substitutes.

The defenders produced their title as a ti
preliminary defences, pleading, inter alia—

1. (Being the second defence in order)—'

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'in 1785, and the infeftment thereon in 1786 in favour of Lord Mac-
'leod and his heirs and assigns, constitute a complete title to exclude
'the present action. In consequence of that infeftment, taken upwards
'of 40 years prior to the date of the present action, any right of chal-
'lenge which might have been otherwise competent to the pursuer as a
'substitute under the entail of 1714, is cut off by the negative prescrip-
'tion; while, on the other hand, the right of Lord Macleod, and of the
'defenders, who are the heirs of entail called by him, is protected by the
'positive prescription.'

2. (Being the fourth in order.)—'Independently of the said charter
'and infeftment, any claim or right in remainder which may have ever
'been competent to the pursuer or his predecessors, was entirely cut off
'by the 22d section of the statute 20th Geo. II. c. 21. above quoted,
'no claim in terms of that section, having ever been made by the pur-
'suer or his predecessors.'

The Lord Ordinary having heard parties, ordered Cases to himself.

Pleaded for the Pursuer—

1. Agreeably to the decision in the case of Park, the Crown was vested with no other estate than a right to the lands of Cromarty during the existence of the attainted Earl, and the several heirs of entail entitled to succeed under the same substitution, viz. the heirs-male of his own body. This being the only estate vested in his Majesty by the 20th Geo. II., or annexed to the Crown by the 25th Geo. II., nothing but this was or could be conveyed to Lord Macleod in virtue of the 24th Geo. III.; and though it was granted to Lord Macleod's heirs and assigns generally, and might have been assigned by him to any one, still it was a right determinable on the failure of heirs-male of the body of the attainted Earl, and accordingly did come to an end by the death of Lord Macleod without issue in 1789, when the right of the heirs under the other substitutions in the entail of 1714, which right could not be affected by the attainder, came into operation. Then as the Act of Restoration, and the charter following thereon, bore express reference to the Vesting and Annexing Acts, and as the charter only conveyed to Lord Macleod the estate which had been vested in and annexed to the Crown by these statutes,—viz. the right to the lands during the existence of heirs-male of the attainted Earl,—the titles made up by Lord Macleod could never form a foundation for prescribing an absolute right of property in the lands, such right being contrary to that conveyed ex facie of the titles themselves, which limited the estate conveyed to a right during the existence of heirs under that substitution which included the forfeiting Earl.

2. Supposing the charter and sasine of Lord Macleod in 1786 to form a sufficient title on which to prescribe, prescriptive possession, as against the heirs in the other substitutions of the entail of 1714, could not begin to run till the death of Lord Macleod in 1789, which was within 40 years of the raising of this action; for, until that event, the right of the other heirs did not emerge,—the estate forfeited to the Crown, and conveyed

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to Lord Macleod, continuing to subsist till that ev a possession counter to the right of these heirs such counter possession commenced, they were i titulo *to* make a challenge; and,

3. With reference to the right of the substitu quence of no claim having been lodged within the exception in the Vesting Act:—The rights r to preserve which a claim was necessary, were o burdens on or affected the estate forfeited to the (which did not interfere with the estate forfeited t after the expiry of the Crown's right, there was claim in order to preserve these, which the forfeit therefore, the right of the substitutes was a on the determination of the estate vested in the (the attainted Earl's issue-male, and was not can any way affected by the forfeiture, it was unnece in order to preserve it when it should open; an when they dismissed the claim of George Macke issue-male of the attainted Earl,) reserved the other substitutions when such right should ope such a reservation was also recognised in the Park. But, besides, the claim for George Mac andum subjoined, was sufficient to preserve the heirs when their right should open, although himself, who could only have taken under the s attainted Earl.

Pleaded for the Defender—

1. The charter of restoration expressly c selves, without any reference to the entail 1714 tion that the estate in the Crown was only a r of heirs under the same substitution with th was nevertheless validated by the forty years lowed thereon; and the narration of the Vesti contained in the charter, could not qualify or conveyance of the lands themselves specially d principles of the law of prescription which h effect to, and particularly in the late and very of Callander v. Livingstone, (ante, Vol. VI. N

2. The charter of restoration being a dire of Cromarty to Lord Macleod and his heirs the first, a title of possession counter to the entail, therefore, were called upon to insti institute their challenge from the moment but they not having done so, and having all to follow on that title, this was sufficient to opposition to any claim under the entail 1714

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LORD JUSTICE-CLERK.—I agree with the Lor
The Vesting Act provides that all the forfeited estate
his Majesty, if no claims be entered within the tin
scribed, and declares that, in default of such claims,
be void, and the estate freed and discharged thereof.

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nature affecting the estates, which were by the act vested in t
were entailed, it was rendered essential to the preservation
that a claim should be entered for them in the Court of Session
by the act. It is true, a claim was made for George Mack
feiting person; but this was dismissed by the Court, who wer
previous judgment of the House of Lords in the case of Pa
have no right. Captain Mackenzie, a collateral substitute,
not apply, did, no doubt, make appearance in the proceeding
but it appears from the account which Lord Elchies gives of
it incompetent to enter into this case, in respect that the
alone, and that none had been entered for the collateral sub
the six months had been allowed to elapse, and that Captain
enter a claim for himself, attempted, as the only thing poss
which had been made for George Mackenzie. That the r
was extinguished by their failure to claim, seems to have be
the subsequent proceedings on the claims of the creditors, wh
notwithstanding of the entail; which would, if subsisting, h
ground, that as the right of the whole substitutes was cut o
it had been held in fee-simple by the forfeiting person. It
dinary that any inference can be fairly drawn from the terms
in support of the right of the substitutes under the entail in

"As to the title to exclude, the pursuer endeavours to e
by assuming that it does not convey the absolute property
to them as the Crown might happen to have. But there se
such assumption. The charter does not convey such right
veys the lands and baronies, both property and superiorit
the granter, his heirs and assignees. It is no doubt said, a
that they had been forfeited by the attainder of the Earl o
cessarily prove that the Crown's right was not absolute; ar
be held to qualify and limit the absolute nature of the grant
is made to the act of the 24th of Geo. III. cap. 57. have
assumes that this act does give power to make the grant
though this should not have actually been the case, it is not c
has run, to question the powers of the granter, where the d
itself. The late decision of the Court in the case of the
Cunninghame, 30th November 1826, seems precisely in p
scriptive title unsuccessfully made there was, that the ch
stituting the right of the granter, while it is clear from th
no such right.

"It is further maintained by the pursuer, that as the
feiture, so long as there existed heirs-male of the body of t
upon their failure, the substitutes were not valentes ager
1789, since which time the negative prescription has not b
right of the substitutes to be still in existence, the Lord O
held to have been extinguished for any period. The savir
supposes that it is to remain unaffected by the forfeiture.
right alone that that of the Crown should be limited; a
grant the lands to Lord Macleod in fee-simple, in prejudi
The substitutes must therefore have been, from the first,
veyance; and the negative prescription must, equally wi
29th of March 1786, the date of recording the infeftment

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pleaded the neglect to claim against the substitute heirs, it *could* have done so; but being perfectly satisfied on clude, it is unnecessary to go into that.

LORD PITMILLY.—I have seen no reason to doubt Lord Ordinary is right on both points; and I concu been stated by your Lordship, that it is unnecessary into the case. I shall only say, that I think the Lord Ordinary affords a sufficient defence against t second, as to the prescriptive title, I cannot entertain would indeed be a most dangerous thing for the doubt could be entertained on a question of this kind attended with more difficulty, but on it I incline also dinary.

LORD ALLOWAY.—I also agree with your Lordsh first, as to the failure to lodge a claim, to be of very though on it I cannot entertain a doubt. It was d stances, in 1751, in 1752, and again in 1762, when ing Act, and it was found that the heirs of entail h Although, therefore, I had not agreed with the would have held the question excluded by these jud also quite sufficient for the decision of the case, and your Lordships.

THE COURT accordingly adhered to the interl

J. G. HOPKIRK, W. S.—WALKER, RICHARDSON, and

No. 218.

A. ORR, Advocator.—*I*
M. MORISON, Respondent.—

Feb. 17. 1829.

2D DIVISION.
Lord Medwyn.
R.

VARIATION of an interlocutor of the Lord instructed to be granted under a remit in a p

CARNEGY and SHEPHERD, W. S.

No. 219.

J. BERTRAM, Advocator.—
ISOBEL STEEL, Respondent.

Semiplena Probatio—Oath in Supplement—Bastard.—(stitute semiplena probatio, and to allow the oath in supp child.

Feb. 10. 1829.

1ST DIVISION.
Ld. Corehouse.
S.

THE respondent Steel was a servant wit Bertram, a joiner at Prestonhaugh, from V mas 1826; and, on the 5th of April 1827, She then brought an action of aliment befor against Bertram as the father of the childr mined, he stated that he and his father sl another, in the same apartment; that his f on which occasions he slept in his own bed,

No. 220.
Feb. 19. 1829.

'power to the said Robert Kennedy and his fores
'failure in the yearly payments after specified, t
'possess the said lands &c., and also to use the
'manner, and as freely in all respects, as I might
'making this assignation:'—'Providing and de
'hereby expressly provided and declared, that
'written is, by acceptation hereof, granted with a
'I or my foresaids shall be entitled to redeem tl
'of the said sums to the said Robert Kennedy
'the 1st day of September yearly, with the leg
'money advanced, until the whole money is p
'and failing the due and punctual payment t
'Kennedy is entitled, and is hereby empowere
'by public roup and sale the said lease, and to
'foresaids for the surplus, after paying off and
'him, and paying all expenses that may be i
'same to sale in the way mentioned; and also
'ment to the said Robert Kennedy or his fore
'expenses, he is by acceptation bound and obl
'sign the said lease; and having herewith deli
'bert Kennedy my duplicate of the said tack,
'him as his own proper evident in time comin
'tration,' &c. This assignation was notorially i
factor on the 29th of August 1816; but no e
was made in the rental-books, and Corson cont
as before.

On the 27th of September following, Corso
creditors, and declared his insolvency; and o
executed a trust-deed, for behoof of his creditc
ders Forsyth and others, whereby he specially a
the farm of Cashogle. This assignation was
trustees thereafter entered into possession of tl
They further exposed a right of sublease at a
pursuer Kennedy attended and offered; but a
this latter was preferred, and obtained a subl
cordingly, in virtue of which he entered into p
trustees having refused to recognise the right
the £100 per annum stipulated in the deed
favour, he raised the present action, concludir
had the preferable right to the lease, and wa
the farm; or at least (by an amendment o
preferable creditor over the lease to the ext
his assignation, payable by instalments of £
ber yearly.

The Lord Ordinary at first found that tl
demand from the defenders payment of £10

No. 220.

Feb. 19. 1829.

LORD ALLOWAY.—This man admits his right wi session; and he attends the roup where the right o trustees, and offers for it. It is impossible to pref right.

LORD GLENLEE.—This is the worst case of the

LORD PITMILLY.—It is by far the worst of the specialties, that the general question does not aris

LORD JUSTICE-CLERK.—I am clearly of the sa

J. PEDIE, W. S.—J. IRVING, W. S.

No. 221.

J. KER and H. JOHNSTON, (for the LEITH *Jameson—Anderson*

A. SCOT, Respondent.—*R*

Bankrupt—Sequestration.—Held not sufficient to prev under the Bankrupt Act, that the debtor had appealed aga taining the diligence on which he had been rendered bankr

Feb. 20. 1829.

1ST DIVISION.

D.

THE petitioners having applied, on the 20th tration of the estates of Scot under the Bankr was bankrupt, and a record was prepared a Ordinary in the Bill-Chamber during vacatio

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"In the present case, the assignment to the pursuer K giving him possession at all, except in the event of certa paid at a distant period from the date of the assignation could not be given nor assumed, because it was never inte ally; and as a consequence of this, no right to possess su by the assignee. The former's right to possess was his le became bankrupt, when he conveyed both his lease and fenders, who assumed possession, and subset the subject t pursuer.

"It is true that the pursuer intimated his assignment t such intimation did not alter the nature of the assignation the pursuer's name as tenant to the Duke of Buccleuch; was not entitled (except under conditions which might ne appears to the Lord Ordinary that the rights arising from and the assignation of one already granted, depend on give a lease to A. B., declaring his entry to be at Lamm subject to C. D., with entry at Whitsunday preceding, a obtains possession, he is, beyond all doubt, preferable to Lord Ordinary this appears to govern this case. Corson a deed, dated 8th May 1816, in which it was declared th sion, if the cedent did not pay £100 on the 1st of Septen was to be made, does not appear; nor whether that sum that year. Probably it was; for certain it is, that the pu or indirectly, or symbolically; and in October of same conveyed his lease to the defenders, as already mention sublet the farm. In the case of Brock, the Lord Ordina had taken possession, though it was not corporeal; but h before another right was completed. The Lord Ordinary the view he formerly took of the case was mistaken, and and delay have been occasioned to the parties."

No. 221.
Feb. 20. 1829.

Robertson.—But the question would still be debt be due?

Lord Gillies.—The statute is quite explicit, 'not instantly pay or produce written evidence of 'satisfied, upon which the diligence proceeded, a 'debt or debts due to the petitioner or petitione 'ditor or creditors, who may have appeared anc 'cation, or show other reasonable cause why the 'proceed further, the Court shall immediately aw debtor must therefore either show that he has respondent has not done, or show other reasonab is not a sufficient cause for stopping the sequestr

The other Judges having concurred, the Cour

Petitioners' Authorities.—E. of Hopetoun, Nov. 9. 1715, (1 (1114); 2. Bell, 318. (5th edit.)

Bisset and Morrison, S. S. C.—T. Small, W

No. 222.

Misses Stewart, Pursuers.—*Jameson*
J. Stewart, Compearer.—*Jeffrey*

Title to Appear.—Held that a party who alleged that he h on which another had raised an action against the debtor, v prevent decree passing against the debtor; but his rights rese

Feb. 20. 1829.
1st Division.
Ld. Corehouse.
S.

The pursuers Misses Stewart raised an acti Menzies for payment of £200, founding upo to their deceased mother, blank indorsed by alleged they had right. No appearance was but James Stewart, the brother of the pursue right to the obligation, and that he had brough of the indorsation, and also for payment again and lodged defences, to prevent decree being pro pursuers. To his appearance the pursuers obj terest to prevent decree being pronounced a accordingly the Lord Ordinary found that 'th 'no interest to appear and defend in the present in expenses, and decerned in absence against the

Stewart having reclaimed,

Jeffrey maintained that as he claimed right to fest interest to prevent the pursuers from recove

Lord Balgray.—But you have no right t against the proper debtors. If they do not ch you do so? It will not affect the interest of you

Jameson for the Pursuers.—The Lord Ordi has 'no interest to appear and defend,' because him.

Lord Gillies.—The decree will be, quoad

No. 223.
Feb. 20. 1829.

The cause was accordingly retransmitted to tl
it was contended for the pursuer, that the us
a period within the years of prescription, been
road and foot road, it could not be extended t
vitude, viz. a cart and carriage road, whatever
place in the mode of carrying goods ordinarily
country; while the defenders maintained, tha
been used for the carriage of goods according
the time, when that mode changed from conv
veyance by carts and carriages, they were ent
lege in the mode used for that purpose; but, b
ing been remitted on a minute taken as admitti
road, the principles regulating servitudes did
were always entitled to use the roads pertaini
most beneficial for themselves.

The Lord Ordinary assoilzied the defenders,
subjoined note;* and the Court unanimously
Lord Ordinary, however, to hear as to fixing t
somewhat indefinite.

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* "The Lord Ordinary heard parties yesterday at the bar
cess. The facts must be held to be established by the ad
and answers, which are tantamount to a special verdict of
the road in question had been used, without 'interruption, a
fenders, and as a communication with the roads leading to t
a period of forty years; but he denied that it had been u
cart or carriage road for a period of forty years, although he
used by the defenders, without interruption, as a cart or car
of carts about thirty years ago into that part of the country.

"The admission that this road had been used as a hors
been used either as a public or private road for carts, certai
as a public road for horses, and also for carts since the int
of the country; and accordingly the admission was so unde
swered that they would have proved the road in question '
and carriage, as well as a public horse and foot communica
it is admitted by General Forbes that it had so existed as
cation road, without interruption, for time immemorial, an
November 1825, the commencement of the present action,
road ever since the introduction of carts,' they, the defen
proof, and rest on this admission.

"Here the defenders distinctly announced to the pursuer
admitted the road to have been not a private servitude, but a p
years, and a public cart road since the introduction of ca
to admit the public nature of the road, he ought to have in
had mistaken his meaning, and thereby put it in their power
But he made no objections whatever to the construction whi
therefore the Lord Ordinary holds that the road in question
the years of prescription, and a public cart road since carts
matters, it can be in no other situation than were the whole
carts were introduced, which the Lord Ordinary imagines is
lieves that people carried commodities from one place to an
horses; yet it was never heard of that men were stopped
grounds a public road conducted, because they were using

No. 224. A. and R. MILLER, Suspenders.—*D. of F. M*
G. BLAIKIE, Charger.—*Forsyth*—

Writ.—Found that it is not an objection under the act 1681, c of a deed it was not set forth that the parties had subscribed merely that the deed had been 'written' in presence of the witnes it was not denied that the subscription of parties was of a differe

Feb. 20. 1829.
2D DIVISION.
Ld. Cringletie.
F.

THIS was a suspension by Andrew Miller, appre watchmaker in Musselburgh, of a charge on an inde given in consequence of desertion of service, on t that the indenture was not probative or duly te which was written by the apprentice himself, bor Miller as his cautioner, became bound under a pen charger Blaikie for five years from 'the 19th day of and the testing clause was in these terms:—'In 'presents are written on these and the two prec 'paper by Andrew Miller, the within-designed a 'and year of God respectively above written, befo The witnesses were specially designed, and the d parties and the witnesses named, one of whom onl to his name the word 'witness.' The apprentice l left his service, he was charged to implement the i tioner was in like manner charged to make pa They thereupon presented a bill of suspension, Lord Alloway. The letters having been expede, th that the indenture could not be the ground of sus testing clause did not bear it to have been 'subsc but only to have been 'written' before witnes averred, and offered to prove by the charger's o was not signed till the month of June 1822; and denied by the charger.

The Lord Ordinary, 'in respect that by the 'quisite that the attesting clause shall contain the 'has been subscribed by the parties, and that the 'tested by witnesses designed in said clause sup 'narrative that it was subscribed,' repelled the re found the letters orderly proceeded.

The suspenders reclaimed.

Dean of Faculty in support of the reclaiming n Ordinary were right on the point which he has s terlocutor goes too far in finding the letters or there are other reasons of suspension to which hi verted. As to that point, however, the Lord O act 1681 does not require the testing clause to be

No. 224. finding that case on our books, I do not think
Feb. 20. 1829. part from it, though I may doubt the soundness
is the sole ground, however, which I can disc
Lord Ordinary's interlocutor; but I think it su
that the judgment is precisely against the wor
ment, though I think it is against the meaning c

Dean of Faculty.—In that case, although the
subsequent to the act 1681, the deed there und
date prior to the act; and it can therefore affor
ing a finding 'that by the act 1681 it is not r
'clause shall contain the narrative that the dee
'the parties.' Besides, the clauses in the two
that in the case of Gordon the deed was merely
there was simply an omission of any mention
subscription; while the deed here bears that i
of the witnesses of a particular date, which fix
witnesses to the *writing*, and so is contradictory
to the subscription at the parties of a subsequen
case was not one of summary diligence, but of a

Lord Justice-Clerk.—I am of the same opini
on the same grounds; and I feel an imperative n
judgment in the case of Gordon. I will give no op
the cause not decided by the Lord Ordinary; but t
to hear parties on that.

Lord Glenlee.—There is a great distinction b
prentice himself and the cautioner; for whatever d
the latter, there can be none as to the apprentice h
holograph of him. As to the question regarding t
is, that a probative writ should bear evidence on t
was signed before the witnesses mentioned in it.
in the deed inconsistent with the parties and the
different days.

Lord Pitmilly.—I came here thinking the inte
to me, that if the testing clause merely omitted
deed was subscribed in presence of witnesses, the c
but that where the clause, as in this case, expres
witnesses to the fact of the writing, the case was di
been aware of the case of Gordon; and the diffe
in the two cases is so slight and unimportant, that
ruled by that decision; and on that ground alone I
be adhered to.

The Court accordingly adhered to the interl
in so far as it repelled the reason of suspens
but remitted to hear parties on the other r

H. Watson, W. S.—J. Stewart, S. S.

No. 227. A. MUNRO, Suspender.—*Robe*
A. CREIGHTON, Charger.—*An*

Feb. 21. 1829.
1ST DIVISION.
Bill-Chamber.
Lord Newton.
S.

THIS was a suspension of a charge on a liquic
spect of an alleged counter claim of damages.
fused the bill, and the Court adhered.

D. and R. BLACKIE, W. S.—A. SWINTON, W.

No. 228. KILPATRICK, Pursuer.—*Rus*
HIS CREDITORS, Defenders.—*C*

Feb. 21. 1829.
2D DIVISION.

Cessio Bonorum—Contingency.—Process of
Second Division by a sequestrated bankrupt, rem
sion, where his sequestration was depending, and
position had been rejected.

No. 229. P. C. HAGART, Suspender.—*San*
W. STIRTON, Charger.—*Kea*

Feb. 21. 1829.
2D DIVISION.
Bill Chamber.
Lord Newton.
T.

THE Sheriff of Perthshire having interdicted
house of Dungarthill, belonging to the charger Stir
and carrying away certain fixtures which he claim
been, according to his allegation, erected by him
having found him liable in the expenses of proce
of suspension of the charge for expenses.

The Lord Ordinary refused the bill, and the Co

A. SHEPHERD,—MACRITCHIES, BAYLEY, and HENDERSO

No. 230. T. JESSIMAN, Suspender.—*Cuning*
J. A. CHEYNE and L. MACKERSY, Chargers

Feb. 21. 1829.
2D DIVISION.
Bill-Chamber.
Lord Newton.
F.

BILL of suspension by Jessiman of a charge on a
of Forfarshire for £300 of principal, obtained by
Bank by imposition, and £170 of expenses said to
in legal proceedings against the Bank consequent th
expenses of process.

The Lord Ordinary refused the bill, and the Cou
regarded the principal sum and the expenses of proce
as to the other expenses, the accounts of which were
in regard to which decree was alleged to have bee
extract.

J. PEDDIE Jun. W. S.—LOW and RUTHERFORD, W. S.

K. MATHESON, Complainer.—*Jameson—Shaw.*
A. M'DOUALL, Respondent.—*D. of F. Moncreiff—Marshall.*

No. 231.

Process—Suspension—Interdict.—1.—Suspension of an interim interdict pronounced by the Judge Admiral held competent.—2.—A party has no right to demand an interdict against the removal of a float or lighter which had been used in the erection of his harbour, by the contractor whose property it was, on the allegation that the work was not completed in terms of the contract.

Feb. 21. 1829.
2D DIVISION.
Bill-Chamber.
Lord Newton.

THE respondent M'Douall having obtained an Act of Parliament for building a harbour at Portnessock in his barony of Logan, entered into contracts for the construction of it with the complainer Matheson, an engineer, and two cautioners for him. Matheson provided the tools and machinery necessary for the erection of the harbour, and, inter alia, he built a lighter or float, being a flat-bottomed vessel, with a crane fixed on it, for carrying stones to and building the pier; and this machine he accordingly used in the construction of the harbour. Matheson having, as he averred, completely implemented his contract, demanded of M'Douall payment of the balance of the stipulated price. This M'Douall refused, alleging that the harbour had not been finished, and that the work was not properly executed; and he accordingly, in 1826, presented a petition to the Sheriff of Wigton, (within whose bounds the harbour was situated,) praying him to grant warrant 'to employ some proper person 'or persons to finish the harbour and pier in the Bay of Portnessock, 'conform to the contracts above mentioned, the same being always at 'the expense of the said Kenneth Matheson and cautioners.' This petition being opposed by Matheson, a remit was made by the Sheriff to engineers to report on the state of the harbour, and the process is still in dependence. Thereafter, in 1827, M'Douall raised an ordinary action in this Court, concluding for damages against Matheson for non-implement of his contract, and Matheson raised a counter action, both of which are still in dependence.

In the mean time Matheson had become contractor for the construction of a new pier at Leith, in the building of which he required the use of his lighter or float. He accordingly, in August last, wrote to M'Douall, acquainting him that he intended to remove it from Portnessock, where it had remained since Matheson's operations there had ceased; but that he (M'Douall) might have the use of it, if he required it, for eight or ten days longer. On this M'Douall immediately presented a bill of suspension and interdict to the Judge Admiral, who, after some discussion, found 'that the possessory question involved in this bill is one of a mari-'time nature,' and therefore repelled an objection to his jurisdiction on that head; and he further passed the bill, 'that the merits of that ques-'tion may be fully discussed,' and in the mean time granted interdict as craved. Matheson thereupon presented a bill of suspension to this Court, praying 'to recall the interdict, and for letters of suspension in the pre-'mises; or at least for a remit to the Judge Admiral to recall his interlo-'cutor, and either to dismiss or refuse the respondent's bill of suspension.'

No. 231.
Feb. 21. 1829.

To the competency of this bill it was objected, to suspend before extract, as had been found in t Alexander, 9th July 1824, (ante, Vol. III. No. 1 in the present case, there had only been pronou judgment.

To this it was answered by Matheson, that tained a general prayer for letters of suspension, i of the interdict; and that this was an interim ord tent to bring under review of the Court by suspe of the cases of Hunter, 10th March 1824, (ante, Vo 4th June 1825, (ante, Vol. IV. p. 71,) and the lat sioners of Leith Harbour v. Magistrates of Edinl 1828, (ante, p. 26); and he pleaded, as grounds merits,

1. That there was no proper Bill-Chamber in in reference to suspensions of the nature of the on M'Douall's procedure there, and the granting of a was incompetent.

2. That this was a question arising out of a cont nature, so that the Judge Admiral had no jurisdict

3. That the interdict was unjust, and contrary lighter being Matheson's own property, M'Doual detain it at Portnessock on the plea that the fo liable still to execute operations for which the use required, the more especially as there was no ave and his cautioners were vergentes ad inopiam.

The Lord Ordinary having reported the bill an recalled the interdict, and passed the bill.

Lord Justice-Clerk.—We have all been much str this mode of procedure by bill of suspension before the do not see that it was objected to in the case of the I same course had been adopted. It is, however, a very m be a maritime cause; and at any rate I do not think the l of in this summary manner by Mr. M'Douall. I will not g disputes between the parties; but taking the whole of l for granted, how does that give him a right to seize on to by this man, on the pretence that it is possible these art again? If Matheson is under an obligation to execute fur harbour, he is also bound again to find apparatus for d tempt of M'Douall's is a wild and extravagant proceeding fere so far as to remit to recall the interdict, at least on

Lord Glenlee.—I am of the same opinion. We can any thing but the interim interdict. I would remit, ho interdict, on caution to the extent of the value of the mac

Lord Alloway.—I doubt the propriety of requiring think this is a maritime question at all; and M'Douall h

party or lien whatever over this machine, but merely a claim for completion of the contract and damages. Now, does this make the case maritime? It is just an ordinary civil contract; and if so, how could the Judge Admiral consider the question whether an ordinary civil contract on shore was completed? I am satisfied the present bill is competent; and in the case of the Leith Dock the First Division recalled the interdict, and passed the bill. Now here there are no legal grounds whatever for granting the interdict; and I see nothing to prevent our following the same course with the First Division, and recalling it. This party might have arrested the lighter, but this would have led to consequences altogether different from an interdict. I never saw a clearer case; and I would have no hesitation in recalling the interdict, and passing the bill, without requiring caution, for which I can perceive no grounds.

No. 231. Feb. 21. 1829.

LORD JUSTICE-CLERK.—I am now satisfied that no caution should be required.

J. DONALDSON, W. S.—J. WEMYSS, W. S.—Agents.

J. M'NAIR, Suspender.—*Thomson.* W. MURRAY, Charger.—*Skene—Shaw.*

No. 232.

Process—Suspension—Expenses.—1.—A Lord Ordinary on the Bills having refused a first bill of suspension by an interlocutor containing special findings as to the facts appearing from a proof in the Inferior Court, and a second bill having been thereafter competently presented —Held,—1.—That the findings of fact in the interlocutor of the Lord Ordinary refusing the first bill were not final and conclusive in the cause, but were brought under review by the second bill;—and,—2.—Observed, that where parties litigate about a small sum, whichever is successful should always be allowed his expenses, subject, however, to modification in case of improper conduct of his cause.

THIS was a case which, as to the merits, depended on a proof; but there arose out of it a question of form. Decree for the amount of £21, with expenses, having been pronounced by the Sheriff of Lanarkshire against the suspender M'Nair in an action at the instance of the charger Murray, the former presented a bill of suspension, which was refused by Lord Eldin by an interlocutor containing a variety of findings as to the facts deduced from the proof and unfavourable to the suspender, who thereupon presented a second bill. This bill was passed; and Lord Medwyn, before whom the expede letters came to be discussed, having taken a different view of the import of the proof from that adopted by Lord Eldin, found accordingly 'that the proof adduced does not establish the respondent's libel;' and suspended the letters simpliciter, but found no expenses due to either party.

Feb. 21. 1829. 2D DIVISION. Lord Medwyn. F.

Both parties reclaimed,—the charger on the merits, and the suspender as to expenses.

Besides his other pleas, which it is unnecessary to notice, the charger contended, that in virtue of the 40th section of the Judicature Act, (extended by the Act of Sederunt 12th November 1826 to the case of interlocutors by the Lord Ordinary on the bills,) whereby the findings directed to be pronounced, where there had been a proof in the Inferior Courts, were declared to have the effect of a special verdict of a Jury,

No. 232. Feb. 21. 1829.

the findings of Lord Eldin, on refusing the first bi as final, and as fixing the facts of the case.

To this it was answered, that the effect of the prevent appeal to the House of Lords from find fact, but did not prevent the interlocutors of Lor the Outer House or on the bills, on matters of fact under review in the same way as might have be statute; and accordingly that as a second bill was in the circumstances, of bringing under review the Eldin, the whole case was open, as if that interlocu nounced.

The Court, after expressing considerable doub tion; and concurring with Lord Medwyn on the they refused the charger's reclaiming note.

The suspender then craved that under his note t be altered, and he found entitled to expenses. grounds having reference to the conduct of the case to which it is unnecessary to advert.

Lord Pitmilly observed—It is a general ru litigate as to a small sum, whichever gains should h ject, however, to modification, if there has been any

The other Judges concurring, their Lordships a this note, and found the suspender entitled to his modification.

Donaldson and Ramsay, W. S.—C. Fisher,—

No. 233.

J. Cook, Petitioner.—*D. of F. Moncreiff—Je*
Mrs. Cuthill's Trustees, Respondents.—*Sol.-*

Sequestration.—Circumstances sufficient to make a party liabl builder.

Feb. 21. 1829. 2d Division. R.

This was a petition by Cook, a creditor of Archib Glasgow, for sequestration of the estates of that ind This was opposed by the trustees of Cuthill's wife creditors to a considerable amount, on the ground t under the Bankrupt Statute to sequestration.

The circumstances founded on by the petitio Cuthill a builder by trade, and rendering him liab were as follows:—

1. In the years 1798, 1799, and 1804, he had taken ings of ground, amounting in all to fourteen, for the in the two former instances, along with other individ his own account. On these steadings houses were bu were not completed till 1812,) and money borrowed; sequently sold at different intervals, some remainin down to 1824. The money borrowed in the course o

No. 283. Feb. 21. 1829.

trustees, rendered him liable to sequestration; for, Harley, he was personally involved, and was spec own interest even before the sequestration, becaus had been paid their composition, and the eventual the part of Harley had become quite visionary; b the transaction with Garden was entirely a pers trustees having incurred the loss, as they would ha profit, arising from the sale of the houses received ment of the price of the ground; and that thou were for the purpose, not of absolute gain, but to as trustee for Harley, still the course of dealing wa the party liable to sequestration.

To this it was answered, that the transactions in 1 were of so old a date, that they could not be taken ing Cuthill's present character as liable to sequ the transactions arising out of Harley's trust, the either of the creditors, or of Harley, who had a ri any profit been made beyond the claims on the esta cumstance of the trustees' taking so many houses in claim, even if they had actually settled with the cr ing, could not make them traders &c. in the sense of special transaction in relief of the obligations come u tioners and trustees.

The Court, considering the question to be atten culty, ordered Cases for the opinion of the other Ju the following unanimous opinion:—

"We are of opinion that Mr. Cuthill is liable to be se rupt, in respect of his dealings as a builder. It is true t cerns in that line are of an old date, and that in other doubted whether he was acting for his own behoof, o others. But, laying all these out of view, it appears to us to entitle Mr. Cuthill to the designation of a builder."

THE COURT accordingly awarded sequestration,—an form of the diligence having been departed from.

CAMPBELL and MACDOWALL, S. S. C.—MOWBRAY and HOWDE

No. 284. JOHN BELLENDEN KER, Esq. and Others, Pursuer *creiff—Brown.*

LADY ESSEX KER'S TRUSTEES, Defenders.—*Sol.-G Forsyth.*

Writ — Foreign — Trust. — Held that a deed of nomination and England, and probative by the law of that country, but not by that trust-disposition of lands in Scotland, is effectual.

No. 294.
Feb. 24. 1829.
1st Division.
Lord Eldin.
S.

Lady Essex Ker was proprietor of lands in Scotland, and possessed of moveable effects situated chiefly in England, where she resided. On the 1st of March 1819, she executed at London a mortis causâ trust-disposition, by which she disponed in favour of the Earl of Winchilsea and Sir Robert Williams Vaughan 'all and sundry lands and heritages 'whatsoever belonging to me, or to which I have or may have right, 'situated or being in that part of Great Britain called Scotland;' and at the same time she bequeathed to them her whole moveable effects; but declared 'that the foresaid disposition of my real estate, and also the 'said bequest of my personal property granted to the said persons, 'shall be taken and accepted of by them in trust only, and for the ends 'and purposes under mentioned; that is to say, in trust to sell and dis-'pose of the said lands and real estate, and out of the proceeds thereof, 'and of my personal property to be collected and recovered by my said 'trustees, to defray the whole charges and expenses attending the execu-'tion of the trusts, and to pay all the just and lawful debts I may owe to 'any person or persons at the time of my decease, in any way or by any 'kind of security, and then to pay over the residue and remainder of the 'said proceeds to and for the use of any person or persons I shall name 'by any writing under my hand, or for such purposes as I may direct 'by such writing; and in default of my making such writing, or giving 'directions in writing, then to pay over my said residue to my next of 'kin, according to the law of England, or statute of distributions.'

The trustees were named executors, and the deed was tested agreeably to the law of Scotland. On the 20th of August of the same year, and when she was on deathbed, Lady Essex Ker executed at London a testament, directing, in reference to the trust-deed, that the whole of her estates, heritable and moveable, should be sold—certain legacies paid—and that the residue should be divided between a Mrs. Garrety, the Earl of Winchilsea, Sir Robert Williams Vaughan, and certain charities. This deed contained no testing clause, and was not holograph of Lady Essex Ker; but it was signed by her mark before three witnesses, and had a wafer seal attached to it. She died four days thereafter, and the testament was, after opposition by the next of kin, proved before the Prerogative Court of Canterbury, and sustained as a valid deed according to the law of England. In virtue of the trust-deed and this relative testament, the estates in Scotland were claimed by the trustees. On the other hand, the pursuers John Bellenden Ker and John Bulteel, Esqrs., the heirs-portioners of Lady Essex Ker, contended that the deeds were not effectual to deprive them of the estates, and at all events that the testament was insufficient as a deed of nomination. To try this question, they brought an action of declarator, in defence against which the trustees maintained that, until set aside, the deeds must receive effect.

The Court having, on the 14th of February 1825, sustained this defence, (see ante, Vol. III. No. 365,) the pursuers raised the present action of reduction of the testament, on the ground, that although it

No. 234. Feb. 24. 1829.

might 'be effectual, by the law of England, as a 'posal of property situated in England, and thougl 'may be compelled to dispose, in terms of it, of 'England, according to the directions therein con 'fective in the solemnities required by the law of 'or writing is invalid and ineffectual as a direction 'to make over the said heritable estates situated i 'longed to the said Lady Essex Ker, to the preju 'her heirs at law.' And they concluded, that the d it ought to be found 'that the pursuers, as heirs-po 'the only good and undoubted right to the resid 'conveyed by the said Lady Essex Ker to her saic 'general disposition, after payment of the debts due 'said defenders have no right or claim whatever to 'Scotland, or the proceeds thereof, under the said reduction was brought of the trust-deed.

In defence the trustees maintained,

1. That the pursuers had no interest to challeng supposing it to be annulled, the trustees would rem trust-deed, to account for the proceeds to the next Ker, according to the law of England; and, on t clined to take a day to satisfy the production. But they were bound to do so; and this having been do

2. That as the will was by the lex loci valid, as an Essex Ker to her trustees in relation to the trust-dee to the same extent in Scotland.

The Lord Ordinary found, that 'in respect the 'strument produced, however effectual it may be as 'sonal or other property by the law of England, is 'party, nor tested in terms of the statute 1681, it is 'as a deed to affect a real or heritable estate in Scot decerned in terms of the reductive conclusions of the

The trustees having reclaimed, the Court ordered

Pleaded by the Trustees.—By the trust-deed the to the trustees for the purpose of being sold, and r sidue in such way as they should be instructed by a Essex Ker—failing which, to the next of kin, acco England. This deed, which is not challenged, is ex the law of Scotland, and therefore is sufficient for and transferring the property to the trustees. The not founded on as a disposition of heritable property instruction by Lady Essex Ker as to the disposal of estates after they have been sold. The question, the whether it can be recognised as the writ of Lady must be decided by the lex loci. But it has been fou Court that it is so, and that it is even sufficient

No. 234.
Feb. 24. 1829.

property in England. Being, therefore, probative by the law of the place where it was made, it must be equally so by the law of Scotland; and accordingly numerous decisions have been pronounced supporting this plea, particularly that of Willoch v. Auchterlony in December 1769, by the House of Lords; and Brack v. Hogg, in the Second Division, on the 23d of November 1827.

Pleaded by the Pursuers, (heirs-portioners.)—Although the trust-deed is an effectual conveyance to the trustees, yet the question remains to be considered, for *whom* do they hold in trust? If there be no effectual conveyance for behoof of a third party, then the trust will be held by them for behoof of the heirs at law. It is sometimes loosely said that a trust-disposition divests the granter of his heritable right, and that he retains merely a personal right to call the trustees to denude. It may be true that where there is an unqualified conveyance, subject to a latent trust, the truster has merely a personal right; but although it be *personal*, it is not *moveable*, and accordingly could not be carried by a testament. But a deed bearing ex facie to be a trust for payment of debts or other purposes (even although delivered in lifetime) does not divest the granter. It is a mere burden; and, on his death, the estate remains in hæreditate jacente, and may be taken up by his heirs, subject to this burden. To extinguish the heir's right, it is requisite that there should be some deed of nomination, in favour of *another party*, executed by the granter; and if there be so, it follows that it is *that* deed, and not the trust-deed, which divests the heir. The question, therefore, comes to be, whether a deed which has such an effect, requires to be executed according to the forms of the law of Scotland, or not? In reference to this, a distinction must be kept in view between the necessity of having disponing words, and that of observing the formalities of the statute 1681. Where a trust-conveyance has been made with proper disponing words, and where it declares that the residue shall be disposed of agreeably to a deed of instructions to be executed, it is not requisite that this latter deed should contain disponing words; but it must be executed in terms of the statute, seeing that it has direct reference to an heritable estate, and has the effect to divest the heir of the rights which he would have to the estate, if there were no such deed in existence. But here the deed is not even subscribed, and it does not appear that in any of the previous decisions there was that peculiarity. They merely prove that a deed in a testamentary form, or without disponing words, is sufficient to give instructions where there has been a previous formal disposition—a proposition which the pursuers do not require to discuss.

In the mean while the pursuers brought a reduction of the deed of instructions on the head of death-bed; and the Court, after expressing great doubts of the soundness of the former decisions, first sisted this process till the reduction should come before them, and thereafter assoilzied from this action, and ordered Cases in regard to the question of deathbed.

No. 234.

Feb. 24. 1829.

Pursuers' Authorities.—Davidson, Dec. 20. 1797, (5597, and Stewart, March 7. 1799, (14407); Durie, Nov. 30. 1791, (559 (8752, and Jan. 14. 1801, No. 1. App. Adjud.)

Defenders' Authorities.—3. Ersk. 2. 40; Cunningham, July ings Company, Jan. 31. 1783, (4472); Govan, Dec. 10. 1790, (4 (Elch. voce Testament, and 5. Sup. 794); Dundas, Feb. 25. 1 law, (not rep. but see 2 Shaw's Ap. Ca. p. 13, Note); Willoc mitted March 30. 1772); Stuart, May 19. 1791, (Bell's Ca. p. 225; Vol. V. No. 457); Brack, Nov. 23. 1827, (ante, Vol. VI. No. 3

A. Goldie, W. S.—J. Thomson, W. S.—

No. 235.

J. Mitchell Jun. Advocator.—*D. of F. Mo*
A. Thomson, Respondent.—*Jeffrey*—

Slander.—Circumstances affording a relevant defence again slander.

Feb. 24. 1829.

2d Division.

Ld. Mackenzie.

Advocation by Mitchell, broker in Leith, of for slander against Thomson, merchant there, in Leith had assoilzied. A proof had been taken be which it appeared that on a particular occasion, in Custom-house of Leith, and in the hearing of se son had used words importing an accusation agains made an improper charge against a foreign shipm with him as broker, and an intimation that on that allow Mitchell to act as broker for such shipmaste (Thomson's) house; and that Thomson did, on th reporting of a ship of another foreign shipmaster Mitchell. But on the other hand, it appeared that th last mentioned was a Prussian, and consigned to the of which house, one partner was Prussian consul; a in point of fact, not long before, made a charge in h with a foreign shipmaster, which charge was unusua further, that he had not signified any intention of a charges in future.

The Lord Ordinary pronounced an interlocuto findings of fact to the above effect, and further foun 'cumstances the defender ought not to be found liab 'pursuer for scandal, either malicious, reckless, or i cordingly remitted simpliciter.

The Court adhered.

Lord Justice-Clerk.—It is impossible to read th satisfied that the findings of the Lord Ordinary are cor chell was doing what he had no business to do; and then a charge made against a foreign shipmaster, which was n not natural and proper for him to speak his sentiments tenance such an action.

The other Judges agreed.

J. Murdoch, S. S. C.—Gibson-Craigs and Wardlaw, W

BOYES'S TRUSTEES.—*Keay—Maitland.*
MRS. HAMILTON.—*Murray—W. Bell.*

No. 236.

Multiplepoinding—Prescription.—Held that a process of multiplepoinding raised by an arrestee does not prescribe by the lapse of the period sufficient to prescribe the arrestment.

Feb. 25. 1829.
1ST DIVISION.
Lord Meadowbank.
D.

THE ancestor of Mrs. Hamilton, being a creditor of one Lawson, executed an arrestment in the hands of the late John Boyes, who was indebted to Lawson; and a multiplepoinding was raised in 1796, in which the usual interlocutor, finding Boyes liable in once and single payment was pronounced. Several other creditors of Lawson lodged claims; but the process fell asleep in 1799. It was wakened in 1801; but no further steps were taken till 1827, when a process of wakening and transference was brought against the trustees of Boyes, who was now dead.

To this they objected, that as the arrestment was prescribed by the lapse of more than five years, the multiplepoinding necessarily shared the same fate.

The Lord Ordinary having repelled the objection, and the trustees having reclaimed,

Keay, for the Trustees, contended that as a furthcoming upon an arrestment would, under similar circumstances, have been cut off by prescription, so, by analogy, the same rule was applicable to a multiplepoinding founded on an arrestment.

LORD PRESIDENT.—There is a material destinction between a multiplepoinding and a furthcoming. In the former there may be numerous parties claiming on grounds altogether different from arrestments, such as personal bonds &c. Is it possible that their right in the multiplepoinding can be affected by the circumstance of its having been brought in consequence of an arrestment?

Murray for Mrs. Hamilton.—Besides, there is here an interlocutor against these parties, finding them liable in once and single payment. It is true that when the parties get into the competition, they may plead prescription against any of those whose claims may be prescribed; but the raiser of the multiplepoinding has nothing to do with that.

LORD BALGRAY.—If the objection to the arrestment be good at all, it can only be available when the parties get into the competition. But here it is stated to the effect of preventing them getting into the competition, which is manifestly untenable.

LORD GILLIES.—They are just putting the cart before the horse.

THE COURT accordingly adhered.

R. MACKENZIE, W. S.—J. WHITEHEAD,—Agents.

No. 237.

D. M'Dougall, Pursuer.—*Jeffre*
A. Campbell, Defender.—*Skene*—

Process— Supplementary Summons—Slander.—The Court
mons of damages for slander, setting forth the slander founde
together with other instances prior thereto, and referred to ge
in proof of malice, except as to a statement inconsistent with

Feb. 25. 1829.

2d Division.

Ld. Cringletie.

After the judgment in this case, mentioned p. 742, (which see,) the pursuer M'Dougall co raise a supplementary summons before going to Such a summons was accordingly raised, settin other occasions on which the defender had sland ferred to in the original summons, besides that spe again setting forth this last, but with more min for damages on account of the whole; with this in the supplementary summons the defender was regularly ordained an elder, while the original su was truly an elder.

To this supplementary summons preliminary d stating that it was incompetent, as creating a cu in so far as it founded on instances of slander o founded on in the original action.

The Lord Ordinary having reported the summo Court verbally, the defender no longer maintained tent to bring a supplementary summons, but only was inconsistent with the original one, because the latter was confined to the alleged slander before other instances of slander being merely referred to while, in the former, these other instances were set grounds of action.

To this it was answered, that there was no inc cumstances founded on in the new summons wer nature, and aggravated the case set forth in the fi and as to the objection that the instances of sland were prior to that specially libelled in the original tended that although a verdict on a subsequent sla party from reverting to prior acts, this was not the merely depending, which might be amended by a mons, as now attempted.

The Court repelled the objections taken by the of opinion that as the first summons proceeded on defender was truly an elder, it was inconsistent with gation in the second that he was not regularly ord that allegation to be delete, together with the statem

sequent to the raising of the original summons, and thereafter instructed the Lord Ordinary to sustain the summons so altered.* No. 237. Feb. 25. 1829.

W. Mercer, W. S.—T. Syme, W. S.—Agents.

Gammell's Trustees, Advocators.—*Maitland—Moir.* J. Miller, Respondent.—*Keay.* No. 238.

Process—Advocation—Final Judgment.—A landlord having presented a petition to the Sheriff, praying to have it found that his tenant was bound not to carry off the straw &c. grown on his farm, and to have a poinding creditor interdicted from selling; and the Sheriff having at first granted interim interdict, and thereafter recalled it, remitting the process at the same time to a process of sequestration depending before him at the instance of the landlord against the tenant and a trustee for his creditors—Held that the judgment recalling the interim interdict was, in so far as regarded the creditor, a final judgment, of which it was competent for him to bring an advocation without leave.

Feb. 25. 1829. 2d Division. Ld. Mackenzie. F.

The advocators, trustees of the late Mr. Gammell, in the month of August last, presented to the Sheriff of Perthshire a petition, setting forth that James Butter, a tenant of part of Mr. Gammell's estate by a lease which had several years yet to run, was prohibted from selling or carrying off straw, unthrashed corns, and turnip, and was bound to consume it on the farm; but that the respondent Miller, a creditor of Butter's, had executed a poinding of his growing corns and effects, and had intimated a sale by public roup; they therefore prayed the Sheriff, 'on 'calling the said James Butter and James Miller summarily' before him, to find that the former was prohibited from selling or carrying off straw &c., and was bound to consume upon the possession the whole straw, fodder, and turnip raised thereon, and to interdict Miller from selling or carrying off any of the said straw &c., and thereafter to declare the interdict perpetual. This petition was ordered to be served on Butter and Miller, and interim interdict was granted by the Sheriff, unless Miller should previously find caution for the rents for which the landlord might be found to have a right of hypothec. The petition was served on both parties accordingly. Appearance was made for Miller, who, with his answers, lodged a bond of caution for the rent, which, he contended, was all the landlord could require; the more especially, as decree had been obtained in a summary process of removing against Butter, whereby the lease had come to an end, and the crop poinded had become a waygoing crop, to which the obligation to consume the fodder on the ground could not apply. After some further procedure, and closing of the record, it having been admitted by the trustees that Butter was removed from the farm, and his lease at an end, the Sheriff recalled the interim interdict, and remitted the process to a

* Some doubt occurred in this and the immediately succeeding case, as to whether, when the Lord Ordinary reported a cause verbally, the judgment should be pronounced by his Lordship or by the Court. After delaying a day to learn the practice as to this, judgment was pronounced by the Lord Ordinary.

No. 238. Feb. 25. 1829.

sequestration and interdict depending at the against Butter and the trustee for his creditor having adhered, the trustees brought an advoca of which it was objected that there was no final of the Sheriff to advocate, under the 50th Ge ment producing a change of possession.

On this objection being pleaded before the L ship appointed the papers to be boxed, with a tion of competency verbally to the Court, iss the following note:—'The question seems impo 'cause, though the recall of interim interdicts b 'very common, the refusal of them is common, a 'ous effects, if erroneous; and if there be no rem 'or none without leave of the Inferior Judge, w 'it. In particular, the refusal of interim interd 'ther proceedings for interdict nugatory; and it 'ties in this case to avoid the risk of proceedi 'competency.'

His Lordship having this day reported the cas him to find the advocation competent. His Lor nounced this interlocutor:—'The Lord Ordina 'the Second Division of the Court, and thereaft 'cess, and being of opinion that the objection to 'advocation ought to be repelled, appoints the cau 'roll of motions for that purpose, and that the 'prepared to say whether he intends to submit 'pronounced, to the review of the Inner House.'*

Lord Alloway.—This Court is entitled at commo ments granting interdict, as such are not interlocutor wherever instant execution or warrant can follow, adv was Ordinary in the case of Hunter, (ante, Vol. II. p Division held this. This Division did the same i (Vol. IV. p. 71) by suspension and interdict; and a the cases of M'Douall of Logan and the Commissioner and 449.) Now, suppose the tenant had complained of that the Court might have interfered, if on the merits been granted. Here the reverse has happened. The and the whole crop might have been sold, in the face o judice of the landlord. Now, can the Court have powe

* His Lordship added the following note:—"The opinion of the lar case, that the interlocutor of the Sheriff was, both in intention an in so far as regarded the respondent Miller. The application to th interim interdict; (2.) thereafter to declare it perpetual against interim interdict was therefore reviewed by the Court as the final cation as to him."

No. 238.
Feb. 25. 1829.

case, and not in the other? This is the strongest case of the two, as removing the interdict is equivalent to a warrant to sell; and I cannot hold it to be an interlocutory judgment. The party might, no doubt, have applied for leave to advocate; but I think he is entitled also to advocate without leave, on the ground that this is a positive warrant, substantially deciding the question finally quoad the interdict.

LORD GLENLEE.—I take much the same view with Lord Alloway. I am surprised that no application is made, in the advocation to this Court, for imposing an interdict. I rather think that the interlocutor is a final one, and disposes finally of the only point in the petition between the landlord and this party. With regard to Butter, there may still be something before the Sheriff; but, as to Miller, the only thing is the interdict; and though the process has been remitted to a process of sequestration, yet the only person having an interest, in so far as it is not decided, is Butter, who is not here at all; and therefore I think that the advocation is competent in point of form, and I have no doubt of its propriety.

LORD PITMILLY.—This is an important point, and deserves consideration. The interim interdict was recalled; but the question whether a permanent interdict was to be granted, was still before the Sheriff. Now this Court must certainly have the power to review such a judgment as that complained of; but the question is, whether the party should not have applied for leave to advocate under the 50th Geo. III.? The difficulty in my mind is, that the Act of Parliament prescribes that, in regard to interlocutors creating a change of possession, the advocation must be with leave of the Sheriff. There is no exception of a case like this; and there being a general prohibition to advocate from interlocutory judgments with certain exceptions only stated, and this one being only on leave, I do not think this is done in a competent shape, the advocators not having applied for leave. If we could hold it not an interlocutory judgment, there would be no difficulty.

LORD JUSTICE-CLERK.—I am a good deal struck with the observation of Lord Pitmilly, and I would not willingly allow advocations from interlocutory judgments, unless the provisions of the statute were complied with as to leave. I think it would have been competent to have applied for leave here, as this is a judgment altering possession; and therefore, unless we can hold this not to be an interlocutory judgment, I should doubt of the competency of the advocation. But then I feel strongly the force of the observations of Lord Glenlee, that this is to be considered as a final disposal of the matter as to Miller, who has nothing to do with the further proceedings, and therefore, as to him, I think it a substantial final decision, which may be competently brought here by advocation.*

D. WELSH, W. S.—MACRITCHIES, BAYLEY, and HENDERSON, W. S.—Agents.

* See, however, Seymour v. Thomson, Jan. 20. 1829, ante, No. 137. p. 300.

No. 239. EWING'S TRUSTEES and W. ROBISON, Pursi
R. FARQUHARSON, Defender.—*Jum*

Process—Summons—Bill of Exchange.—It being set forth the contents of a bill, that it had been indorsed to the pursuer suers, in their condescendence, having stated that the bill was Bank, and thereafter retired by them (the pursuers); the Court supported by the condescendence, reserving to the pursuers to

Feb. 25. 1829.
2D DIVISION.
Lord Medwyn.
F.

THE late Mr. Ewing and the pursuer Robison, as writers in Aberdeen under the firm of Ewing summons (since Mr. Ewing's death carried on by l son) against the defender Farquharson, as rep father, and General Hay of Rannes, setting forth quharson had indorsed to Ewing and Robison a b him upon and accepted by General Hay, whicl noured by the acceptor, and concluding for pay their condescendence, however, the pursuers averr counted by the late Mr. Farquharson with the bra Bank at Aberdeen, to whom it was blank indors fell due, it was retired by Ewing and Robison, to by the Bank without a new indorsation,—that by maining blank as before. The record being clos the Lord Ordinary found 'that the narrative of th 'the pursuers aver that they acquired right to the b 'of the drawer Robert Farquharson, is contradic 'contained in the revised condescendence, which d 'the said summons;' and his Lordship according with expenses, reserving to the pursuers to bring covery of the contents of the bill.

The pursuers reclaimed, and contended that a bill blank indorsed becomes thereby indorsee of th that therefore the condescendence did sufficiently s but the Court adhered.

R. BURNETT, W. S.—A. NAIRNE,—Age

No. 240. ELIZABETH and MARY SMITH, Pursuer
J. SCOTT, Defender.—*Pyper.*

Agent and Client—Expenses.—Circumstances in which the Co of an agent in a question between him and his client, refused to

Feb. 25. 1829.
2D DIVISION.
Lord Medwyn.
T.

THE defender Mr. Scott, writer in Edinburgh, pursuers, persons in the lower ranks of life, to rec which had belonged to their father, but which was an heritable creditor called Webster. The defen the matter, advised the pursuers, instead of raising

mise their claims, recommended them to accept £40 which had been offered by Webster for a disposition to the property, even if nothing should be got towards the expenses which had been incurred by them. Having, however, got Webster to agree to give £12 towards the expenses, in addition to the £40, besides paying the expense of the disposition, he communicated this to the pursuers. The pursuer Mary Smith returned the following answer:—'In reference to your letter of yesterday, 'I hereby authorize you to settle with Webster, in so far as I am con-'cerned, in terms of your letter, viz. that Webster agree to pay £40, and 'also £12 towards our expenses, and likewise that she pay all expen-'ses of disposition &c.' To this the defender replied:—'I have re-'ceived your letter. In the circumstances in which you are placed, and 'the ruinous state of the property, I consider that I have made an ad-'vantageous bargain for you; but from the expression in your letter, "expenses of disposition &c.,' you would seem to expect more than I had 'stated in my letter. Now I think it right to apprize you that the terms 'on which a settlement has been offered are exactly these:—That for an 'absolute right to the property Webster is to pay £40 sterling, with an 'additional £12 sterling for expenses. You, of course, pay all expenses 'previous to the disposition—I mean all the expenses incurred by me, 'which I do not think will much exceed the £12. Webster pays the 'expenses of the disposition, and whatever expenses she incurs after-'wards must, of course, be defrayed by herself. Upon these terms I 'expect to be able to effect a settlement, and when that is done I shall 'inform you.' Elizabeth Smith having likewise agreed to this offer, Scott effected a compromise on these terms, and received from Webster the sums agreed on. Thereafter he rendered an account to the pursuers, debiting himself with these sums, and £1 of interest,—and charging on the other hand £8, being the amount of a country agent's account, and £37: 0: 10½, restricted to £30, as the amount of his own account, which was, to a considerable extent, composed of charges subsequent to the letter to the pursuers, and before the matter was finally arranged. These charges left a balance in favour of the pursuers of only £15; and they, conceiving that the defender had undertaken that the expenses should not much exceed £12, raised an action against him for payment of the money received from Webster, under deduction of £12 only, or of a sum not much exceeding that.

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Feb. 25. 1829.

The Lord Ordinary found 'that there was no undertaking on the part 'of the defender that the expenses incurred should not exceed £12, nor 'was the compromise agreed to by the pursuers under such an impres-'sion;' and remitted the defender's account to be taxed, but refused to allow him the expenses of process in this case.

Against this interlocutor, so far as it refused expenses of process, the defender reclaimed; but the Court adhered.

Lord Justice-Clerk.—I think the Lord Ordinary has exercised a sound discretion in refusing expenses. These women have suffered enough in not

No. 240. having the defender's account restricted to £12, as
Feb. 25. 1829. with some difficulty.

The other Judges concurred.

J. ELDER, W. S.—J. SCOTT,—Age

No. 241. MRS. MARY GLEN or CRAWFURD
J. GLEN, Defender.—*Cuning*

Feb. 25. 1829. THE Lord Ordinary having in this case assoi
2D DIVISION. found no expenses due, both parties reclaimed.
Lord Newton. ever, being made for the pursuer at the advising,
F. reclaiming note; and, on that of the defender, i
entitled to expenses.

J. DUNLOP, W. S.—W. A. MARTIN, W. S.-

No. 242. D. ANDERSON and COMPANY, Pursuers
J. COLLIER, Defender.—*Gord*

Principal and Agent—Retention—Compensation.—A mercha
signed by the consignees of a foreign merchant not entitled to se
the prejudice of those consignees, a debt due to him by the forei

Feb. 26. 1829. DOUGLAS, ANDERSON, and COMPANY, merchant
1ST DIVISION. the practice of receiving flax on consignment from M
Ld. Corehouse. of Archangel, sent several quantities at different
H. Collier, a merchant in Dundee, to be disposed of o
vious to this, Collier had occasionally received flax
Mackenzie and Murray, to whom he made advanc
of his correspondence with Douglas, Anderson, a
aware that the flax belonged to Mackenzie and
to them, inquiring, 'Is all the flax received fro
'and Company, as well as that invoiced by you
'count?' To this no precise answer was returned
that he thereupon put the whole goods to the accou
Murray. These latter parties having become ins
Anderson, and Company having required Collier to
consigned by them to him, he insisted on setting
kenzie and Murray against them. This having been
Anderson, and Company brought an action against
Lord Ordinary found, 'that the cargoes of the flax
'been consigned by the pursuers to the defender,
'him on their account, he is bound to account to the
'and that the balance due to the defender by Me
'Murray on their separate account cannot form a

'against the pursuers, as that balance arose out of transactions with which 'the pursuers had no concern.'

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The Court adhered.

CRANSTOUN and ANDERSON, W. S.—A. STORIE, W. S.—Agents.

WILLIAM DUNCAN, Pursuer.—*Sol.-Gen. Hope—Wilson.*
J. HUME and H. WATSON, Defenders.—*D. of F. Moncreiff—J. Miller.*

No. 243.

Prescription—Title to Exclude.—A proprietor of heritable subjects having granted an ex facie absolute disposition, on which infeftment was taken, qualified by a back bond containing a power of redemption within eleven years; and having assigned this bond to a third party, and disponed the property to him; and the assignee having, within the eleven years, raised an action of redemption, which fell asleep; and the heir of the original disponee having acquired right to the assignation and relative action, which he afterwards wakened; and more than forty years having elapsed from the date of the above deeds—Held that a prescriptive title had not been obtained, so as to exclude the heir of the original proprietor.

Feb. 26. 1829.
1ST DIVISION.
Lord Meadowbank.
H.

JAMES DUNCAN, the father of the pursuer, held certain heritable subjects in the Kirkgate of Leith under a disposition on which he had not been infeft. On the 4th of September 1771 he executed an ex facie absolute disposition of these subjects in favour of John Watson, on which Watson was infeft on the 19th, and his sasine recorded on the 20th of the same month. On the same day on which infeftment was taken, Watson granted a back bond, declaring that 'albeit the said disposition 'does bear to be an absolute and irredeemable right of property to the 'said tenement and pertinents, I hereby declare that the same is re-'deemable and may be redeemed at any time within the space of 'eleven years from the date hereof, upon payment of the sum of £150 'sterling.'

In 1773 Duncan entered into a transaction with Robert Hope, by which he bound and obliged himself, 'his heirs and successors, to grant 'a full and ample disposition, containing all the requisite and necessary 'clauses, and to free and relieve the subjects after mentioned of all debts 'and encumbrances; and being so disencumbered, to grant the said dis-'position to and in favour of the said Robert Hope, his heirs and as-'signees,' of the subjects in question; and he thereby not only de præsenti disponed these subjects, but also assigned the back bond by Watson, and acknowledged that 'the price instantly paid me by the said Robert 'Hope, together with the obligation hereafter mentioned, wherein he 'becomes bound to relieve me of the debt due to John Watson, is a full 'and adequate price for the subjects above mentioned.'

On the other hand, Hope bound himself to relieve Duncan of the debt due to Watson.

On the 14th of December 1781, Hope assigned his right under this deed to Mr. Tod, as trustee for his creditors; and in 1782 Tod raised

No. 243.
Feb. 26. 1829.

an action of redemption against Watson, in which calling a decree in absence was pronounced in July cess afterwards fell asleep, and Watson died in the deed of settlement Watson conveyed the subjects who, in 1787, disponed them to his brother James. on the 27th of January of that year; and in 1792 he trust to the defender Hume and others for behoof of h the death of James, these trustees expede a charter o confirmation on the 11th of May 1816. In 1821 To Hope, wakened and transferred the process of redemp trustees and representatives of Watson; and in Janua suer William Duncan, as heir of his father, brought an tion of the disposition in 1771 to Watson, and also of the Hope, on the ground of fraud, incapacity, and blindness. action, Hugh Watson, (one of the trustees and representat ginal disponee John Watson,) acquired right from Tod Hope) to the deed in favour of Hope. The pursuer adm father had received £150 from Watson in 1771, and £10 but he alleged that the sum which Hope ought to have paic

In defence, Hume and others, as trustees of Watson, foun absolute disposition and sasine in favour of Watson, with for session, as sufficient to give them, in virtue of the positive pr right to the property; and, on the lapse of that period, as s the negative prescription, to extinguish the obligation to recon Watson, as in right of Hope, in like manner founded upon t conveyance in the deed 1783 as exclusive of the right of the p

To this it was answered, that prescription had been interr the action brought by the assignee of Duncan in 1782, foundin back bond; and that as the deeds had been obtained from old by fraud, and at a time when he was imbecile, they could founded on by the defenders, who were the representatives of the who had got the deeds. Of these allegations, however, there was dence.

The Lord Ordinary found 'that the pursuer's title to insist 'cluded by the operation both of the positive and of the negativ 'scription; and therefore sustained the title to exclude founded o 'both defenders,' and dismissed the process. The pursuer having claimed, and the Court having expressed doubts of the interlocutor, observing that although the pursuer admitted the receipt of the £ and £100, he concluded for reduction in toto; and he having propo to amend the conclusions, they recalled the interlocutor in hoc statu, a remitted to the Lord Ordinary to receive a supplementary summon This having been done, the case was reported to the Court, who re 'pelled the defences, stated by the defenders, arising from an alleged 'exclusive title to satisfy the production,—remitted to the Lord Ordi-

'nary to proceed accordingly, and found the defenders liable to the pur- No. 243.
'suer in payment of the expenses of the present discussion.'* Feb. 26. 1829

Pursuer's Authority.—Sinclair, July 4. 1781, (6725.)
Defenders' Authorities.—2. Stair, 12. 15; 3. Ersk. 7. 8; 2. Bank. 12. 16; Younger, Nov. 28. 1665, (10925); Murray, March 18. 1807, (10721); Stewart, July 6. 1711, (10722); Clerk, Jan. 27. 1746, (10662); Paul, Feb. 8. 1814, (F. C.)

W. Mercer, W. S.—H. Watson, W. S.—Agents.

J. Inglis and Company, Complainers.—*Buchanan.* No. 244
W. Paul, (Morison's Trustee.)—*D. of F. Moncreiff—Graham Bell.*

Assignation in Security—Lease.—Held,—1.—That an assignation by a subtenant of his lease in security of debt, intimated to the principal tenant, but not to the possessors of the subjects, and on which no actual or civil possession was taken, was not effectual in competition with the right of a trustee under a sequestration of the estates of the subtenant; —and,—2.—That an intimation of the assignation to the possessors, posterior to the sequestration, was unavailing.

Feb. 26. 1829
1st Division
Lord Newton
H.

On the 7th of May 1793, Lord Gardenstone granted a lease for 999 years to John Wilson and others, and to their heirs, assignees, and subtenants, of a piece of ground situated near the Water of Leith. This lease Wilsons assigned in 1803 to John M'Farlane, merchant in Edinburgh; and in 1811 M'Farlane granted a sublease of part of this property to the late William Maxwell Morison, advocate, who became bound, inter alia, to ereet buildings upon it to the value of £1000. Morison, along with David M'Gregor, builder, proceeded to erect houses upon the subjects; and it appeared that, in December 1816, a proposal had been made by a person of the name of Rowan to take a lease of a small house on the property at a rent of £18. In November 1817 Morison and M'Gregor applied to the complainers Inglis and Company, bankers in Edinburgh, for a cash-credit of £1000, which they agreed to grant, on condition of receiving an assignation to the subjects in security. Ac-

* According to the notes taken by the Reporter, the Lords President and Balgray were at first of opinion that the prescriptive title had been established—Lord Gillies, that the question was still open, as the parties were the representatives of Watson—and Lord Craigie, that there was sufficient interruption by the action at the instance of Tod in 1782, in which view the Lord President came to concur. A petition was subsequently presented for leave to appeal, in which it was stated, that 'from the turn which the discussion took at advising, the 'counsel for the petitioners were somewhat at a loss to know whether there was a difference 'of opinion on the Bench or not.' At this time Lords President and Craigie were absent; and the other two Judges stated that their recollection was not distinct upon the subject, and they had no notes. Lord Gillies suggested, both in reference to this and to another case, that when parties intended to appeal, they should ask the Bench whether the judgment was unanimous or not. The Dean of Faculty stated, that it was impossible for counsel to come prepared to say whether the party intended to appeal or not; and that in this case, so far from having an intention to appeal, he had considered the case so clear in favour of his clients, that he did not address their Lordships, which he would have done, if he had thought there had been the slightest doubt.

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cordingly, on the 11th of that month, Morison a bond for repayment of that sum; and Morison, w for all right he had in the premises, assigned t Inglis and Company, his right in the lease en and M'Farlane, with power to enter into possess sell the subjects. On the 13th this assignation to M'Farlane, who acknowledged the same by deed 'as principal tacksman of the ground this time Rowan was in possession, but it wa Company that he was merely the clerk of Mori establishment there, so that Morison was the tru ever, was denied, and the fact was not investigat that no intimation was made to Rowan, or t M'Farlane, and that possession was not taken Additional houses were thereupon erected or the whole premises were let to tenants. No them, and Mr. Morison drew the rents. In t sequent to the intimation to M'Farlane, Ing advances to Morison. On the 14th of Augu under the Bankrupt Act was awarded of his September Inglis and Company intimated the ants, and required that they should pay the spondent Mr. Paul was elected trustee on the usual decree of adjudication was pronounced in preference to the subjects having been made Paul, after consulting counsel, rejected it, for tl

'In respect that the assignation of the lease w 'Inglis and Company have no preferable clair 'Douglas against Hay's creditors, and Yeoman 'the trustee's judgment in this case. The first 'rectly reported, and at any rate does not app 'sequestration, and the trustee's title rested me 'deed, executed after notour bankruptcy, and 'act 1696; and as to the second, the decisio 'principle, and not of authority to determine so 'were thrown on it by Mr. Bell, Vol. II. p. 1 'been completely shaken by the judgment of t 'case of Brock against the Glasgow Bank, No

'With regard to the objection that the in 'and Company to the tenants, previous to the 'the trustee, gives them a preference, the trus 'complete by the decreet of sequestration. T 'Farquharson, May 24. 1797, has been suppo 'very point (though right in principle otherw 'statute. See Bell, Vol. I. p. 228, and Vol.

'any rate, the clauses of the late statute must produce a different result. No. 244
'See also Bell, Vol. II. p. 424.' Feb. 26. 1829.

Inglis and Company complained of this judgment to the Court, who appointed the parties 'to give in mutual and special condescendences 'as to the alleged fact of possession, with the view that the opinion of 'the Judges of the Second Division, and of the permanent Lords Ordi- 'nary, may thereafter be taken upon the whole cause along with the case 'of the Earl of Breadalbane now depending.' The case having been afterwards remitted to Lord Newton, his Lordship reported it, stating in a note, that 'it appears to have been the wish of the House of Lords, in 'remitting the case of Russell against Lord Breadalbane, that the opi- 'nion of the whole Court should be taken as to the proper mode of com- 'pleting an assignation of a lease. In consequence of specialties which 'were found to exist in that case, it became unnecessary to give any opi- 'nion on the question as to the effect of intimation to the landlord; and 'as that question occurs nearly free from specialties in the present case, 'the Lord Ordinary thinks it proper to report it.'

Pleaded for Inglis and Company—

1. A lease is a personal contract, of which an assignation is completed by intimation. Actual possession is not required to the effect of transferring the right. Possession may be requisite to vest a real right, and exclude singular successors; but the right itself is effectually taken out of the person of the cedent, and vested in the assignee by the assignation, and intimation. But Morison assigned his right to Inglis and Company, and this they intimated to M'Farlane, so that they came into Morison's place. The plea of the trustee, that possession is necessary to transfer the right, is not supported by law, and is contrary to every principle of expediency. He confounds two things essentially different—the vesting of a real right under a lease, and the transference of the right. If his plea be well founded, then no tenant can raise money upon his lease without going out of possession, and the assignee entering into possession, although the very purpose of borrowing the money may be to improve the subject and retain possession. This doctrine is at variance with the authorities, and particularly with the cases of Hardy Douglas, and Yeoman, and the opinion delivered in the House of Lords in the case of Breadalbane.

2. Supposing, however, that possession were requisite, this was effectually taken by the intimation to the tenants in September 1819. It is true that this was subsequent to the sequestration, but it was prior to the adjudication. Mr. Bell has observed that a sasine taken after a sequestration upon a previous unobjectionable disposition will be preferable to the subsequent adjudication in favour of the trustee even under the present Bankrupt Act, and such also was the law relative to an intimation on a previous assignation prior to that statute. He has, no doubt, said that this has been altered by the statute, and that the date of the assignation is to be held as the date of the intimation. But although this may be true in regard to moveables, yet it cannot apply to the cre-

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ation of an heritable security of the nature of
far, in point of principle, is not distinguishable
curity. The assignation, therefore, followed
quent to the sequestration, affords an effectual

Pleaded for the Trustee.—A lease confers tw
sonal, and the other real. To obtain a real
ing upon the lease must have taken possession
session, his right is merely personal, and liab
is undoubted in regard to a tenant; and theref
tial to give him a real right, so in point of princ
site in regard to an assignee. This is expre
authorities. But in this case Mr. Morison
Inglis and Company merely held an assignatio
natural or civil possession prior to the sequest
personal claim against him, liable to be defeat
followed by possession, in favour of any other
tion in favour of the trustee is equivalent to a
possession, and consequently effectual to exclu

2. The words of the 13th section of the stat
'all assignations &c., to which intimation or
'order to complete them as transferences or s
'to be of the date of the intimation, delivery,
'completing the same;' and it is declared that
of the trustee shall have a retroactive effect
liverance; and as the assignation was not ir
period, the adjudication must be preferable.
is therefore conformable to the statute, and
to a distinction between infeftments and inti
an adjudication may, by certain acts independ
ferable to other adjudications, even in regard
dal, yet an infeftment is always preferable to
infeftment has not been taken. Therefore, if
tion from a bankrupt complete it by infeftmen
holds an adjudication without infeftment, the
an exclusive right. This rule, however, must
not feudal, for an adjudication, being equivale
ation, is always preferable to an unintimated a
independent of the rule of the statute that an
the date of the intimation, and that no prefere
sequent to the first deliverance, the right of the
seeing that his adjudication has a retrospectiv
first deliverance.

The Court, on advising the Cases, transmitt
to the other Judges:—'1. Whether the assig
'favour of the petitioners Messrs. Inglis and
'at the date of the sequestration, in consequer

'on the 13th day of November 1817? 2. Whether the same was effec- No. 214.
'tually completed by the intimation made upon the 18th and 23d Sep- Feb. 26. 1829.
'tember 1819, being posterior to the sequestration, but prior to the act
'of confirmation and decree of adjudication in favour of the trustee?
'3. Whether, supposing the said assignation to be effectually completed
'by either of the above-mentioned intimations, the right of Messrs. Inglis
'and Company under it is preferable to that of the trustee under the said
'decree of adjudication?'

Thereafter, on advising the answers to these questions, and the Court, having again 'resumed consideration of this petition and complaint, an-'swers thereto, replies and duplies, revised Cases for the parties, and whole 'process; and having also heard the counsel for the parties, and advised 'the cause, with the opinions of the consulted Judges; find, in terms 'of said opinions, that the deliverance of the trustee, rejecting the claim 'of Messrs. Inglis and Company, is correct; therefore dismiss the petition 'and complaint, and decern; and further find the complainers liable in 'expenses.'

Lords Justice-Clerk, Glenlee, Pitmilly, Meadowbank, Mackenzie, Medwyn, Corehouse, and Newton. — The rule of law is, that rights are completed by delivery. In feudal subjects, this is accomplished by sasine or symbolical delivery; and in subjects which do not admit of sasine, by giving natural or civil possession. Tacks, in one respect, are personal; and in another, real rights. In a question between the landlord and the tenant or his assignees, they are personal rights; therefore, in a competition between two bonâ fide and onerous assignees, the landlord is bound to prefer him who first intimates his assignation, (which is the way of completing a personal right,) and to put him in possession accordingly. But, in a question with the singular successors of the landlord and the tenant or his assignee, a tack is a real right by force of the statute 1449; and therefore it is incomplete, unless possession, natural or civil, has been attained This doctrine, founded on general principles, seems fully confirmed by the authorities cited in the Revised Case for Mr. Paul. The decision in the case of Yeoman against Elliot and Foster, 2d Febuary 1813, on which Inglis and Company rely, may perhaps be justified by the specialties which occurred in it; but some of the observations which are stated in the report to have fallen from the Bench, appear to be of questionable authority.

It must be admitted that some inconvenience may arise from this doctrine where a tenant assigns his lease, meaning to remain in possession himself as subtenant to his assignee. Perhaps it may be removed by the assignee taking and recording an instrument of possession, and then granting a sublease specifying the time at which possession is redelivered to the subtenant, and his entry takes place. But, at any rate, a general principle of law must not yield to a particular inconvenience, which, if it exist, should be removed by legislative interference. In this instance Inglis and Company, if they had been vigilant, might easily have obtained civil possession.

Inglis and Company claim a preference, on the ground that their intimation to the subtenants, between the date of Mr. Morison's sequestration and the trustee's adjudication, formed a mid impediment to the completion of the trustee's right. We do not think that this argument is maintainable. In terms of the late Bank-

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rupt Statute, the assignation must be held to be of the date of the intimation; and an assignation by the bankrupt, after he is sequestrated, is clearly incompetent.

We are of opinion, therefore, that the deliverance of the trustee, rejecting the claim of Inglis and Company, is correct.

LORDS ALLOWAY and CRINGLETIE.—We concur in the foregoing opinion, but under the following explanation. We conceive it to be unnecessary to express our sentiments upon the case of Yeoman v. Elliot and Foster, because we think that it is not applicable to the present. We think that Messrs. Inglis ought to have intimated the assignment in their favour, not only to the landlord, or to the persons from whom their cedent obtained the lease, but also to every subtenant. It is said, but not ascertained, that there was one subtenant (Rowan) at the time Messrs. Inglis obtained their right; but afterwards the whole subjects were subtenanted, and for two years possessed by persons to whom Mr. Morison had let them, and from whom he uplifted the rents; yet no intimation was made to any of them.

Intimation after the sequestration was clearly too late, and ineffectual in terms of the statute 57th Geo. III. c. 137. This attempt to intimate to the subtenants shows the sense of Messrs. Inglis of their own negligence in having omitted to make intimation of their assignment during two preceding years, and that the measure was necessary to complete their right.

On the whole, we think that the assignment to the lease was not effectual to give a preference to Messrs. Inglis and Company in competition with Mr. Morison's other creditors.

LORD BALGRAY observed, he was afraid that the opinions which had been submitted to the consideration of the Court, and by which their judgment must be regulated, were rather too generally expressed, and might lead to a misunderstanding upon a most important branch of the law of Scotland. Perhaps it was not at all meant, but the matter ought to be pointed out.

It was constantly to be kept in mind, that a lease by the law of Scotland was nothing but a personal right. It was a bonâ fide contract for the use of land or other subject, as laid down by the civil law. It was very true that the Scotch act 1449 bestowed, from public utility, a peculiar privilege on those who held leases of heritable subjects, that they should be protected in the possession of their subjects against all persons till the contract expired, if they were in the actual possession. This was an exception from the general rule, and a privilege bestowed; but it altered not the nature of the right. To say that a lease is a real right, is a most egregious mistake in point of law. No doubt it is effectual against singular successors, and it descends to heirs; but this arises from other extrinsic and adventitious circumstances, totally distinct from the true legal nature of the right. Being a personal right, a lease naturally becomes the subject of assignation; and that assignation is perfected by intimation to the landlord or author from whom it flows, or acknowledgment by them, provided always he has originally bestowed the right of conveyance. Abstractly, therefore, the assignation of a lease is perfected, and must be perfected, by intimation to the landlord. It requires intimation to no other human being. So much is this the case, that suppose a number of intimations were made to a landlord, and it is required of him to give possession, he is bound to deliver it to the first intimated assignation. No authority can be pointed out in the law of Scotland to the contrary.

But, in a question of this kind, it is ever to be remembered that in all personal

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rights, and in all moveable acquisitions, they are, from the nature of the thing, precarious, unless the party has such actually within his power and grasp. The title, as it may be called, may be rendered nugatory. The mere possession of personal rights and of moveable subjects always presumes a right of property, and that permitted exercise the law always looks upon with suspicion; and therefore, when exercised to a certain extent and for a certain duration, it is thought to be more just to attend to the rights of bonâ fide third parties, and so deny the exercise of the original proprietor, who by his conduct has exposed others to be imposed upon. That is the true foundation for maintaining that, until possession follows on the assignation of a lease, the assignee is not secure. But it is most incorrect in point of law to say that the assignation is not perfected by intimation to the landlord, and is only perfected by possession. Intimation to a subtenant is nothing to the purpose. He has nothing to do with the conveyance of the right. Intimation to him has no other effect than to interpel him from paying his rent to his immediate landlord. But then when the question comes to be, whether possession has followed?—in a question with third parties this intimation is of importance, as it demonstrates that the party has taken that possession of which alone the subject is capable; but when no competition of this kind occurs, it is not the law of Scotland to say that the assignation of a lease is not perfected where there are subtenants, unless it is intimated both to landlord and subtenants. In short, assignations to leases, although quite complete as to title, may be defeated and disappointed by allowing the cedent to remain in possession. The assignee thereby exposes his right to danger and risk. All this depends upon quite different principles from the consideration of what is necessary to complete the assignation of a lease. The authority of Stair relative to possession is perfectly consistent with and agreeable to what is above stated.

The case of Yeoman was well decided, if the peculiar circumstances are attended to. The original tenants had never paid even a term's rent to the landlord. They assigned before that period. The assignation was intimated to the landlord, and the assignees were entered in the rent-roll; and moreover, the assignees actually granted a regular sublease to the tenants. By these steps no creditor could be deceived, as the smallest inquiry would have at once explained the true nature of the debtor's right. It is quite unnecessary to pursue the question further; but it appears to me proper to make these few observations, as my humble opinion in the present case.

Lords Craigie and Gillies also dissented from the opinion of the other Judges in regard to the necessity of possession.

The Lord President doubted whether the consulted Judges held possession requisite; and, on the supposition that they did not, he was understood to agree with them. He also observed that in Yeoman's case every thing possible was done to complete the right.

Complainers' Authorities.—3. Ersk. 5. 3; 2. Ersk. 6. 25; Wallace, Nov. 16. 1750, (2809); Lardy Douglas, June 6. 1794, (2802); Yeoman, Feb. 2. 1813, (F. C.); E. of Breadalbane, June 28. 1825, (1. Wilson and Shaw, p. 621); 2. Bell, 405. 221. 222. 237.

Respondent's Authorities.—3. Stair, 2. 6; 2. Bank. 9. 4; 2. Ross, 506; 1. Bell, 66; Kilk. 145; Wallace, Nov. 16. 1750, (2805 and 2809); Syme, May 23. 1806, (No. 13. App. Tack); Monk, Nov. 29. 1822, (ante, Vol. II. No. 54); 1. Bell, 67; Lord Breadalbane, July 3. 1827, (ante, Vol. V. No. 433); 1. Bell, 381.

Gairdner and Robertson, W. S.—W. Lang, W. S.—Agents.

No. 245. T. FREEBAIRN, Suspender.—*Skene—J. M. Bell.*
M. DALRYMPLE, Charger.—*Jameson.*

Diligence, Legal.—Letters of horning and charge, describing the decree on which they proceeded of a date different from the true date, held inept.

Feb. 26. 1829.
2D DIVISION.
Bill-Chamber.
Lord Newton.
R.

DALRYMPLE, proprietor of a farm of which Freebairn was tenant, having obtained against him a decree in absence before the Sheriff of Lanarkshire, on the 21st of December 1828, for £415 alleged arrears of rent, charged him for payment of the same in virtue of letters of horning, in which the decree was, by mistake, described as dated the 'first' of December, instead of the 'twenty-first.' Freebairn thereupon presented a bill of suspension, on the ground, inter alia, that the letters of horning were without warrant, there being no decree of the date therein set forth.

The Lord Ordinary refused the bill, remitting to the Sheriff to repone Freebairn against the decree in absence; but the Court altered, and passed the bill, reserving to Dalrymple to give a new charge.

F. HAMILTON, W. S.—D. DOUGLAS, W. S.—Agents.

No. 246. C. MONRO and REV. A. GUNN, Pursuers.—*Skene—Monro.*
J. LYON, Defender.—*Robertson.*

Process—Executor—Cautioner.—In an action against a cautioner for two confirmed executors, one of whom had died, it is necessary to call the representatives of the executor deceased, though there be no special allegation of intromission on his part.

Feb. 26. 1829.
2D DIVISION.
Ld. Cringletie.
T.

IN 1823 Mrs. Arthur, widow of the Rev. Robert Arthur, minister of Resolis, and Robert Arthur, his son, were confirmed by the Commissary of Ross as executors nominate of the deceased, and gave up an inventory of effects to the extent of £2951 : 11 : 3. In this confirmation the defender Lyon bound himself 'as cautioner and surety, 'acted in the Commissary books of Ross, that the sum of £2951. 11s. '3d. sterling, contained in the testament testamentary of umquhile 'Rev. Robert Arthur, late minister of Resolis, and wherein Mrs. Mary 'Turner or Arthur, relict of the said defunct, and Mr. Robert Arthur, 'tacksman of Knockgarty, residing at Kilderry near Parkhill, are the 'only executors nominate, shall be made free and forthcoming to all 'parties having interest therein, as law will; and the said Mrs. Mary 'Turner or Arthur, and Robert Arthur, became bound for the said cautioners' relief in the premises.'

Mrs. Arthur died in 1826, and in 1828 the pursuers, creditors of the deceased, obtained decree for £475, with interest and expenses, in an action before the Sheriff of Ross, directed against Robert Arthur alone as surviving executor, and as having intromitted with the funds of the deceased to an amount beyond what was necessary for payment of the debt. On this decree Robert Arthur was fully discussed; and thereafter

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the pursuers raised the present action against Lyon the cautioner, but without calling the representatives of Mrs. Arthur.

The defender accordingly pleaded as a dilatory defence, that these representatives were not called, and that he, being a cautioner for both executors, could not be called upon till both (or their representatives) were discussed;—to which it was answered, that, by the death of one executor, the office accresces to the survivor, and does not descend to the representatives of the deceased, and that it was therefore sufficient to have discussed the survivor.

The Lord Ordinary, 'in respect that when the pursuer raised his action against the defender Robert Arthur junior, the other executor was dead, whereby the office did not descend to the representatives of the deceased, but accresced to the surviving executor, (Erskine, book iii. tit. 9. § 38,) and the pursuer libelled that the surviving executor had intromitted with more than equal to the payment of his debt, and obtained decreet in terms of his libel, which has been extracted, and the surviving executor has been discussed, and this action has been brought against the defender as cautioner for that executor,' repelled the preliminary defence, and sustained the action.

The defender having reclaimed—

Robertson in support of the Reclaiming Note.—Although it is quite sufficient, in an action of constitution against executors, of a debt due by a party deceased, to call merely the surviving executor, to whom the office accresces on the death of his co-executor; yet the case is entirely different in an action against the cautioner. He is cautioner for both executors, and is entitled to relief against both; and, like any other cautioner, he has a right to demand that the principal debtors should be first discussed. In the present case, the representatives of one of the executors confirmed has not been called; and it has been frequently decided in such circumstances that the cautioner cannot be called upon till this is done.

Skene in answer.—Unless Mrs. Arthur had intromitted with the funds the defunct, she could not be liable to pay the debt now sued for; and there is no allegation on the part of the defenders that she did intromit, we cannot be obliged to call her representatives. Besides, the representatives of a deceased executor can only be considered as debtors to the estate, whom a creditor has no right to sue. The whole estate is vested in the surviving executor, who alone can call the representatives of his co-executor to account; and accordingly, it was expressly decided in the case of Rocheid (2190,) that, in an action against the cautioner, it is not necessary to call the representatives of an executor deceased.

Lord Justice-Clerk.—The report of that case bears that the deceased executor had been discussed, and that was the reason why it was necessary to call the representatives.

Skene.—At all events, the pursuer does not aver intromission by the deceased executor; and we cannot be obliged to bring an action against

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her representatives, in order merely to have it decided against us, with expenses.

The Court, being desirous to consider several authorities which ha been referred to, appointed the parties to give in 'short minutes of au 'thorities in law' applicable to the defence; and in the minute for th defender it was stated, in addition to the legal argument, that Mrs. Arthu had signed along with her son the discharge of a bond, and receipts fo arrears of stipend; but it was not alleged that she herself had actually re ceived any part of the proceeds.

The Court, on considering the minutes, recalled the interlocutor of th Lord Ordinary, and found that the representatives of Mrs. Arthur mus be called.

At the first advising—

Lord Glenlee observed.—It is clear the representatives of Mrs. Arthu should be called. She, being named executor, has a right to intromit, and ma have intromitted; but, at any rate, she was capacitated to intromit, and i should be made to appear at least that she has not intromitted. The distinc tion taken by Mr. Robertson is right.

Lord Pitmilly.—I agree. To constitute the debt, it is sufficient to call th surviving executor; but when the creditor comes against the cautioner, he mus call the representatives of the deceased executor, unless he have been discussed which was the case in Rocheid; and that case, therefore, does not support th pursuer's plea.

Lord Alloway.—There is some difficulty here. It is admitted that a action is competent against the surviving executor alone in order to constitut debt. Then, when an action is brought against the cautioner, it seems to m very odd if, while it is not necessary to call the representatives of the deceased executor in the action against the survivor himself, it should become so whe the cautioner is called. I do not give any opinion, but I see some difficulty.

Lord Justice-Clerk.—I am satisfied that the distinction taken by Mr Robertson is well founded. This cautioner is for both executors, and both were liable in relief to him; and Mrs. Arthur not being discussed when the pur suers came against him, I think they must call the representatives of the exe cutor, who has not been discussed. She was confirmed, and, it must be pre sumed, had intromissions; and it may turn out she has intromitted. Therefore we must alter, and sustain the defences till the parties are called.

At the second advising—

Lord Justice-Clerk.—I can see no difficulty. I am firmly of opinion, on examining the authorities, that there are none contrary to the principles which I think should rule this case. This is a question with the cautioner; and though a third party may call the survivor alone in a claim against the estate, yet, when he comes against the cautioner for the whole executors, it is clear that he must discuss the whole executors, or the representatives of those deceased.

Lord Alloway.—I merely wished to consult the authorities, and I am now satisfied. It is clear, as laid down by Lord Stair, that, in claims against the estate, a creditor can only call the survivor, if called merely as executor. But if intromission is alleged, he must call the representatives of the deceased exe-

cutor, who is alleged to have intromitted; and the intromission here alleged is of itself sufficient ground for requiring the representatives to be called. My opinion is entirely grounded on the allegation of intromission. No. 246. Feb. 26. 1829.

Lord Glenlee.—It does not appear to me that there is any intromission admitted; but I nevertheless think that the representatives of Mrs. Arthur must be called.

Lord Pitmilly.—I am of the same opinion.

Pursuers' Authorities.—3. Stair, 8. 59. and 79; 3. Ersk. 9. 38; Culross, March 14. 1548, and other cases, (Mor. 3877-3880); Lord Dunduff, March 13. 1612; Steven, Feb. 14. 1622, (3843); Falconer, July 7. 1625, (3845); M'Kie, Dec. 9. 1628, (1778); M'Aulay, Dec. 12. 1712, (3848); Leitch, Feb. 4. 1623, (3844); Rubric, Dec. 2. 1628, (3846); Rocheid, Dec. 5. 1623, (2190.)

Defender's Authorities.—1. Stair, 17. 4-5; 3. Ersk. 3. 61; Scrogie, June 27. 1610, (3587); Arnot, Feb. 12. 1623, (3588); Stewart, Dec. 10. 1623, (ibid.); Swinton, Dec. 14. 1711, (3581); Anderson, June 30. 1827, (ante, Vol. V. No. 424. p. 879.)

G. Monro, S. S. C.—J. Arnott, W. S.—Agents.

Agnes Hamilton, Suspender.—*Cockburn.* No. 247.
H. Paul, Charger.—*Jameson.*

Stat. 1696, *c.* 5.—*Heritable Bond.*—The Court passed, without caution or consignation, a bill of suspension of a charge for part of the amount contained in a bond, the whole of which was admitted not to have been advanced.

Paul, as trustee on the sequestrated estate of Charles Walker, charged Agnes Hamilton for payment of a heritable bond for £900, granted by her to Walker. She presented a bill of suspension, without caution or consignation, alleging that only £5 of the sum in the bond was truly advanced. Paul admitted that the whole sum in the bond had not been advanced, and restricted his charge to £300, which he understood to have been the amount actually paid, but as to which there was no evidence. On this the Lord Ordinary passed the bill. Paul then reclaimed, in so far as caution or consignation was not required; but the Court, holding that the bond, the sum in which was admitted not to have been advanced, was of itself no warrant for a charge to any amount, refused the reclaiming note. Feb. 26. 1829. 2d Division. Bill-Chamber. Ld. Mackenzie. F.

J. Cullen, W. S.—C. Fisher,—Agents.

Rev. Dr. Nicoll and Others, (Principal and Professors of the College St. Andrews,) Suspenders.—*Sir J. Connell.* No. 248.
Rev. Dr. Hunter, Charger.—*Christison.*

Parish Church—Manse—Warrandice.—Held,—1.—That the church of St. Leonards is a parish church, and the minister of it entitled to a manse and glebe;—and,—2.—That a general clause of exemption from taxations in favour of heritors does not embrace an exemption from the burden of manse and glebe.

No. 248.

Feb. 27. 1829.
1st Division.
Ld. Corehouse.
H.

The Reverend Dr. Hunter, minister of the parish of St. Leonards in the Presbytery of St. Andrews, partly burgal and partly landward, having applied to the Teind Court, under the 5th Geo. IV. c. 72, for the statutory allowance in place of a manse and glebe, the Officers of State objected that he had right to both. He therefore presented a petition to the Presbytery to allot a glebe to him, and to ordain the heritors to erect a manse. A decreet to that effect having been pronounced, the Principal and Professors of the United Colleges of St. Andrews (who are the chief heritors) brought a suspension, in which two questio

1. Whether the church of St. Leonards was a proper

2. Whether the Professors were exempt from the c

In regard to the first point, it appeared that, prior the church was connected with the hospital of St. L establishment; and that the clergyman who then offic was called the curatus, and was not paid out of the teinds, but from the general revenue of the college. Subsequent, however, to the Reformation, the church was not distinguishable from any other parish church, except by the circumstance that the clergyman was not supported out of the teinds of the parish, his stipend being payable, under a decree of the Platt Commission, out of the teinds of the Priory of St. Andrews, situated in the parishes of St. Andrews, Cameron, and Leuchars. Besides, in the ancient deeds St. Leonards was described as a parish, and mention was made both of a manse and glebe; but it did not appear that the clergyman had ever got possession of them.

In reference to the claim of exemption, the Professors founded upon a charter to their lands, dated in 1512, granted by Prior Hepburne, confirmed by James IV., and by an Act of Parliament in 1612. The clause in that deed was in these terms:—'Eximimus et in perpetuum exoneramus 'prædictos Collegium Magistros regentes capellanos studentes et pauperes 'clericos ejusdem de omnibus taxationibus, contributionibus, impositioni-'bus exactionibus et aliis oneribus quibuscunque quæ exigi poterint quo-'modolibet vel requiri de dictis Collegio Magistris regentibus capellanis 'studentibus et pauperibus clericis ejusdem, seu de dictis molendinis 'decimis tenementis annuis reditibus vicaria proficuis sibi temporibus 'retroactis, datis, vel de aliis ecclesiæ reditibus aut possessionibus quibus-'cunque dandis in futurum tenore presentium in perpetuum.' The Professors therefore contended that this clause exempted their lands from the claim for a manse and glebe, and at all events that lands belonging to colleges could only be subjected to such a burden ultimo loco.

On the other hand, it was maintained by the charger, that the titles founded on could not legitimately bestow such an exemption; and at all events, as a glebe and manse formed inherent burdens on property, which could only be taken away by express words, and as there was no express exemption from manse and glebe, the general words were not sufficient to bestow such a right.

THE COURT, on the report of the Lord Ordinary, repelled the reasons of suspension, and found the letters orderly proceeded. No. 248. Feb. 27. 1829.

Charger's Authorities.—2. Stair, 8. 15; Forbes, p. 32 and 85; 1. Ersk. 5. 3; 1. Connell, p. 28; 1563, c. 72; 1572, c. 48; 1587, c. 29; 1593, c. 55; 1594, c. 202; 1606, c. 7; 1644, c. 31; 1. Connell, 471-9.

W. COOK, W. S.—RENNY and HUNTER, W. S. - Agents.

A. SCOTT, Advocator.—*Cuninghame.*
J. WOTHERSPOON, Respondent.—*Currie.*

No. 249.

Jurisdiction—Landlord and Tenant—Removing.—Circumstances under which it was held that a tenant was barred from objecting that an action of removing, founded on an irritancy in his lease, was not competent before the Inferior Court.

Feb. 27. 1829. 1ST DIVISION. Ld. Corehouse. S.

In 1821 the advocator Scott granted a lease of a farm, at a rent of £173, to Wotherspoon and his heirs, excluding assignees and subtenants, legal or voluntary; and it was declared that, in case of the 'tenant's 'bankruptcy, the lease shall immediately fall and expire, and it shall not 'be in the power of the tenant, directly or indirectly, to continue his 'possession, either by himself, or a manager, factor, or overseer, for be-'hoof of his creditors, without the consent of the proprietor in writing.' Wotherspoon entered to possession; but having incurred an arrear of rent, Scott, in 1824, raised an action against him, under the Act of Sederunt 1756, before the Sheriff of Lanarkshire, concluding that he should either find caution for five years rent, or remove from the farm; and Scott also applied for and executed a sequestration for these arrears. The Sheriff having assoilzied Wotherspoon, Scott advocated, and at the same time raised another process, averring that Wotherspoon had become notour bankrupt, libelling upon the above clause, and concluding for his removal. In defence, Wotherspoon founded upon the advocation of the previous action, which, he contended, afforded him a defence of lis pendens; but he did not deny his bankruptcy. In his replies Scott specially averred that Wotherspoon had totally deserted the farm; that there was neither man nor horse upon it; and that it was lying totally waste. This was not explicitly denied by Wotherspoon, who, on the contrary, stated that he had 'no objection to give up the farm to the 'pursuer from this period as to the arable lands, and at Whitsunday 'next as to the houses and parks;' and accordingly he gave up the possession to Scott, under reservation of all his pleas. The Sheriff, in consequence, authorized Scott to take possession, which he did. On the 8th of May 1826 the Sheriff repelled the defences, and decerned in terms of the libel, and in the mean while the interlocutors in the first action had been altered by the Court of Session. Against the above judgment of the 8th of May Wotherspoon reclaimed, and then contended, for the first time, that the action was incompetent, in respect that it was founded upon an irritancy, which could only be declared by the Court of Session; and the Sheriff-substitute thereupon altered his interlocutor, and 'in re-

No. 249. Feb. 27. 1829.

'spect it appears that an action of removing, founded on said clause, 'ought to have been preceded by an action before the competent Court 'declaratory of the irritancy, and no such declarator having been sued 'out or obtained by the pursuer, dismissed the action.' To this judgment the Sheriff-depute adhered, 'in respect that the irritancy founded 'on is not declared to be incurred eo ipso, and without any declarator 'or process of law.'

Scott having advocated, the Lord Ordinary found 'that, by the 'minute of tack between the parties, it is declared that, 'in case of "the tenant's bankruptcy, the lease shall immediately fall and expire, "and it shall not be in the power of the tenant, directly or indirectly, "to continue his possession, either by himself, or a manager, factor, "or overseer for behoof of his creditors, without the consent of the "proprietor in writing;'—that the proceeding in this case commenced 'not by summary application, but by ordinary action as a libelled sum-'mons;—that evidence of the respondent being rendered a notour bank-'rupt was produced in process, and it appears that he was not only 'incarcerated, but applied for the benefit of the Act of Grace;—that 'the specific averments of the advocator in the Inferior Court, that the 'farm was deserted, 'that not a single furrow was ploughed between "December and the 11th of March, that there was neither man nor horse "upon it to do any work,' was met only by a vague assertion that the 'respondent's whole establishment, without stating what it consisted of, 'was allocated upon the farm, and an offer to give up possession to the 'landlord, under the reservation of all claims, which offer was accepted, 'and the landlord accordingly put into possession;—that the respondent 'joined issue with the advocator in the Inferior Court on various pleas 'of fact and law, without objecting that no declarator of irritancy had 'been raised in the Supreme Court, and that the cause had been more 'than a year in dependence before that plea was resorted to;—that, in 'these circumstances, the action in the Inferior Court was not incompe-'tent;—therefore advocated the cause, and decerned in terms of the libel.'

His Lordship at the same time issued this note:—'Whether an ir-'ritancy is to be held penal or conventional, and in consequence whether 'it requires a declarator in the Supreme Court before it can be enforced 'by the Judge Ordinary, is a question which may depend upon circum-'stances. If it be stipulated, for example, that a lease is to expire on the 'bankruptcy of the tenant, it is thought that he could not be removed 'by the Sheriff on the sole ground that he has committed a single act 'which brings him under the predicament of the act 1696, because he 'may have retrieved his circumstances, and still be able to carry on the 'management of the farm; but, if joined to the act of bankruptcy, he is 'in a situation which plainly disqualifies him from fulfilling his part of 'the contract. For example, if his whole stocking is removed, and his 'farm remains unlaboured, there seems no reason why a bankruptcy of 'that description should not be held as a fair condition of the contract,

'without any thing penal in its nature. To require a decree of declarator in the Supreme Court, before the Judge Ordinary could proceed in that state of matters, would be unreasonable in itself, and might subject the landlord to great hardship. This distinction will reconcile the apparently conflicting decisions upon the subject.'

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Wotherspoon reclaimed; but the Court, for the reasons assigned by the Lord Ordinary, adhered.

Advocator's Authorities.—Copland, Dec. 7. 1805, (No. 11. App. Tack); Miller, Dec. 11. 1811, (F. C.); Forbes, June 2. 1812, (F. C.)

Respondent's Authorities.—1. Stair, 13, 14.; 2. Ersk. 5. 25; Bell on Leases, 425.

W. Young, W. S.—W. Waddell,—Agents.

No. 250.

Mrs. Margaret M'Laren, Suspender.—*D. of F. Moncreiff—Jameson.*

A. Buik, Charger.—*Sol.-Gen. Hope—Shaw.*

Triennial Prescription—Ship-Owner—Insurance.—Held,—1.—That a party holding an ex facie absolute vendition to a vessel, and being the sole owner appearing on the register, but under a latent obligation to reconvey on receiving payment of a loan, was liable for furnishings made to the vessel.—2.—That he was not liable for insurance not made in the ordinary manner, but by inserting the vessel in the books of an association for mutual insurance, whereby the owners of the vessels entered became liable for their shares of loss.—3.—That the triennial prescription of an account of furnishings to a vessel was not barred by a marking on it, without date, by the master;—nor,—4.—By the raising and executing, within the three years, a summons for payment before an incompetent Court.

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Bill-Chamber.
T.

In the year 1823, the suspender Mrs. M'Laren lent to William Scotland, owner of the sloop Zealous of Perth, the sum of £300, and took from him, at the same time, a bill at twelve months for the money, and a year's interest, and likewise a vendition to the vessel, bearing date the 8th of July of that year. This vendition was ex facie absolute; but missives were interchanged between the parties, by which Mrs. M'Laren, on the one hand, acknowledged that it was granted to her only in security of the loan,—'I being nevertheless,' as the missive bore, 'the true owner of the said vessel, until the said bill is paid,'—and binding herself, upon Scotland repaying the same, and all expenses which might be incurred, to reconvey the vessel, which it was declared should continue at his risk while she retained it. Scotland, on the other hand, took upon himself the whole risk attending the sailing and use of the vessel, and the expense of keeping it in repair, so long as she should retain right thereto—gave power to her to sell—and bound himself to keep the vessel constantly insured in her name, and to relieve her of all claims at the hand of the 'associations' or underwriters insuring the vessel.

Mrs. M'Laren obtained a new certificate of registry in her own name; but for some time she allowed Scotland and his son, who acted as master, to continue in the sole charge of the sloop. Scotland, however, having

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failed, after the first year, to pay the interest of the loan, Mrs. M'Laren, in May 1825, dismissed the son, and appointed another master; and thereafter, in July of the same year, she sold the vessel, the price of which, after paying her debt with interest, and the charges of the sale, left a balance of £80, as to which a multiplepoinding, still depending, was raised in the Admiralty Court. Among other claims given in for a share of this balance, there was one by the charger Buik for alleged furnishings and disbursements on account of the vessel. The furnishings charged, amounting to £18: 4: 4, were stated to have been for cordage, and made between the 26th of September 1823 and 10th January 1824; and, in addition to these charges, there were, in the account claimed, two items of date 8th of April and 1st of May 1825, being charges for insurance incurred in the following way:—It seems that there exists at Perth an association of ship-owners for mutual insurance of their vessels. This is effected by each owner entering his vessel in the books of the association, and, on the loss of any vessel entered, the amount for which she has been entered as insured is allocated in certain definite proportions on the other vessels. The entry of vessels in this manner is frequently made by agents, who sign the book, and thereby become personally liable for the shares of loss effeiring to the vessel so entered by them. The sloop Zealous had been so entered by Buik on the employment, as alleged, of Scotland; and on the loss of two vessels (Dandy and Crichton) entered in the books of the association, Scotland, it was stated, had accepted bills for the share of loss allocated on the Zealous, which bills Buik was obliged to retire of the dates charged in his account.

On this account there was indorsed the following marking by Scotland, but without any date:—'I acknowledge the within account for materials 'furnished the sloop Zealous of Perth to be correct; but as for the ac-'counts of averages, the credentials, if any, can be produced by Mr. Buik. '(Signed) W. Scotland, per master, for the owners.' Besides claiming the amount of his account in the multiplepoinding regarding the balance of the price of the vessel, Buik demanded payment of it as a debt against Mrs. M'Laren personally, and in the course of the year 1826 he raised an action for payment against her before the Sheriff of Perth. She, having been cited to this action, appeared, and pleaded that the Sheriff had no jurisdiction in regard to this, which was a maritime matter. The Sheriff sustained this objection, and dismissed the process. Thereafter, in May 1827, Buik raised a new action to the same effect before the High Court of Admiralty, in which he obtained decree with expenses.

Mrs. M'Laren then presented a bill of suspension, on the grounds,

1. That the furnishings and insurance charges in question not having been made or incurred on her credit or by her authority, or while she was in actual occupation of the vessel, did not form a personal debt against her, although she appeared on the register as owner of the vessel, as she was in reality merely a mortgagee,—it having been decided by the Courts in England that the mere fact of appearing as an owner on the registry

is not sufficient to make a party liable for such charges, unless the furnishings have been made on his credit, or unless, in the case of a mortgagee, he have been in actual occupancy of the vessel. No. 350. Feb. 27. 1829.

2. That as to the charges for insurance, she had not authorized any insurance for her behoof; and that if Scotland should be held to have had authority to insure for her behoof, it could only be to insure in the ordinary way, and not to make her a partner in an association of so unusual a nature, and which might subject her to the risk of incalculable loss; and,

3. That the two items for insurance being struck off the account, the action before the Judge Admiral was barred by the lapse of the triennial prescription from the date of the last item, and that this was not obviated either by the marking on the account, or the raising of the action before the Sheriff of Perth; because, 1. As to the marking—it had no date, and could not be assumed to have been posterior to the lapse of the three years; it did not import that the account was resting-owing, or any thing more than that the furnishings had been made; and being merely by the master, it was not sufficient to save the account, as no marking by a factor, or any one but the true debtor, was a sufficient acknowledgment, any more than an oath on reference by one not the true debtor would establish the debt;—and, 2. As to the action before the Sheriff—an incompetent action cannot interrupt the running of the shorter prescriptions.

To this it was answered:—

1. The English decisions referred to merely establish that where a party is not the real owner, the mere fact of his name appearing on the register will not make him liable. But here Mrs. M'Laren was not only in form, but in reality, the true owner, having the real interest in the vessel; and she was also in actual possession by Scotland and his son, the latter of whom acted as her master, and was accordingly removed by her when she became dissatisfied with his conduct.

2. The mode of insuring adopted in this case is the common mode of insuring in the port to which the vessel belonged; and Scotland had authority from the owner to insure, both under the missives, and as master of the vessel.

3. The case of an acknowledgment by a shipmaster, who has a certain character, and possesses certain powers ex lege, having power to contract debts for furnishings, and being under a personal obligation for them, is in a situation very different from that by an ordinary factor, who has no powers but those specially conferred on him by his employer, and an acknowledgment by the former is sufficient to bar the plea of prescription, where there is no allegation of payment; but, at any rate, an action, though not in a competent Court, interrupts prescription.

On advising the bill and answers, the Court pronounced the following interlocutor:—'Find that the claims for what, in the summons, are denominated insurance losses on the vessels Dandy and the Crichton, 'are not of a kind to subject the suspender on the ground of her liability

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'for premiums of insurance on the sloop Zealous; and, to the extent of 'any such claims, alter the interlocutor of the Judge Admiral complained 'of, sustain the defences, assoilzie the defender, and decern: Further 'find, that for the cost of repairs and furnishings of the vessel, such as 'have been claimed and concluded for by the respondent, the suspender 'must be held liable, unless the claim has been cut off by the statutory 'triennial prescription: Repel the plea of interruption of the course of 'prescription founded on the alleged attestation of the account of fur- 'nishings by the master of the vessel, and in so far alter the interlocutor 'complained of; but, before further answer, allow the parties to give in 'minutes on the plea of interruption founded on the citation given by the 'respondent, and subsequent proceedings before the Sheriff of Perth.'

Minutes were accordingly given in on this point.

Pleaded for Buik.—The act establishing the triennial prescription enacts, that 'all actions of debt for house-mails &c., that are not founded 'upon written obligations, be persued within three zeirs, utherwise the 'creditor sal have nae action, except he outher preife be writ, or be aith 'of his partie.' Exactly synonymous expressions are used in the acts 1469, c. 29, and 1474, c. 55, relative to the long negative prescription. It has been found, however, as to these last, that irregular and even null citations amount to a 'following' of the obligations, so as to interrupt the prescription, and on the same ground such citations ought to be held to be a 'pursuing' under the 1579, c. 83, to the effect of interrupting the triennial prescription. But, besides, an action for furnishings to a vessel is not incompetent before a Sheriff; and, at any rate, the Sheriff had sufficient jurisdiction over the suspender, who resided within his county, validly to cite her to appear, though he might not be entitled to judge in the subject-matter of the suit.

Pleaded for Mrs. M'Laren.—The long prescription and the triennial depend on quite different principles. The former operates a total extinction of the obligation, and is founded on a presumption of dereliction on the part of the creditor. Any judicial or solemn act, therefore, which shows his intention to follow out his claims, interrupts the currency of the prescription.

On the other hand, the triennial prescription does not extinguish the debt, but merely limits the mode of proof, and is founded on a presumption of payment, so that no act merely showing the intention of the creditor not to relinquish his claim can operate an interruption; and consequently, although null citations had been sustained as sufficient to interrupt the long prescription, (which was disputed,) it would not follow that the triennial prescription could be interrupted in the same manner. But further, there is no such thing as interruption, properly so called, of the triennial prescription, from which a new course of prescription begins to run, so that, if the action be brought in time, prescription cannot run at all; while, on the other hand, if the action in which decree is sought be not brought within the three years, it must necessarily have run.

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Besides, the citation here being in an action maritime in its nature, (and admitted to be so by the charger's acquiescence in the Sheriff's interlocutor,) as to which the jurisdiction of the Sheriff could not even be prorogated, was so absolutely null and void, that it must be considered as if it had never taken place, or had proceeded on the warrant of a private individual.

The Court found that the action before the Sheriff of Perth did not prevent the running of prescription, and therefore suspended the letters, reserving to the charger to make reference to the suspender's oath.

At the first advising—

LORD JUSTICE-CLERK. — There are in this case three different points of considerable difficulty. To begin with that regarding the charges for insurance: I cannot concur with the interlocutor making the suspender liable for this insurance, which is not a premium of insurance, but losses on other vessels by an association in which Scotland entered this vessel; but whether before or after the sale to Mrs. M'Laren does not appear. Whichever way, however, this may have been, it is a most extraordinary mode of insurance; and I cannot hold that she could be made liable in this way for all such losses. Suppose the loss had been equal to the value of the vessel, could she be held liable by being entered, without her own specific authority, in such an extraordinary association, where the risk was so extreme? An obligation to pay fair insurance is very different from becoming a member of such an association. As to the other question, whether she is not answerable for furnishings and repairs, I think the Judge Admiral right. I consider her not only the apparent owner on the register, but the real owner; and she might have discharged Scotland as master the next day after the sale. None of the cases quoted touch this one. But then comes the question of prescription, and if I am right as to the insurances, there can be no doubt that these insurance articles must be struck out, and then the three years will have elapsed. As to the attestation of the master, it is not an acknowledgment that the debt was due; and as to the action brought before an incompetent Court, I do not think that an interruption.

LORD ALLOWAY.—I have no difficulty as to the insurance, as it is quite clear that it requires express consent to insure in this way. But, besides, I deny this to be an insurance at all. It is merely a combination to save the expense of insurance, by putting ships into an association, and paying an average of the losses. But such a contract cannot be entered into without the express consent of the parties; and whether it be the custom of the place or not, as there is no evidence of consent, the charges cannot be brought against this woman. As to her liability as owner, the law of England seems in some degree to have changed, and in their later cases they have adopted those views of equity which were followed in this country. These cases, however, do not apply. This person was sole and exclusive owner for her own benefit, and had the power of removing the master, and did remove him, and she alone was responsible. Then comes the question of prescription, on which I have some doubt. As the articles of insurance must be struck off, the years of prescription have run; but has it been elided by the acknowledgment or the action?

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The master was bound personally, and the acknowle
But as the oath of a co-obligant on a bill will n
think the same principle must apply here, and that
not interrupt as to the suspender, though I have gr
to the action, I am clear that it is no interruption.
tinction between the long and the short prescription

Lord Glenlee.—As to the insurances, it is pl
own authority, was not entitled to insure, except in
and that given in the missive certainly gave him no
way; nor is it alleged that the suspender gave l
knew any thing of the matter. I have as little hesi
furnishings as the true owner, which she really was
furnishings were made on the faith of other people,
but the registered owner, it might alter the questior
was the only owner, or party having an interest. T
interruption of prescription. I have no idea that th
can keep up the obligation; but then, till the mas
a non valentia agere against this woman; and I do no
any action could have been pursued against the owr
is the interruption by the action before the Sheriff c
clear about it one way or other. It was at one time c
demands would interrupt the shorter prescriptions.
no doubt; but it is not plainly made out that a deme
not before a proper Judge, is exactly the same as
and I would wish to avoid deciding this point on so

Lord Pitmilly.—I have no difficulty on any of t
terruption of prescription. Interruption is stated o
knowledgment. But I do not think this at all simi
one of several correi debendi on bills, and that we
as authorized *by law* to bind the owners. But eve
would interrupt, I do not think this acknowledgmen
only bears that the account is correct, and on that I
as to the action, I would wish to consider it more a
be called an extrajudicial, and yet it is not a judicia

At the second advising—

Lord Glenlee.—I rather incline to think that
Mrs. M'Laren between the long and the triennial pr
I doubt whether there is such a thing in triennial presc
perly so called, as a mere act done by the creditor
the statute is, that unless the action *in which you*
within three years, you have no action at all, and an
nothing. The case of Campbell v. M'Neil is on the
ing the position that any serious demand by the cr
for in that case the action was sustained to the eff
to refer to oath; but, notwithstanding the docume
copy of the summons, and appearance in Court, it w
interruption; therefore I do not think we can hold
petent Court to have this effect.

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Lord Pitmilly.—Mr. Jameson's paper has completely satisfied me. It is clear we cannot proceed here on the same principles as in regard to the long prescription. The one is founded on dereliction, the other on presumption of payment; and we must go on the words of the statute, which assume that the action in which the party is to recover must be within three years. It is, that the party shall have no action, unless he have pursued such action within three years. It follows, therefore, that an action before an incompetent Court is of no consequence, as the only question is, if this action be brought within three years? The only case which gave me any difficulty was that of Corbet v. Hamilton, on the act 1669, as to the vicennial prescription. But though the words are somewhat similar, yet they are not the same; it is nowhere said the party 'shall have no action,' and it would be dangerous to argue from the one to the other. But, besides, it was a special case, proceeding on the plea of compensation, and cannot be considered a precedent. I therefore agree that an incompetent action is not a sufficient interruption, or, to speak more correctly, prevention of the running of prescription.

Lord Justice-Clerk.—I have arrived at the same conclusion. We must take it for granted that the former process is abandoned as incompetent. We cannot doubt that it was a maritime question; but it is enough that the action is dismissed, and the judgment dismissing it acquiesced in. Then, holding it to have been totally incompetent, I agree, on considering all the authorities, particularly the case of Campbell v. M'Neill, that there has been nothing here to prevent the removing of prescription.

Suspender's Authorities.—(1.)—Baker v. Buckle, (7. Moore, 349); Jennings v. Griffiths, (Ryan and Moody, 42.)—(2.)—Bell v. Humphries, (2. Starkie, 345); Pitcairn and Scott, May 16. 1810, (F. C.)—(3.)—Ferrie, July 9. 1812, (F. C.); Campbell, Jan. 19. 1799, (11120); Baillie, March 2. 1790, (11286.)

Charger's Authorities.—(1.)—Fraser v. Marsh, (13. East. 338.)—(3.)—2. Bank. p. 176. §. 52-6; 3. Ersk. 7. 38-9; 2. Stair, 12. 26; Morris, July 21. 1629, (11228); Ainslie, July 3. 1665, (11232); Muir, Feb. 11. 1663, (11238); M'Intosh, Jan. 8. 1675, (11239); Riddocks, June 16. 1670, (2. Sup. 465); Scott, July 2. 1706, (11263); Corbet, March 20. 1707, (2642.)

W. Murray, W. S.—A. Duncan, S. S. C.—Agents.

W. Milligan, Suspender.—*Sol.-Gen. Hope—Gillies.* No. 251.
J. Barbour, Charger.—*Maitland—Lamont.*

Bill of Exchange—Notification of Dishonour.—Evidence that a letter of advice of dishonour of a bill of exchange, intended for William Milligan, residing at 'Stoop,' a village in the immediate vicinity of Dumfries, which was the post-town, addressed to William Milligan, Trench,' Dumfries, (Trench being another village in the immediate vicinity of Dumfries,) was put into the post-office of Castle-Douglas, about twenty miles distant, held not sufficient proof of due notification.

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2d Division.

Lord Medwyn.

T.

The charger Barbour, a writer and private banker in Castle-Douglas, having raised an action before the Magistrates of Dumfries against Milligan, the suspender, for payment of a bill of exchange accepted by persons of the name of Allan, and indorsed to Barbour by Milligan, who was the drawer, the latter pleaded in defence, inter alia, non-notification of dishonour. The bill bore a marking of its having been advised of date

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the 20th of May 1822; and the Magistrates f proof of the notification. It was admitted that, in question fell due, Milligan resided at a vil immediate vicinity of Dumfries, which was tl was also, in the immediate vicinity of Dumfri Trench, of which likewise Dumfries was the po Douglas, where Barbour resided, was distant proof of the notification, Barbour adduced t had been his clerk at the time when the bill fel of Castle-Douglas. The former deponed that book; 'and being particularly shown the copy c 'defender William Milligan, under date the 2 'which the following is a copy—"William Mi "and Jane Allan's acceptance to you for £18 "ple. 3 m. d., is due," &c. &c.—he deponed, ' 'of advice was engrossed by the deponent; and 'with those letters of advice, engrossed of the s 'him, and committed of that date to the post- And on an interrogatory for the defender, ' 'word Dumfries (Dfs.) in the said letter of ad 'handwriting?' he deponed, 'that he think 'tively swear that it is so;' and he further d of advice on the bill was made by him of the c witness, the postmaster of Castle-Douglas, (wh years,) 'being interrogated if a letter address 'Trench, without the addition of the post-tov 'office, would be forwarded to Dumfries?' depo 'knowledge of Dumfries and its neighbourhoo 'a letter to Dumfries.'

On this evidence Milligan maintained that th of notification, because,

1. The contraction 'Dfs.' for Dumfries, enter probably an ex post facto operation, in which ca to have been addressed to Trench without a p it uncertain where it might have been sent, no tion of the postmaster, who might not person letters; and,

2. Because he (Milligan) did not live in Tre though both villages were close to Dumfries, wh both, still a letter addressed to William Mil not in all likelihood be delivered by the pos ligan in Stoop; and on these grounds he cont not shown that he dispatched a letter of advice as to relieve him of the necessity of proving that duly received, which he had not attempted to d

On the other hand, Barbour contended that

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believe that the 'Dfs.,' which was a common contraction for Dumfries, was inserted in the letter-book ex post facto; but, at any rate, that a letter addressed to Trench, without a post-town, would undoubtedly, according to the evidence of the postmaster, have been forwarded to Dumfries; and as to the mistake of Trench for Stoop, it could not have prevented the delivery to Milligan in a neighbourhood so limited as that of Dumfries; the more especially as letters (except to persons within the town) required to be sent for, and were not sent round by the post-office.

The Magistrates of Dumfries repelled this and the other defences, and decerned against Milligan, with expenses; but, in a suspension, the Lord Ordinary found that the notification of dishonour was denied by Milligan, and that there was 'no sufficient evidence that intimation of the 'dishonour was duly made to him;' and therefore suspended the letters simpliciter.

The Court adhered, without prejudice to a reference to oath.

Lord Justice-Clerk.—This is a case as to the sufficiency of proof of notification of dishonour. Now the charger knew who the suspender was, as the bill was indorsed to himself by this man; and when we see such an error in the address, we cannot hold it a sufficient intimation, unless it be proved that the suspender got the letter. Suppose he had called at the post-office, he would not have been entitled to have got the letter addressed to William Milligan in Trench, he living in Stoop. Quomodo constat that there was not a person of the name of William Milligan in Trench? Under these circumstances, I come to the same conclusion with the Lord Ordinary, not taking into view the other matters.

Lord Glenlee.—I agree. I understand the rule to be, that the party must address the letter so as, in the ordinary case, to ensure delivery. Now we have here, not an incomplete address, but an erroneous address; and though the suspender had called at the post-office, it is not certain that he would have taken this letter as being for him. It might, in particular circumstances, have been so; but it is not the general rule that any person would take a letter so erroneously addressed.

Lord Pitmilly.—I am of the same opinion. The party does enough if he puts a letter of intimation into the post-office, and the law goes far enough in holding that sufficient, if correctly addressed. But I cannot hold this letter to have been so. At the very best, all that can be said for Barbour is, that this letter might have gone to Dumfries. But suppose it there, it is addressed not to the proper party, who, before getting it, must have led a proof that he was the person for whom it was intended. Proof might have been led to show that in this particular case the address would do; but we cannot assume that, and the interlocutor must be adhered to.

R. Welsh, S. S. C.—W. Dalrymple, S. S. C.—Agents.

No. 252. W. C. LEARMONTH, Advocato
J. MORTON, Respondent.—C

Process—Expenses—Judicature Act.—Held, that althou Ordinary, relative to a preliminary defence, on notice beir yet an adherence by the Court does not carry the expenses must be moved for and allowed.

Feb. 28. 1829.

1ST DIVISION. Lord Meadowbank. H.

MORTON having objected to the competenc by Learmonth, the Lord Ordinary repelled it, intimated his intention of submitting the in him liable in the expenses of the preliminar judgment Morton reclaimed, and the Court interlocutor:— Adhere to the interlocutor c 'the Lord Ordinary to remit the cause to the of expenses was then laid before the Auditor any of those which had been incurred in the I (as was stated by the parties) that they had agreeably to the Judicature Act. Learmonth to the Lord Ordinary, his Lordship found the 'of process verbally reports, that upon con 'Clerks of Session of the First Division of 'formly held, that when an interlocutor by a 'preliminary defence, and finding expenses du 'and adhered to by the Court, the interlocutc 'pense of the discussion in the Inner House, a Morton reclaimed.

Cuninghame.—The question here must be Judicature Act, and not by those rules which ar of the whole cause have been given by the Lo have adhered. Prior to the Judicature Act, the Lord Ordinary to find a party liable in ex minary objection. But by the Judicature Act that if the party shall give notice of his inte Ordinary 'shall forthwith give judgment for 'minary discussion.' But although the rule is Ordinary, it is not so in regard to the Court, being, that 'if the interlocutor of the Lord Ord 'shall be adhered to, an interim decree shall

* See ante, No. 126. p. 276.

† The Auditor had refused to allow a fee to a senior cou preliminary objection before the Lord Ordinary; but his and also the expense of preparing a set of papers for the co before the Court, it being incompetent under the Act of Se

'penses decerned for by him, with the additional expenses of the Court, 'if such shall be allowed.' It is not therefore sufficient to carry expenses that the interlocutor be adhered to, but they must be specially allowed. In this case, however, no such additional expenses have been allowed. With regard to the alleged practice of the Clerks, the question which was put to one of them was merely, whether an adherence to the interlocutor of a Lord Ordinary finding expenses due carried those of the Inner House, without reference to the special case of an interlocutor on a preliminary objection. It may be true that, where judgment is given on the whole cause, a simple adherence carries expenses. But this is a case which must be regulated by the words of the statute. No. Feb. 28

Anderson.—There can be no doubt that an adherence carries expenses; and the principle is, that the Court adopts and repeats the interlocutor of the Lord Ordinary. The Judicature Act, according to a sound construction, makes no distinction in regard to this particular case, and it must be interpreted according to the general principle. But, agreeably to that principle, the Court, when it adheres, adopts and repeats the interlocutor of the Lord Ordinary, and consequently finds expenses due; or, in other words, it allows those incurred in the Inner House.

LORD BALGRAY.—Although Mr. Anderson's argument is strong, yet we must be regulated by the statute.

LORD PRESIDENT.—I am of the same opinion.

LORD GILLIES.—There can be no practice under so recent a statute as to give any precise interpretation to the clause.*

THE COURT accordingly altered the interlocutor, and affirmed the report of the Auditor.

A. PEARSON, W. S.—W. WADDELL, W. S.—Agents.

J. GRINDLAY, Suspender.—*Skene—Russell.*
G. SAUNDERS, (AMORY'S TRUSTEE,) Charger.—*Jameson.* No

Process—Extract—Sheriff Court.—An objection having been made to an extracted decree of an Inferior Court that the extract had been issued before the expiration of six free days from the date of the final judgment, held not necessary to reduce the extract, or make the Clerk of Court a party; but that the fact might be inquired into in a suspension of the decree.

SAUNDERS, as trustee on the estate of Amory, brought an action before the Sheriff of Stirlingshire against Grindlay, a writer in Airdrie, for £15, in which, on the 21st of March 1828, the Sheriff decerned in terms of the libel, and found expenses due. Before the expenses were taxed or decerned for, and within fifteen days from the date of the judgment, Fe Is Lo

* Sir Walter Scott stated that for some time the Clerks, in cases of this nature, had written out a simple adherence, when such was the judgment; but that more lately, and on advertising to the Judicature Act, they always introduced a special finding of expenses where they were moved for and granted.

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Saunders extracted the decree, on which he ch brought a suspension upon various grounds, extract was irregular.

When the case first came into Court, Gri upon the allegation that the extract had been t ation of fifteen days, during which he was e advocation, in terms of section 2. c. 18. of the runt 12th November 1825, and that he had be an appeal to the Circuit Court in consequence decerned for, which he stated was necessary ur Act of Sederunt. He, however, afterwards a been issued before the expiration of six days f ment, which, consistently with section 1. c. 18

To this it was answered, that as no notice h of his intention to advocate in terms of section by section 1. to extract the decree on the expi was not true that it had been extracted before tract was ex facie correct, it could only be ob which the Clerk of Court was a party.

The Lord Ordinary found that, 'in terms 'Act of Sederunt relative to the forms of 'it was competent for the charger to extract th 'the lapse of six days from the date of pronour 'out being under the necessity of having the e 'Sheriff modified, and therefore repelled that 'it is averred by the suspender, and denied by 'tract of the decree charged on was taken out 'six days after pronouncing final judgment, f 'was preferred against the clerk of the Inferic 'of the decree instituted, the allegation cannot 'pension,'—and found the suspender liable in

Grindlay having reclaimed, and the Court, clear opinion that it was not necessary to have Clerk should be called as a party, and that the depended on whether the decree had been extr of the six days from the date of the final judg as was always the case, bore the date of the j the issuing of the extract, so the fact could no of it—'altered the interlocutor reclaimed ag 'Lord Ordinary to receive evidence touching 'the extract, and also to hear parties on the ot

J. Cullen, W. S.—G. J. Ure, W. S.

* The Lord President took occasion, on a subsequent assembled, to point out to them the necessity of an Act o Clerks of Court to affix the date of issuing extracts to those by them; and an Act of Sederunt was passed to that effect a

AGNES WATSON or RICHARDSON and CHILDREN, Advocators. No. 2
Skene—Riddell.

HERITORS and KIRK-SESSION of ANCRUM, Respondents.
Sol.-Gen Hope—Cockburn.

Poor.—Held that an able-bodied woman in destitute circumstances, with two young children to support, having a claim against her father-in-law for the maintainence of the children, he being able to support them, was not entitled to be placed on the permanent roll of paupers, but was entitled to temporary aid pending an action at her instance against her father-in-law to have him ordained to maintain the children.

SEQUEL of the case mentioned ante, Vol. VI. No. 256, p. 736, (which see.) After it had returned to the Lord Ordinary, his Lordship allowed a proof; and in the mean time the Heritors and Kirk-session, on a new application by Watson, granted an interim aliment, agreeably to the recommendation of the Court. From the proof it appeared that the circumstances as to Watson, stated in the former report of this case, were correct; and that though an able-bodied woman, yet with two children to take care of, she could not go on working so as to support herself and them, being otherwise utterly destitute; and as to William Richardson, her father-in-law, that he was a man of between 70 and 80 years of age, in embarrassed circumstances, but was tenant of a farm rented at £135 a year; and although his crop and stocking had been sequestrated in 1825, he had not been sequestrated since, and still remained in possession of his farm, and had only himself and his wife to support.

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Ld. Cringle
T.

On again advising the case with the proof, the Lord Ordinary pronounced the following interlocutor, to which he prefixed the subjoined note.*

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* "The Lord Ordinary heard parties' procurators at great length in this case, which he considers to be of the utmost importance both to the law of Scotland respecting the poor, and the laws of humanity. He is sorry to see that the Court appeared to differ from him in opinion to a certain extent, when they came to review his interlocutor of the 15th of January last, although they latterly came to do very nearly what he had done by that interlocutor. However, the cause has returned to him; he allowed an investigation of the facts, in so far as they were disputed, in obedience to the remit by the Court; a proof has been taken and reported, and he confesses that it makes no difference on his opinion of the merits of the question, as it was originally advocated to this Court; and in order to explain how this happens to be the case, he will begin with shortly announcing what he considers to be the law of this subject:—

"1st, Then, he holds it to be law that the parents of indigent children are bound to maintain them, and failing the ability of the immediate parents, the next ascendant parents are laid under that obligation; so that, in application to the present cause, the Lord Ordinary has no doubt that William Richardson, the paternal grandfather of Agnes Watson the advocator's children, was bound to support them, if he was able so to do—of which afterwards.

"2d, The Lord Ordinary holds that public begging is against the law, for by 1672 the Kirk-session and Heritors may grant a badge to a pauper, to entitle him to beg within the parish; but it is understood, as Mr. Dunlop says, that the pauper need not use this privilege unless he pleases, but may trust for support from the parochial funds. Such being the case, the Lord Ordinary holds the Heritors and Kirk-session to be the guardians and protectors of the poor, bound to extend protection, whether temporary or permanent, to every

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'The Lord Ordinary having advised the cl
'the Second Division to him, procedure follow
'duced, finds that the question advocated to t
'William Richardson, father-in-law of Agnes

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human being having a legal settlement in the parish, when to support him or her self; and here the Lord Ordinary w understanding whether it be of the least importance that or grandmother, or father-in-law of any creature starving wealthy, nay, as rich as Crœsus, if he withholds from the When such a pauper applies to a parish, is it a reasonable manity—to answer, 'You have a wealthy parent; go to hi not?' The wretched creature answers, 'I have applied to *wont;* go to the parish. As I have not even the means of less the power to go to law with that parent. I believe th as he will not, I must die of want!' Let any individual be of honour and shame, which every parent is, who, being ab it to perish in famine, a parish, meaning a kirk-session ar stituted body, ought not to be guilty of a failure in duty; stances they be misled, it is the duty of the Court to set th dinary's opinions on this subject, and on them he has act parish where he generally attends the meetings for provid shall just suppose that a pauper shall apply to a parish for whether that parish or another is bound to support him; that question shall be settled, the pauper must be maintair but the parish, primâ facie liable—that where he has gene If he be allowed to die, it would settle the question with gined that the pauper is to try the question, which of the t is to aliment him? Certainly not. Look to our record questions are tried by the parishes themselves.

"Now it does not appear to be of the least importanc be a parish or an individual that disputes the liability to a It arises out of nature herself. The pauper cannot be allc which does not deny the indigence of the creature must al cover its own relief. If this be not law, there is no other perish, if the humanity of individuals do not interpose to munity as a human being perishing of famine.

"To apply this to the present question, the Lord Ordir William Richardson was liable, and is so yet, to maintain proof which has been led of his circumstances—in spite c sequestrated in 1825—the Lord Ordinary sees that he ha that he retains the lease and possession of a farm of £135 gling to pay his rent, but still a person of that description to maintain his children or grandchildren. It appears to tl to make such a demand. If he be not able to keep such a let him abridge his establishment and mode of life, to sui maintain his offspring; for who can assimilate his situat and yet labourers maintain many more than four childr opinion of the result of the proof; but, with the utmost r is quite irrelevant. The question here originally was n was or is liable to maintain the children, but whether the fusing to allow aliment to a woman undeniably unable t very last stage of pregnancy, and burdened with three in was advocated, and it is one which was decided by the pub her application to the parish of Ancrum, the parish of S support the pursuer. The Sheriff next, after the refusa time, and the humanity of Jedburgh received her into th

'of her children, was or is able to maintain them?—but whether she and 'they, confessedly indigent, and he confessedly refusing to maintain them, 'ought to have received temporary support from the parish of Ancrum; 'that they were entitled to such support, and that the parish did wrong 'in refusing it; but, in respect that she and they received such maintenance from others who do not demand repayment, no decree can be 'given for the amount thereof; that the said William Richardson having 'taken charge of two of the children, the parish is also relieved from 'affording support to them; but that as the pursuer Watson, having 'the charge of two infants, cannot labour so as to maintain herself and 'them, the defenders are bound to give the pursuer temporary assistance, 'or to take her children from her and maintain them, reserving to the 'defenders their relief from the said William Richardson; and in re-'spect that the Lord Ordinary considers the proof to be quite irrelevant

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tained for nine months. The Lord Ordinary formerly said that the parish of Ancrum were mistaken, and he must repeat that opinion. It was their duty to maintain her and the children, while she was personally unable to support herself and them; and they would have got their relief from the grandfather of the children, at least for their maintenance. Whether he is liable to maintain his daughter-in-law or not, is a different question. But if it be questionable, it a fortiori proves that the parish ought in the mean time to have maintained the woman while unable to do any thing for her own support. With the utmost deference to any contrary opinions that may exist, the Lord Ordinary must express his own, that the proof led is quite irrelevant to the question as it was decided by the Kirk-session, and which was advocated, namely, Whether that Session was acting legally or properly in refusing subsistence to a woman and three infants undeniably and undenied to be absolutely unable at the time to maintain themselves, for the single reason, that the children had a paternal grandfather able to support them, but who refused to give them assistance, and who, even in the Sheriff's opinion, was unable to support more than two of them. The Lord Ordinary thinks that the Kirk-session and Heritors were wrong; and he is satisfied that if the contrary be held to be law, very great inconvenience must be the consequence. Even the factor for the Marquis of Lothian decides this question as the Lord Ordinary has done, when an interrogatory was put to him, applicable to the circumstances of this case. See Mr. Grainger's oath, proof, p. 5, taken in Edinburgh. The prayer of the original petition to the Kirk-session was, "to allow to her and her infant children such a sum, payable weekly, as you may consider proper and necessary for their relief and support, reckoning from the 28th October 1825, with an additional sum as inlying charges and midwife's fees of the last child, and the expenses incurred by the Sheriff-depute in conveying the petitioner in child-labour from Knowsouth to Sprouston." The Lord Ordinary formerly observed, and now repeats, that as the humanity of individuals paid all the inlying charges, and maintained the pursuer and her family till she came out of the Castle of Jedburgh, no decree can be given to the pursuer against the defenders for these sums; and, quoad aliment after that period, it is clear that as her father-in-law took two of the children, and maintains them, all claim for them is at an end; and perhaps till now she may have lived on the charity of others, who do not demand repayment, in which case the parish is relieved of that also. But in so far as regards time to come, as she is an able-bodied woman, able to work for herself, and partially for the two remaining children, the parish ought to give her assistance; or, if they decline that, they must take the children, and operate their relief from their grandfather. This must have been the arrangement, if there had been no relation able to maintain them, and the question had been whether another parish ought to bear the burden; and the Lord Ordinary can see no distinction that can alter a case where a parish declines such a burden, and where it is opposed by an individual. Having thus explained his views at a length perhaps too great, he subjoins an interlocutor in conformity to them."

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'in this case, in which Richardson is not a party,
'for the whole expenses of the advocation and
'mits to the Auditor to tax the same; and rem
'Ancrum with instructions either to give the
'ance for the support of herself and two infan
'her and maintain them.'

The Heritors and Kirk-session having reclaim

LORD GLENLEE.—As to those general principles m
nary's interlocutor with regard to the necessity of provi
will differ. The present process, however, is plainly mor
any real consideration. The thing has been radically
woman from the beginning. Her application to the Sh
law was interrupted by the return of her husband. H
applied of new to the Sheriff, who ordained the father-in-l
ren, and to appear to be examined as to his capability of n
the process stopped. If the woman had then applied for
the action was at an end, there could have been no harm
up the action, and applies to be put on the ordinary rol
relief was given pending this process, and a proof allowe
as to this process; for if it had turned out that she wa
her father-in-law unable to maintain the children, the Co
she must be admitted to the roll as an ordinary paupe
result of the proof; for the Lord Ordinary holds she is no
it is clear she cannot be considered so; and her father-in-l
tain the children. The Lord Ordinary has appointed an
do not suppose the parish ask to have it recalled; but th
expenses, put upon the ground of the irrelevancy of the p
a case to give expenses, and therefore there must be
Otherwise I am very well satisfied with the interlocutor,
woman is only to get temporary relief, and is still to carr
her father-in-law.

LORD PITMILLY.—This was just an ordinary applic
poor's roll. Now, when an application of this sort is made
one way or other. But there may be some difficulty as
entitled to relief; and this was the case here, until the gra
port was ascertained. In such cases the parties are not to
and the applicant should get some temporary relief; and w
per footing in the last interlocutor. Then, as to the othe
investigation as to the fact; and certainly the proof as to
But, pending the investigation, we recommended to give t
father-in-law's liability was settled, and so separated the
whether she is to be put on the poor's roll or not, that d
proof as to Richardson's capability of maintaining the childr
him must be brought to a conclusion, and the proper way is
before the Sheriff, and she must insist in that action; but n
pending, what is the course to be followed in this process? I
be pronounced against the parish, but that it should be sist
and she is entitled to the interim support which she is getti

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application. Till that action is terminated, we cannot say whether she should be on the poor's roll or not. Then the only question is as to expenses, and I cannot conceive that the parish should be liable for taking a proof allowed by this Court.

LORD JUSTICE-CLERK.—Lord Pitmilly has put this question on a proper footing. The Lord Ordinary supposes that we differed more from him than we did. We thought we had not materials to decide, and allowed investigation; and this interlocutor is very different from the former, which was just placing her on the ordinary roll of paupers. This, however, only gives a temporary allowance; and I do not feel disposed to object to that finding, for it is clear there is enough to warrant the continuance of temporary assistance towards the support of the children. I agree with Lord Pitmilly that the process before the Sheriff must be proceeded with, and the parish will be entitled to appear if necessary, and she is bound to co-operate with them. As to expenses, considering all the circumstances, I cannot think the parish liable.

THE COURT accordingly pronounced this interlocutor:—'Recall the interlocutor of the Lord Ordinary; find that the advocator is bound immediately to proceed in and follow forth her action before the Sheriff of Roxburghshire against William Richardson, her father-in-law, to a final issue; in the mean time find her entitled to a continuance of the temporary support now given her by the Kirk-session of Ancrum, in pursuance of a former recommendation of this Court; sist further proceedings in the present action until the before-mentioned process before the Sheriff of Roxburghshire has been concluded, in which process the heritors and Kirk-session of Ancrum shall be entitled to make appearance for their interest; and find no expenses due to either party.'

G. MONRO, S. S. C.—H. DAVIDSON, W. S.—Agents.

ANDERSON, CHILD, and CHILD, Pursuers.—*D. of F. Moncreiff—Greenshields.*
POTT and M'MILLAN, Defenders.—*Forsyth—Borthwick.*

No. 255

Personal Exception—Cautioner.—Circumstances in which cautioners in a loosing of arrestment held precluded, by the tenor of their defences in an action of forthcoming, and by delay, from availing themselves of an objection to the character of the arrestments.

Feb. 28. 18[illegible]
2D DIVISIO
Ld. Macken
F.

THE pursuers, Anderson, Child, and Child, being creditors of Abiel Wood of Wiscasset in America, in the month of May 1805, used arrestments jurisdictionis fundandæ causâ in the hands of several individuals in Glasgow who were indebted to Wood the amount of freights of a cargo from America to the Clyde, per the Diana, a vessel belonging to Wood, against whom they thereupon raised in the Court of Session an action of constitution. On the 1st of June, M'Millan, partner of the concern of Pott and M'Millan, Wood's agents in this country, granted to the pursuers a bond of caution, not de judicio sisti, nor describing the nature of the arrestments, but binding himself to make forthcoming to them the funds arrested, as accords of law. Letters of loosing were accordingly intimated on the 9th of June, and on the 10th arrestments on the dependence were used in the hands of the several consignees;

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which last arrestments were never loosed. The d
M'Millan, however, obtained payment of the freight, g
signees letters of relief. After a long litigation, the
1822, obtained decree in their action against Wood for
Immediately on this, they raised the present action of f
the defenders. The summons narrated the arrestm
fundandæ causâ, and the action against Wood, and then
the arrestments on the dependence, and the bond of c
M'Millan, which, though mentioned in general terms, w
as granted for the loosing of the arrestments on the depe
cluded to have the freights made forthcoming. This s
cluded to have made forthcoming the price of a vessel
which had likewise been arrested by the pursuers, to wl
sary here to advert. The defences given in by Pott and
regarded the freight of the Diana, were in the follow
'regard to the freight arrested of the Diana, the defenc
'lodged in the hands of the opposite agent all their acc
'ers; and being willing to account for the balance, no
'to be stated.' In the course of the proceedings, howe
ed that neither the warrants nor executions of the ar
dependence were produced. This, and certain pleas as
gave rise to some litigation, in the course of which th
(Lord Pitmilly) gave an interim decree (June 12. 1826)
was acquiesced in by the defenders; and thereafter (J
pelled the objections to the title, 'and also the objections
'duction of the arrestments, in respect there is sufficie
'admission of the defenders, of the existence and natur
'ments to which the bonds of caution relate.'

Against this interlocutor the defenders reclaimed.

Hitherto the case had been argued by both parties as
caution had reference to the arrestments on the dependen
advising of the defenders' reclaiming note, it was state
time, that this bond was granted on loosing the arrestmen
dandam jurisdictionem, and was prior in date to the arr
dependence.

On this the Court (Nov. 17. 1826) remitted to the Lor
'hear parties further on the nature of the arrestment an
'tion, and new allegations of parties relative thereto.'

The Lord Ordinary (Lord Mackenzie, who had come
of Lord Pitmilly) appointed Cases, in which it was.

Pleaded for the Defenders—

That the bond of caution having been granted in a loos
restments ad jurisdictionem fundandam only, and not in
those on the dependence specially libelled on by the pursu
be the foundation of an action of forthcoming; and the
course for the pursuer to adopt was to bring a forthcomin

consignees upon the unloosed arrestments used on the dependence, leaving them to seek their relief from the defenders. No Feb. 5

Pleaded for the Pursuers—

As the bond in question contained an absolute obligation to make the funds arrested forthcoming, the pursuers were entitled to enforce that obligation, although it had been incurred with reference to a loosing of arrestments jurisdictionis fundandæ causâ,—the defenders having been permitted, in consequence of that bond, to draw payment of the arrested freights; but, at any rate, that the defenders having, in their defences, declared their willingness to account for these freights, and having pleaded the cause for several years without stating this objection, were now barred from founding on it.

The Lord Ordinary, on advising these Cases, altered the interlocutor of Lord Pitmilly, and assoilzied the defenders, with expenses; observing in a note—'The Lord Ordinary cannot get over the circumstance that 'the bond of caution libelled has no reference to the arrestments libelled, 'but only to arrestments jurisdictionis fundandæ causâ, on which the 'pursuers do not insist.'

The defenders, however, having reclaimed, the Court, 'in respect of 'the tenor of the original defence, and of the long delay in bringing forward the objections now maintained, and of the procedure which has 'taken place in the cause,' altered 'the interlocutor of the Lord Ordinary 'in so far as it alters the prior interlocutors in the cause, and assoilzies 'the defenders, and finds the pursuers liable in expenses;' and remitted to his Lordship 'to ascertain the amount of the funds, and to hear par-'ties further thereon, and proceed as to him shall seem just,—reserving 'all claims to expenses until the issue of the cause.'

Lord Glenlee.—When one considers the whole matter, it seems too late to listen to this objection. The defenders said in their first defence that they were willing to account; and if they had not, the only consequence would have been an arrestment in their hands of the funds possessed by them. In the bond there is no mention made of the arrestment jurisdictionis fundandæ causâ; it is only inferred from the date that it had reference to these. If the fact be that no arrestments were used till after the date of the bond, it must have been just that they were satisfied that these people were bound for arrestments to be laid on, though they might be entitled to insist that they should be laid on so as to attach the funds; and we may just suppose he agreed to become cautioner before they were used, but insisted that they should be used. The material thing with me, however, is, that this objection, if stated in time, would have been followed by an arrestment in their hands, and it is therefore too late now. I would therefore alter in so far as the interlocutor assoilzies in toto.

Lord Pitmilly.—If the interlocutor is to be altered, I should wish it to be done on the last ground, as I think the objection well founded, if the bond has no reference to any arrestments but those jurisdictionis fundandæ causâ. A bond to loose arrestments jurisdictionis fundandæ causâ is only that the goods are to remain in fence till the party appears, and, in order to attach them, the creditor must lay on new arrestments; and therefore, if this bond has reference only to

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arrestments jurisdictionis fundandæ causâ, it could not be a ground of forthcoming at all. In the bond I see no reference made to any particular arrestments; and the difficulty is, how it is made out that it refers to those only jurisdictionis fundandæ causâ. That is said to be made out by the dates; and I think there is a great deal in that, if it had been brought forward in good time; but the plea that it was not brought forward in time (which is not pleaded in the papers) has much moved me.

LORD JUSTICE-CLERK.—On reading the papers, I felt the same difficulty as Lord Pitmilly. If this bond be meant to apply to arrestments jurisdictionis fundandæ causâ, it is impossible it should have been in those terms, though certainly prior to the second arrestments; and it is clear that these parties themselves took the same view of it, as they referred to them, and said in their defence, we are ready to account. If they had taken the objection at first, an arrestment would at once have been laid in their hands; but, after twenty years litigation, to take an objection in the face of their own defences cannot be allowed; and if the parties went against the arrestees, they would have relief against the cautioner.

W. PATRICK, W. S.—A. BAYNE, S. S. C.—Agents.

No. 256.

G. PENTLAND, Advocator.—*Buchanan.*
J. SCOTT and Others, Respondents.—*Walker.*

Lease.—Held that the scroll of a lease by a minor in favour of a tenant possessing under a certain lease, but on which scroll no possession had been taken, did not afford a defence to the tenant against payment of the rent due under his former lease.

March 3. 1829.

1ST DIVISION. Lord Meadowbank. S.

THE Hon. Alexander Oliphant Murray, eldest son of Lord Elibank, was proprietor of Pittheavlis, subject to a reserved right of liferent in favour of Lady Elibank. Part of these lands, called Greenyards and Unthank, had been possessed for several years by Pentland as tenant,—the former at a rent of £60, and the latter of £30. In April 1818, Lord Elibank, as administrator for his son, who was a minor, authorized Pentland to get building leases prepared of these lands for 99 years; and Pentland alleged that, agreeably to this authority, a scroll of a lease was prepared between Mr. Murray and him of Greenyards at a rent of £5, and of Unthank to his son Colin at £40, and binding them to erect buildings. This scroll had a marking on the back, dated the 21st July 1822, said to be signed by Mr. Murray, (who was still a minor) approving of it, and ordering it to be extended. Mr. Murray, having gone abroad, granted a commission to certain gentlemen, who appointed Mr. Scott, the trustee for the creditors of Lord and Lady Elibank, to be their factor. In August 1825, these commissioners and Mr. Scott presented a petition to the Sheriff of Perthshire, setting forth that Pentland as tenant of Greenyards and Unthank under his original title of possession, was due large arrears of rent, and praying for decree and sequestration. In defence, Pentland founded upon the letter of Lord Elibank in 1818, and the scroll of the lease of 1822, and alleged that possession had been thereupon taken by him and his son, and buildings erected

upon the faith of these documents, and therefore that his son was the tenant of Unthank, for the rent of which Pentland could not be made liable; and that, as to Greenyards, the rent had been reduced by the above transaction from £60 to £50. No March

The Sheriff, after allowing a proof as to the possession under the above documents, found 'nothing proved tending to show any alteration in the 'mode of occupation of Greenyards and Unthank, after Whitsunday 1822, 'from what previously took place, from which it can be inferred that at 'the said term a change of possession was adopted, and the building 'leases then entered upon; but that, on the contrary, the same mode of 'possession continued after that term as was enjoyed by the defender 'previous thereto, when he occupied the lands of Greenyards at a rent 'of £60, and the lands of Unthank at a rent of £30; and therefore re-'fused, in these circumstances, to sustain the building leases founded on 'by the defender, which are incomplete, and do not appear to have been 'acted upon,'—and decerned in terms of the libel. Pentland having advocated, the Lord Ordinary, after hearing his counsel, found 'that none 'of the documents founded on by the advocator (whether taken 'individually or collectively) are, even if the same had been followed by 'possession, sufficient to constitute a lease binding and effectual upon 'the Honourable Alexander Murray, who was, at the date thereof, under 'the age of majority,' but above the years of pupillarity; that even if the 'said documents could have been held, if followed by possession upon his 'part, to be sufficient for constituting the contract of lease between the 'parties, there has been no proof of such possession adduced, or offered 'to be brought; and that the proof led in the Inferior Court is, upon 'this point, altogether defective and incomplete;' and therefore repelled the reasons of advocation, and remitted simpliciter. To this interlocutor the Court, without requiring the proof to be laid before them, and after hearing the counsel for Pentland, adhered.

J. J. Fraser, W. S.—Walker, Richardson, and Melville, W. S.—Agents.

David Dickson, Esq. and Others, Pursuers.—*D. of F. Moncreiff—Sol.-Gen. Hope—Pyper.*

J. Cuninghame, Esq. Defender—*Fullerton—Jameson.*

Lord Medwyn, Defender.—*Irving—Keay—Anderson.* No

Entail—Sasine—Res Judicata—Title to Pursue—Personal Objection—Homologation.—1.—Circumstances under which it was held,—(1.)—That an entail executed in implement of a decree-arbitral did not prevent an heir-substitute from selling part of the estate.—(2.)—That a sale under a power in the entail, and by authority of the Court, in absence of minor and pupil heirs, was effectual.—(3.)—That the refusal of a bill of suspension presented by a purchaser, relative to another sale, afforded a plea of res judicata.—(4.)—That a sasine written on nine pages, but stated in the docquet to be on eight, was valid.—2.—A posterior entail, inconsistent with the original one, having been sustained by the Court; and an action having been brought by the heirs-substitute under the original entail, concluding for reduction of the sales of parts of the estate falling within it—for declarator of irritancy against the heir in possession under the second entail, in respect of his having concurred in those sales, and to have the next substitute found entitled to possess; but that substitute having had the suc-

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cession to the fee propelled to him under the second entail, and be a freeholder, and having voted as such—Held,—(1.)—That the o lated.—(2.)—That the action was not maintainable by that substitu with him, notwithstanding a renunciation by him of the infeftment, pendente lite against the other heirs;—and,—(3.)—That these by the defenders, although not heirs of entail.

1st Division.
Lord Eldin.
D.

William Dickson, proprietor of the estate of I sons—John, David, and Michael. In 1733 he execu his estate in favour of John and the heirs-male of hi ing, the other heirs-male of his own body. This companied by a prohibition against altering the orde not by irritant or resolutive clauses. On the 17th he executed an unlimited disposition in favour of Jo the 8th of March. John made up titles to part of charter, proceeding on the disposition of 1733—to pa marriage-contract—and the rest (embracing the baron sessed on apparency. He himself acquired, in fee- land in that part of Edinburgh now called York pl issue, and his heir at law was his younger brother Da children, the eldest of whom was William, afterwar Dickson. On the 11th of June 1767, John dispone to trustees for various purposes, but particularly to pay an annuity of £100 to David, and settle prov each of David's younger children; and declaring tha any part of the lands for these purposes, they should the rents of the residue till they had a sufficient f other lands in place of them. He further appointed of any part of his paternal succession, unless absolutel the purposes of the trust being accomplished, to denu 'said William Dickson, or the eldest son of my said 'Dickson who shall be alive at the time, and the heirs 'whom failing, to the other sons of my said brother 'their seniority, and the heirs-male of their bodies 'failing, to the sons of my said brother Dr. Michae 'according to their seniority, and the heirs-male of t 'ively,'—and that under such burdens, restrictions, a should appoint by a writing under his hand. He died without having executed any such writing. His b thus excluded by the trust-deed, adopted legal measu aside; and in 1769 the estates were sequestrated by t on a petition by the trustees.* These proceedings consequence of an arrangement under which, while Dav deed, a submission was entered into between him and h liam to certain arbiters. By this submission the arbiter appoint such parts of the estates to be sold as they mi

* See Hyndford and Others v. Dickson, Dec. 5. 1769

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for payment of the debts, to settle the provisions to be payable to the younger children of David, and to determine 'in what manner, to what 'series of heirs, and under what burdens, limitations, conditions, pro-'hibitory, irritant, and resolutive clauses, the said lands and estate, or 'what part thereof may remain unsold, shall be settled,'—and in general to do whatever might be necessary 'for the interest of the said parties, 'and a final and amicable settlement of their whole family affairs.' Under an interim order of the arbiters, David executed a disposition of the estates in favour of the trustees, who were thereupon infeft. He and General William then acquired right to the debts due by John, of which all the creditors, with one exception, executed discharges. For the security of these creditors, they granted heritable bonds over the barony of Culter, and the five acres in York place, and at the same time disponed these lands to a Mr. Boswell, as trustee for the creditors, with power to him to sell them for payment of John's debts. They also granted a bond of relief to the trustees, to protect them against the claim of the creditor who had not discharged his debt.

After these arrangements were concluded, the arbiters, on the 11th of August 1775, pronounced a decree-arbitral, by which they 'decerned 'and ordained the said Mr. David and William Dickson, for their re-'spective rights and interests, on or before the 1st of October next, to 'execute a tailzie and strict settlement of the lands and barony of Kil-'bucho in favour of the said Mr. David Dickson in liferent, and the said 'William Dickson and the heirs-male of his body in fee—whom failing, 'to the others mentioned in a scroll of the said tailzie signed by us, of 'the date hereof, as relative to this decree-arbitral, and with and under 'the whole conditions, provisions, clauses prohibitory, irritant, and re-'solutive, contained in the said scroll;' but they declared that the life-rent of David should be burdened with an annuity of £250 to his son General William, and that they should grant a joint bond to the younger children* for payment of certain provisions. On the same day the trustees denuded in favour of General William and the series of heirs mentioned in the trust-deed, and he was thereupon infeft. He then, upon the 27th of January 1776, executed the entail agreeably to the scroll referred to in the decree-arbitral. It proceeded upon the narrative of John's trust-deed—the measures taken by David to set it aside—the arrangement and relative submission—the discharges by John's creditors, and the decree-arbitral—and then the dispositive clause was thus expressed:—'Wit ye me, therefore, in implement of the decree-arbitral and 'other writs above narrated, and for carrying the intention of the said 'deceased John Dickson, my uncle, into further execution, to have given, 'granted, and disponed, likeas I, &c. give, grant, and dispone to and 'in favour of the said David Dickson, my father, in liferent, during all 'the days of his lifetime, for his liferent use allenarly, and to myself and

* These younger children were—John, a member of the Faculty of Advocates—David, a clergyman—and two others unnecessary to be noticed.

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'the heirs-male of my body in fee—whom failing, 'son, advocate, my first brother-german, and second s 'Dickson, my father, and the heirs-male of his bod 'David Dickson, my next brother-german, and th 'father, and the heirs-male of his body'—whom faili heirs. This deed was fortified by all the clauses of it was declared, that as the lands were liable for the father William, his uncle John, and his father David 'himself, preceding the date hereof,' (all of which we dens,) therefore it was provided, 'that if the prices o 'of five acres of ground in the New Town of Edinbu 'said father and me to the said Thomas Boswell, sl 'for paying the whole debts and provisions aforesai 'case it shall be lawful to, and in the power of m 'Dickson, or the heir possessing the said estate for 'wise to any of the other substitutes hereby called 'bring an action before the Court of Session for se 'such parts of the said lands and barony of Kilbu 'with least prejudice to the remainder, and shall b 'ing such of the said debts and provisions as shall 'due application of the prices of the other lands and 'tioned.' There was also a clause that the heirs sho of the entail, and on no other title. The entail was r of February 1776, and in June a Crown charter wa it, and sasine immediately taken and recorded.

Prior to this sasine, an heritable bond was grant General William to his brother John (the advocate,) a children for their provisions, on which they were inf lands of Culter and the five acres in York place were the debts; but it was alleged that the proceeds wer purpose. David died in April 1780, whereupon G possession in virtue of his infeftment under the ent with concurrence of his brother John as his comm action before the Court of Session, directed against terest, and as administrator in law for a child then a other heirs-substitutes, several of whom were in pu ting forth the terms of the entail, the insufficiency Culter and the five acres to pay the debts, and the part of the entailed lands, the summons concluded th should be found empowered to do so; that a proof sh amount of the debts, and of the lands proper to b should be declared free from the fetters of the ent was made for any of the defenders; but John Dic missioner and counsel for his brother the General, ha as well as the other brothers, an interest to have the get payment of their provisions, on which there w

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interest. No tutors ad litem were appointed to the pupil children; and appearance having been attempted for two sons of Dr. Michael Dickson, who resided in England, an objection was made that they had not sisted a mandatory, and they did not subsequently appear. After some procedure, the Court, on the 11th of December 1784, found that the debts condescended on had been contracted prior to the entail; that, in virtue of the reservation, it was competent to sell part of them; appointed certain lands to be sold, and ordered that the sale should be reported, and the surplus price applied in the purchase of other lands, agreeably to the entail. At this time nothing was done under this authority; and General William, conceiving (agreeably to the then recent decision in the case of Agnew of Sheuchan) that the whole lands were liable for payment of his debts, and being greatly embarrassed, executed a disposition, in July 1785, of the estate of Kilbucho in favour of John Loch, Esq., as trustee for his creditors. An action of declarator at the instance of him and Mr. Loch was then brought against the heirs of entail and their respective children, concluding to have it found that the lands were attachable for the debts of the General then due, and that Mr. Loch was entitled, under his disposition, to sell them for payment of these debts. Appearance was made by his brother John, and some of the other nominatim heirs-substitutes, but none for the minor children of these substitutes. During the dependence of this process, and before any judgment was pronounced, the lands which had been authorized to be sold were exposed by public roup, and purchased, on the 31st of January 1786, by the late William Cuninghame, Esq., father of the defender Mr. Cuninghame; and, on the 5th of February thereafter, another part of the estate, called Parkgatestone, not comprehended in the conclusions of the first action, was purchased by private bargain also by Mr. Cuninghame. He then, to ascertain the validity of the sale, presented a bill of suspension of a threatened charge for the price of the lands last sold; and this having been reported, along with the action of declarator at the instance of the General and his trustee, on informations to the Court, (one of the informations being for Mr. John Dickson and the heirs-substitutes who had appeared,) their Lordships, on the 10th of March 1786, repelled the defences, and found and declared in terms of the libel, and remitted to the Lord Ordinary to refuse the bill of suspension presented by Mr. Cuninghame.*

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* See Mor. 15534. The following notes of the opinions of the Judges were laid before the Court by the pursuers:—

"Lord Swinton.—Clear that no person can bind up his estate against his own creditors.

"Lord Justice-Clerk.—No man can make a deed to hurt prior creditors; but there is a difficulty as to future contractions. This requires very serious consideration.

"Lord Eskgrove.—I am much difficulted, laying aside the decision in the case of Sheuchan; and I do not see that it established law in every case. Clear the act 1685 applies not to the maker of an entail, but to heirs only; and if the fetters were laid only on the maker, it could not be registered in the record of tailzies, or thereby have more effect than it had aliunde. The question is, whether such a settlement as the present may not be good, independent of a statute? The rule of law is, that no man can hold an estate which is not affectable

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In consequence of this judgment, Mr. Cuningham the lands which he had purchased, and received a c General and his trustee Mr. Loch, and which John s heirs-substitutes subscribed as consenters. On this de was infeft, and obtained from these heirs-substitutes position, on which he was likewise infeft. The Gene deeply involved in debt, an arrangement was entered i his brother John, (who was the next heir-substitut

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by his debts; and therefore by the act 1685 the right of the conti Here there is a resolutive clause. There are two other modes in wi estate against creditors. He may dispone the fee, and only reser interdict himself. A voluntary interdiction will be effectual, even a man be not so weak and facile as he calls himself. This Cou grounds, but both interdictions equally effectual. The arbiters in deed they ordered would have some effect; and John Dickson s entail. I would incline to have a hearing in presence.

"Lord Braxfield.—If this were a new case, notwithstanding the I would join your Lordships in wishing a hearing in presence; but t determined in the case of Sheuchan. I was for the judgment then the same opinion. Tailzies were no doubt made before 1685, and in this country are held under these deeds; but the House of Lords trary to a judgment of this Court) that these entails are not effectu ing to that act, and no tailzie can be valid but upon that statute. no doubt to bind up this young man, and they meant well; but th way. They should have restricted his right to a liferent; for s perty, his debts must affect it. The other case of an interdictior those who are weak and facile; but if a man prove himself otherwis ation of his right. Besides, a man's deeds, even under interdictio lesion is proved. Another man may give me his estate under limi sub modo as he pleases to give it; but if once the fee-simple is in that remains, can cut out my creditors. The act 1685 is the rule be determined; but every line of that act is repugnant to the idea perty not affectable by his debts. Accordingly, no prohibition to irritancy of debt, is sufficient; there must at the same time be an right of the debtor. It is now trite law, that without a resoluti effectual against creditors. By the act 1685 the next heir serves passing by the contravener, that he may not be liable for his debts the maker himself; for if you pass by his right, the right of the This is the idea of the common law, sanctioned by the act 1685. man cannot bind himself to his own heir, so as to prevent him cor other deeds; the heir, being eadem persona cum defuncto, necess predecessor's deeds as his own. The same principle applies here est ambulatoria usq. ad mortem. With respect to the submission h not have entered into it but as he pleased. As to John Dick nothing, as he did not execute them. The decree-arbitral makes

"Lord Justice-Clerk.—After recollecting the case of Sheuc now stated, on which it proceeded, I am of the same opinion.

"Lord Henderland.—For the judgment in Sheuchan's case, a A man's property can only be secured from creditors in the two tioned.

"Lord Hailes.—I would wish extract to be superseded, as this and importance.

"The parties desired extract not to be superseded; upon wh defences in the declarator, and refused the bill of suspension at M

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agreed that certain additional parts of the estate should be sold, and that the General should execute a new deed of entail of the residue in favour of John and a series of heirs. Accordingly, in February 1809, the General agreed to sell part of the estate to the defender John Hay Forbes, Esq. advocate, (now Lord Medwyn,) of which he and his trustee Mr. Loch executed a feu-disposition on the 24th of May thereafter, and at the same time disponed the whole other lands of Kilbucho to Mr. Forbes in real warrandice. Upon the 28th of April of the same year, the General executed an entail, proceeding on the narrative of that of 1776, that he had sold a considerable part of the estate, and had exposed himself to a declarator of irritancy at the instance of his brother John, but that John had agreed not to object to the sales, nor to raise such a declarator, on condition of executing the new entail; and therefore he disponed to himself in liferent allenarly, and to his brother John in fee, 'and the 'heirs-male of his body—whom failing, to the heirs-female of his body'—whom failing, the other heirs called by the entail 1776; with this difference, that the heirs-female were, by that deed, postponed to the heirs-male of all the nominatim heirs-substitute, whereas, by this new deed, their heirs-female were called immediately after their respective heirs-male. From this deed there was excepted the feu-right of the lands which had been sold to Mr. Forbes.

Thereafter, in 1814, the General, along with Messrs. Hotchkis and Tytler, W. S., (who had succeeded Mr. Loch as trustees for his creditors,) brought an action of reduction of the entail 1809, mainly on the ground that it had been obtained by his brother John by fraud and deception, which he explained to have consisted in representing that he was liable to a declarator of irritancy, whereas he alleged that he had the absolute disposal of any part of the estate, without being subjected to any such penalty. At the same time he executed a minute of sale of the estate to Mr. Tytler, who brought a suspension; and defences having been lodged for Mr. John Dickson, and the Cases having come before Lord Balgray, his Lordship, on 6th July 1813, pronounced this interlocutor:—'In respect that the pursuer and charger asserts and maintains that he was unlimited fiar of the estate of Kilbucho, and had the right of disposing thereof as he thought proper—1mo, Finds that, so far as he is concerned, he had power to execute the deed of entail dated 28th April 1809. 2do, Finds that the said entail is a delivered deed, and irrevocable; and that the pursuer has conveyed away the right of fee, and has restricted his right to that of liferent allenarly. 3tio, Finds that no legal, just, or reasonable ground is assigned by the pursuer or suspender for setting aside the said bond: Therefore in the process of reduction assoilzies the defender, and in the suspension suspends the letters simpliciter.' To this interlocutor his Lordship adhered on the 16th of November 1813, 'in respect, 1. That it does appear that the execution of the deed of entail 1809 was, under all circumstances, a measure highly proper, prudent, and expedient on the part of the pursuer. 2.

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'That it is admitted by the pursuer—that he voluntarily executed said
'entail, and had power to do so; and that there does not appear from
'the tenor of the deed itself, or any collateral circumstance, any found-
'ation for the allegation that the pursuer was improperly or fraudulently
'induced to execute said deed; and that the present proceedings seem to
'arise rather from a change of mind on the part of the pursuer, than
'the discovery of any facts attending the execution of the entail 1809.'

The case having afterwards come before Lord Alloway, his Lordship reported it to the Court; and Mr. Tytler having withdrawn his suspension, their Lordships, on the 2d and 28th of June 1814, 'assoilzied the 'defender from the whole conclusions of the action of reduction, and 'found and decerned in terms of Lord Balgray's interlocutors of 6th July 'and 16th November last;' and found expenses due.

On the 18th of May 1815 the General died; and, on the 2d of June, his brother John, in virtue of the entail 1809, expede a Crown charter of resignation. By this time he had several children, and his eldest son the pursuer David had been admitted a member of the Faculty of Advocates in 1815. In September of that year John conveyed the fee to David, and they were thereupon infeft for their respective rights of liferent and fee. In virtue of this title, David was enrolled as a freeholder of the county of Peebles, and as such he voted, at the elections of 1818 and 1820, in favour of the successful candidate.

In the mean while Messrs. Hotchkis and Tytler, as trustees for the General's creditors, had entered an appeal against the judgment sustaining the entail of 1809; but the House of Lords affirmed it on the 19th July 1820, with costs.

In 1822, the pursuer David, along with his brother Alexander, as two sons of the next nominatim heir-substitute, brought an action of reduction and declarator against John, and also against the defenders Mr. Cuninghame and Lord Medwyn, founding on their rights as heirs substitutes under the entail 1776, and concluding for a declarator of irritancy and forfeiture against John, and decree of reduction of the sales to Mr. Cuninghame and Lord Medwyn, as made in violation of the entail 1776. From the nature of the decision which was ultimately pronounced, it is unnecessary to state minutely the grounds of these conclusions; but it may be mentioned generally that they were rested upon the allegation that the entail 1776 was an onerous deed, whereby it was incompetent for the General to sell any part of the estate, except for payment of the debts mentioned in it; that the proceedings in 1784 and 1786, under which the sales were made to Mr. Cuninghame, were collusive, irregular, in absence and to the lesion of the parties having the best interest to oppose them; that those heirs for whom appearance was made were creditors of the General, and as such had an interest to have the lands sold; and that the sale to Lord Medwyn had been made without any title of authority.

No appearance was made by Mr. John Dickson; and after the

duction had been satisfied, great avizandum made, and a remit to discuss the reasons of reduction, parties were heard before Lord Mackenzie, and memorials ordered, in which the whole case was argued. Mr. Cuninghame confined himself to the merits, and rested mainly on a plea of res judicata afforded by the judgments in the declarator and suspension in 1784 and 1786; but Lord Medwyn further maintained, that as the pursuer David had made up titles under the entail 1809, which was in opposition to, and a contravention of the entail 1776, he had not a title to insist in the present process, which contained a conclusion, that on the sales being set aside, and decree of forfeiture pronounced against his father, it should be found that he had right, under the entail 1776, to the lands; that besides, by availing himself of the entail 1809, and exercising the rights of a freeholder, he had homologated both that deed and the sale to Lord Medwyn, which was expressly mentioned in it; and that as the conclusions in favour of the other pursuers were dependent upon the success of David, the action must be dismissed. Lord Eldin, on advising the memorials, (July 10. 1824,) 'repelled the reasons of reduction, assoilzied the defenders from the conclusions of the libel,' and found them entitled to expenses.

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Against this judgment the pursuers presented a petition; on advising which, with answers, the Court, considering that the principle of the case of Sheuchan, then recently decided in the House of Lords, was brought into discussion, and that it would be proper to have the opinions of the whole Judges, made a remit accordingly. In consequence of this remit, Lords Justice-Clerk, Glenlee, Robertson, Pitmilly, Alloway, Cringletie, Meadowbank, Mackenzie, and Eldin, returned this opinion:—

"Having considered the summons and printed pleadings of the parties in this case, we are of opinion that the action cannot be maintained, in respect of the form and structure of the summons. That instrument, after concluding for reduction of the various decrees, interlocutors, judgments, charters, and writs therein set forth, concludes, that it shall be 'found and declared, by 'decree foresaid, that the pursuers, and the other heirs of entail in the order 'set down in the said deed of tailzie, have the only good and undoubted right 'and title to the hail foresaid entailed lands and estate, and others which were 'sold as aforesaid,' &c. 'And further, it should be found and declared, by 'decree foresaid, that the said John Dickson, the heir of tailzie to whom the 'succession opened on the death of the said William Dickson, has, by the various acts and deeds of contravention above set forth, or one or other of them, 'incurred an irritancy in terms of the resolutive clause in the said entail, and 'has for ever lost, forfeited, and amitted all right and title to the said entailed 'lands and estate; and that his right, title, and interest therein has been, since 'the death of the said General William Dickson, is now, and shall be in all 'time coming, void and extinct; and that the said entailed lands and estate 'did, at the date foresaid, fall, and have now fallen and devolved to the said 'David Dickson first above named, being the eldest son of the said John Dick-

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'son, and the next substitute called to the succession b
'tail, and the other substitutes in their order; and tha
'son, and the other pursuers as aforesaid, have accor
'possess and enjoy the said lands and estate,' &c. Su
portant and primary conclusion of the action, in order t
maintained, it is only necessary to attend to the situatio
pursuer David Dickson confessedly stands. It appear
and in consideration of the last sales of the estate of Ki
son executed a deed on the 24th April 1809, conveying
estate to himself in liferent, and Mr. John Dickson in f
series of heirs differing from those contained in the er
of which deed was afterwards sustained in this Cour
General (William) Dickson and the trustees for his cre
Mr. John Dickson; and the judgment was affirmed on a
mitted fact, that, after General Dickson's death, Mr. J
title under the deed 1809, and propelled the successio
the fee thereof to his son, the pursuer David Dickson, w
enrolled as a freeholder, and is now actually in possess

"In these circumstances, it appears perfectly manifest
standing infeft in the fee of the remainder of the estat
a clear contravention of the entail 1776, which likewis
whole heirs of tailzie 'to possess and enjoy the lands
'poned in virtue of this present tailzie, and infeftmen
'and by no other right or title whatsomever,' cannot
founded on that very entail, and a declarator of contrave
If his father has contravened, he himself stands in the
equally barred from insisting in the conclusions of the
the sales under reduction should be set aside, and the
But, independently altogether of this objection, as Davi
moment enjoying the benefit of the deed 1809 execut
which, in consideration of the validity of all the prio
mainder of the estate to his brother and his descendant
interest to a liferent, he is barred personali exceptior
present action for setting aside the whole of these prio

"We consider it to be no satisfactory answer to the
from the nature of the action, that other persons claim
the entail 1776 are associated with David Dickson a
to be clear, that if David Dickson, the leading pursuer
tain that the estate has devolved upon him, no other p
the reductive or declaratory conclusions for his bene
vidual interests of the other substitutes of entail to ins
the action, to the effect of having it declared that t
upon any of them, it is altogether incompetent unde
As it appears, upon their own showing, that it was cor
clare the forfeiture of Mr. John Dickson, it must be eq
to take the same step with regard to his son, before
substitute can be declared; but that is certainly a p
competent under the present summons. We are ther

action ought to be dismissed, and that it is unnecessary to give any opinion on the other points argued in the pleadings. No.

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A minute was then lodged by the pursuer David, stating that on 12th January 1824 he had executed a renunciation of the infeftment under the entail 1809; and he afterwards gave in another minute, stating that although the sasine in his favour was written upon nine pages, the notary's docquet set forth that it consisted of only eight, and therefore the sasine was null and void. He also raised a reduction of the sasine, in which he got decree in absence against the other heirs. On resuming consideration of the case, and it having been ascertained that there had been an irregularity as to the form of consulting the Judges, the Court appointed the parties to lodge Cases on the subject of the title. This having been done,* a minute was thereafter given in by Mr. Cuninghame, stating that he waived all objections to the pursuers' title, and requested their Lordships to determine the merits of the reduction.

The parties were then ordered to lodge questions, with the view of consulting the other Judges; which was accordingly done, and remitted to their Lordships along with a separate class of questions proposed by the Court, which will be found embraced in the opinions of the Judges.

Lord Justice-Clerk, Pitmilly, Alloway, Cringletie, Meadowbank, Mackenzie, and Newton, returned this opinion:—On considering the whole of this case, we will advert to the questions by the Lords of the First Division, because in answering them we shall fully exhaust those put respectively by the parties.

Q. 1.—Whether the interlocutor of the Lord Ordinary is to be regarded as a final judgment, virtually sustaining the pursuers' title against either or both of the defenders, Mr. Cuninghame and Lord Medwyn?

A.—We are of opinion that the interlocutor of the Lord Ordinary cannot be considered as a final judgment virtually sustaining the pursuers' title. We do not consider the objection to the title as a dilatory defence, because a defence of that sort only delays the cause; it prevents it from proceeding in the shape in which it is brought till something shall be done, or till another summons better libelled shall be brought. But the objection to the title in this case, if good, appears to us to involve in itself a defence on the merits, as the pursuers can never sue to the same purpose in any other action. We imagine that the Lord Ordinary has been of the same opinion, and therefore assoilzied the defenders in general, whereby we cannot know whether his judgment was founded on the objection to the title alone, or on the merits; and therefore we think that both are open to discussion.

Q. 2.—Whether the David Dickson thereby incurred an irritancy under the entail 1776?

infeftment in 1815 was valid,—and whether the pursuer

A.—To us there appears to arise out of this question a view of the cause

* The nature of the pleas maintained by the parties will be seen from the queries put to the Judges, and their opinions.

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which has not occurred to the parties, but which is one involving in itself both title and merits inseparably; and it is this, that the entail 1776 has been recalled, and the investiture under it annulled by a new one being taken, which has been found to be valid both in this Court and by the House of Lords, and which stands unreduced at this hour. This requires some detail.

General Dickson executed the entail 1776, which contained a power to sell lands, by authority of this Court, for payment of debts contracted prior to the entail; and accordingly lands were sold to Mr. Cuninghame at the price of £7,200; and although objections are stated to the formalities observed in that action for selling lands, we consider these to be trifling and unavailable. About that time the judgment was pronounced in the case of Agnew, whereby this Court found that a man cannot entail his estate on himself as institute, so as to restrain himself from contracting debt, payment of which may not be made effectual against his estate. General Dickson, regardless of his entail, had incurred considerable debts; and judging that what was law for Agnew was also law in his case, he appointed the late John Lord of Boehan, Esq. factor and trustee for himself and his creditors, by a trust-disposition dated the 8th of February 1785. Accordingly they raised an action for having it declared that they were at liberty to sell parts of the estate for payment of the debts contracted posterior to the tailzie 1776; and, before any decree was pronounced in that cause, they made a second sale to the predecessor of the defender Mr. Cuninghame of Lainshaw at the price of £1100. In addition to the declarator, that gentleman raised a process of suspension of a threatened charge for payment of the price, which two actions were conjoined; and this Court, proceeding on the principle that General Dickson could not entail his estate against his debts, pronounced decree in the declarator, and found the letters orderly proceeded in the suspension; and thus part of the lands in the tailzie 1776 was taken out of the investiture by a posterior one.

Relying on his powers, thus found by this Court to be competent to him, General Dickson contracted more debt, for payment of which this sale of the dominium utile of lands was made to Lord Medwyn; and by his infeftment these were also taken out of the tailzied investiture 1776, leaving the dominium directum still as part thereof, burdened with the feudal right in favour of Lord Medwyn; and General Dickson's brother, John Dickson, Esq. advocate, being afraid that the whole family estate might be squandered away, entered into the transaction detailed in the pleadings, by which the General, on the 24th of April 1809, executed a deed of entail, divesting himself of the fee of the remaining estate by disponing it to himself in liferent for his liferent use allenarly, and to the said John Dickson and the heirs-male of his body in fee; whom failing, to the heirs-female of his body; whom failing, to his next brother, and the heirs-male of his body; whom failing, to the heirs-female of his body; and so on through the course of succession, preferring the heirs-female of the several heirs in their order to the next.

General Dickson still persisted in his course of extravagance; and supposing that he was not restrained by the second entail 1809, more than he had been by that in 1776, he brought an action in his own name, and that of the trustees for his creditors, against his brother and the whole heirs under the tailzie 1809, who were also heirs under that of 1776, though in a different order, for setting

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aside the entail 1809. In that case Lord Balgray, as Ordinary, (July 6. 1813,) pronounced an interlocutor, in which his Lordship, "in respect that the pursuer and charger asserts and maintains that he was unlimited fiar of the estate of Kilbucho, and had the right of disposing thereof as he thought proper, 1mo, Finds that so far as he (General Dickson) is concerned, he had power to execute the deed of entail dated 28th April 1809. 2do, Finds that the said entail is a delivered deed, and irrevocable; and that the pursuer has conveyed away the right of fee, and has restricted his right to that of liferent allenarly."

The General then pleaded that he had been fraudulently misled to execute the entail; but the Lord Ordinary repelled that plea, and adhered to his interlocutor. (Nov. 16. 1813.)

The case then went before the First Division, when the Court (June 3. 1814) assoilzied the defender, "and find and decern in terms of Lord Balgray's interlocutors of the 6th July and 16th November last."

Here, then, there was an action brought for setting aside the entail 1809, in which the judgment of the Court was expressly that General Dickson had power to execute the deed of entail 1809; and the judgment was affirmed by the House of Lords, with costs, in 1819, at which time the defender David Dickson had been four years at the Bar, and stood infeft in the fee of the estate under that entail. For General Dickson having died in 1815, after the judgment had been pronounced against him, his brother John, who had been previously infeft in the fee, propelled the succession to the estate to the pursuer David Dickson by conveying to him in fee the superiority of the lands in the tailzie 1809, comprehending the superiority of Lord Medwyn's lands, reserving his own liferent; and on this both father and son were infeft for their several rights of liferent and fee, and both were placed on the Roll of Freeholders for the county of Peebles, on which they stood for many years.

Thus there is a direct finding of this Court that General Dickson had power to execute the tailzie 1809, and that had been affirmed by the House of Lords in 1819. The tailzie 1776 contained a different order of succession from that in 1809. It contained a provision, too, that the heirs should possess under it, and it alone; yet it is finally decreed that the General was not bound to possess under it. It has been virtually recalled, and a new investiture made on a posterior deed found to be valid in the Court of the last resort, which could not have been executed if the tailzie 1776 had been in force. And although the entail 1809 did not contain, or even make allusion to the lands sold to Mr. Cuninghame, the first sale was warranted by the tailzie 1776 itself; and the same powers which authorised the General to recall that tailzie must have enabled him to make the second sale to that gentleman, which was ratified by the Court. The other part was also taken out by the sale to Lord Medwyn; and the remainder, including the superiority of Lord Medwyn's lands, was put under a totally new investiture, which stands in force at this moment. The conclusion that we draw is this, that the tailzied investiture 1776 is annihilated; in particular, that the sale of the lands to Lord Medwyn is ratified by the right to the dominium utile of them being excepted in the tailzie 1809; that neither John Dickson the father, nor his son the pursuer, has incurred an irritancy under it; and that the latter and the other pursuers have no right to found on

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which has not occurred to the parties, but which is one in title and merits inseparably; and it is this, that the e recalled, and the investiture under it annulled by a ne has been found to be valid both in this Court and by the which stands unreduced at this hour. This requires some

General Dickson executed the entail 1776, which c lands, by authority of this Court, for payment of debts c entail; and accordingly lands were sold to Mr. Cunningh £7,200; and although objections are stated to the formal action for selling lands, we consider these to be trifling and that time the judgment was pronounced in the case of Court found that a man cannot entail his estate on himself to restrain himself from contracting debt, payment of wh effectual against his estate. General Dickson, regardless curred considerable debts; and judging that what was law law in his case, he appointed the late John Loch of Be trustee for himself and his creditors, by a trust-disposi February 1785. Accordingly they raised an action for h they were at liberty to sell parts of the estate for pay tracted posterior to the tailzie 1776; and, before any de that cause, they made a second sale to the predecessor Cuninghame of Lainshaw at the price of £1100. In rator, that gentleman raised a process of suspension of a payment of the price, which two actions were conjoined; ceeding on the principle that General Dickson could not e his debts, pronounced decree in the declarator, and four proceeded in the suspension; and thus part of the lands taken out of the investiture by a posterior one.

Relying on his powers, thus found by this Court to General Dickson contracted more debt, for payment of dominium utile of lands was made to Lord Medwyn; these were also taken out of the tailzied investiture 1776 directum still as part thereof, burdened with the feudal Medwyn; and General Dickson's brother, John Dickson afraid that the whole family estate might be squandered transaction detailed in the pleadings, by which the Ge April 1809, executed a deed of entail, divesting himself maining estate by disponing it to himself in liferent fo narly, and to the said John Dickson and the heirs-ma whom failing, to the heirs-female of his body; whom faili and the heirs-male of his body; whom failing, to the hei and so on through the course of succession, preferring several heirs in their order to the next.

General Dickson still persisted in his course of extrav that he was not restrained by the second entail 1809, n by that in 1776; he brought an action in his own name, for his creditors, against his brother and the whole heirs who were also heirs under that of 1776, though in a diff

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it, whereby the title on which they libel is a nonentity, and to abide by the tailzie 1809 in so far as contains Lord Mr. Cuninghame, his acquisitions are secured to him b Court, against which there is no power of appeal. The son now says that the infeftment of the fee of the subje has been reduced by a decree in absence by this Court. since, allowing every effect to that decree, the only ou father's infeftment on that deed remains in full force, w was completed, which altered that on the tailzie 1776.

2. Supposing that the foregoing is a mistaken view we are not sensible,) and that the tailzie 1776 has not we are clear that the pursuer David Dickson, by acce tailzie 1809, and infefting himself thereon, did incur of 1776, in so far as he possessed on a different title fr one, too, altering the order of succession in it.

Q. 3.—Whether the irritancy, supposing it to have purged?

A.—The pursuer David Dickson's infeftment of fe decree in absence, which is only a recent measure, l pursuers understand each other, and allow temporary support their cause. We do not feel ourselves called might have had, if that step had preceded this acti was raised, and the action decided in a contrary prod think that this ought to make any difference.

As to the renunciation of the right of fee, the lea must at once determine that it cannot take away a r pursuer's person. Nothing short of a reconveya sasine, on a charter of resignation or confirmation l pursuer.

3. As to the sasine being null, owing to the nota the instrument consisted of nine pages, we can pr It is true that Acts of Parliament require the le requires the pages to be numbered 1st, 2d, 3d, docquet shall mention the number of pages of wh the pages be numbered, and there be an inaccura the docquet, specifying the number of pages, w mere clerical error both by the numeration of th in the docquet, none of the forementioned acts, Now each of the pages of the pursuer's sasine is the notary attests that there is an erasure in t being the same on which the docquet is written 'octo' in that docquet is a clerical error for Sederunt 17th January 1756 goes beyond the

Q. 4.—Whether it is not just tertii to the d supposing it still to subsist? and whether they tion?

A.—We are of opinion that the defender h tancy, and by way of exception. He stands i

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A.—We are satisfied that it is protected by the res judicata, against which all the objections started by the defenders appear to us perfectly groundless. Whether the judgments were right or wrong it is of no importance now to inquire, for they are secured by lapse of time against the power of appeal.

Q. 5.—Is Lord Medwyn's defence against the conclusions of the action well founded on the ground of res judicata, or on any other ground?

A.—We do not see that Lord Medwyn can found on any res judicata, as there is no action mentioned in the proceedings to which he was a party, or in which the validity of his individual purchase was brought into question. But we have already enlarged on an objection to the title of the pursuers, which intimately blends itself with the merits—we mean the plea that the tailzie 1776, on which the pursuers libel, was revoked and altered by the subsequent deed 1809; that the tailzied investiture 1776, in so far as it remained, was annihilated by a new one upon that tailzie 1809; that this was declared to be within the powers of General Dickson, as an unlimited fiar, to do, both by this Court and the House of Lords; that the last investiture is, therefore, the only title which the pursuers have to the estate; and since the General was an unlimited fiar, Lord Medwyn's purchase must be secure to his Lordship.

When we review the whole proceedings detailed in this action, and from them see that the defender John Dickson acted uniformly in conformity to the opinion and judgments of this Court—when we see that the tailzie 1776 was not considered to be binding on General Dickson, and that he was declared to have full power to execute the tailzie 1809, it is inconceivable to us that this Court can declare a forfeiture against him of his right to the estate; and his not opposing such a decree is evidence of a collusion between him, his children, and the other heirs, by this action to attempt to enrich themselves by an act of injustice to the defenders. Let the case of Agnew be admitted to have been well decided in the House of Lords, which we are bound to admit, still that judgment cannot be a precedent in this particular cause, which has precedents of its own. This Court and the House of Lords have both found that General Dickson had power to disregard the tailzie 1776, and execute that of 1809; and whether it is possible for the pursuers to reduce the entail 1809 or not, in spite of the precedents already mentioned, we do not think ourselves entitled to decide. It is sufficient that that entail is the subsisting investiture of the estate, homologated by the pursuers David Dickson and his father, to exclude the former and the other pursuers from founding on the tailzie 1776 in this question with Lord Medwyn; and we are of opinion that, on the title as blending itself with the merits, his Lordship ought to be assoilzied with full expenses.

Mr. Cuninghame has renounced his objection to the pursuer's title; but it appears to us to be impossible for the Court to pay any regard to such renunciation, since Mr. Cuninghame's case must of course be decided partly on the principles which apply to that of Lord Medwyn. Mr. Cuninghame, no doubt, has the additional plea of res judicata, which, we think, is of itself alone sufficient to protect him on the merits; but he ought to be assoilzied from this action, not only on that ground, but on the whole, with full expenses.

Lord Newton subjoined this opinion.—I concur in the foregoing opinion in all that regards the objections to the title of the pursuers.

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just as much as did his father. The case of M'Cull correctly in point; and, with deference, it appears to to forfeit John, and award his estate to David, who that inferred forfeiture against John. Besides, we 1776, on which all the pursuers libel, was revoked House of Lords, has been decreed to have been wi Dickson to execute; and the investiture 1776 was

Q. 7.—Whether the remote substitutes are entitl to the title of David Dickson to be sustained, to in clusions of the action?

A.—We think that this question is answered b served on the preceding query.

ON THE MERITS ON THE AC

Q. 1.—Whether the entail 1776 was an onerous ing it onerous, or even gratuitous) it was effectua the subsequent acts and deeds of the late General

Q. 3.—Is Mr. Cuninghame's defence against t in regard to the land comprehended in his fath 1. Upon the plea of res judicata; or, 2. Upon th the action 1784?

A.—We unite all these queries, because we th at once. We think that the deed 1776 was be the Judges entertained doubts of its onerosity it agitated whether it was effectual or not; they it was ineffectual, because General Dickson e which, in their opinion, ought to have been do the General. But, with regard to the lands so Cuninghame, that was done in conformity to a p at the sight of this Court. An application was who granted to the pursuer power to sell ce and of which a rental was proved. The sal pursuer in terms of the power given him by t his duty to report the sale to the Court, as he ing that duty could not affect the validity of th chaser. It is said that John Dickson, and oth ren, were called as administrators in law for t terested to betray these children, on which ac have been appointed, which was not done; an them are null. This is carrying matters very any jarring interests which existed between th were alike concerned in preserving the estate. neous in the procedure, they fall under the ru ing on that ground were competent and omitt that the res judicata protects Mr. Cuninghan

Q. 4.—Is Mr. Cuninghame's defence again regard to the lands comprehended in his fath on the ground of res judicata, or on any oth

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As Mr. Cuninghame has waived these objections case to give an opinion on the merits. Here I a that the first purchase was made in conformity to in the tailzie 1776, and that no irregularity has affect its validity. The second sale, I also agree challenge as a res judicata.

Being satisfied in Lord Medwyn's case that the pursuer's title, I think it unnecessary at present of the merits. Both defenders should be assoilzie

Lord Glenlee delivered this opinion.—The by General Dickson in favour of his brother Joh tioned, I understand to be inconsistent with, an tailzie of 1776; and also that it bears an expre not to challenge the sales previously made by th

The validity of this last entail was sustained i of Lords, in a question between General Dickso be challenged at the instance of the pursuers of consider, because in fact it has not yet been ch nor the subsequent charter 1815 is called for i indeed a forfeiture of John Dickson's right un cluded for, yet there is no conclusion for having deed 1809 also extinguished.

This being premised, it appears to me, in th stood when the petition and answers came to be David Dickson, by accepting and acting in the under the deed of his father John propelling t new tailzie of 1809, had lost all title to pursue heir under the tailzie 1776. And, in the nex although, his father being still alive, he cannot proper passive title of præceptio, yet even now those sales which, by the deed 1809, his fath cession under it to him, was expressly bound exceptions also bar the other pursuers from ins it concludes that the lands of which the sales to belong to David Dickson. There is no sep in favour of the other pursuers themselves.

I think that it was competent for the defen and on the pursuer's having accepted and use succession as above mentioned, and that the p to them by exception; and I see nothing in barred them from insisting on these pleas petition.

As the cause stood, therefore, when the advised by the First Division, and a remit, some informality, was made to the other J think that, on the grounds I have stated, th

With respect to the steps which, in order against him, have been taken by the purs

was formerly before the First Division, I think it needless to inquire, and indeed I have formed no opinion as to what effect they might have had if taken before the action was raised, or even tempestive before it had made any considerable progress, because I think they were taken at so advanced a period of the litigation, and under such circumstances, that no regard can be paid to them in the present process. No.

According to the opinion above expressed, I certainly do think it altogether unnecessary to say any thing on the other questions which are discussed in the papers. The remit, however, bears that regard is to be had to Mr. Cuninghame's minute, waiving on his part all objections to the title. Now Mr. Cuninghame has defences peculiar to himself, and distinct from others which apply to both defenders—namely, his plea on the proceedings in 1784, in as far as concerns the first purchase—and his plea of res judicata, in as far as concerns the second purchase; and I am of opinion that those pleas are well founded. I think, in expressing this opinion, I sufficiently obey the requisition in the remit in regard to Mr. Cuninghame, and that I am at liberty to abstain from saying any thing at present as to other questions, on some of which I have not in fact made up my mind.

When the case again came before the Court, the pursuers stated, that as a new plea had been suggested by the Judges, which had not been noticed by the parties, they were entitled to be further heard; and the Court accordingly ordered additional Cases, 'in respect the consulted 'Judges are of opinion that the tailzied investiture 1776 is annihilated, 'and that the entail executed on the 18th of April 1809 has been sus-'tained by final judgment of this Court, and in the House of Lords, and 'so become the standing investiture of the estate, whereby the pursuers 'are deprived of any title to bring this present challenge, and that the 'defenders should be assoilzied; a plea in law arises, which hitherto has 'not been stated by the parties, and upon which they are entitled to be 'heard, if they shall be so advised.'

In reference to this new plea, the pursuers (who denied that there was any understanding between them and Mr. John Dickson) maintained—

1. That as the object of the action by General Dickson in 1814 was to set aside the entail of 1809, on the ground that it had been obtained by fraud and deception, in representing to him that he was bound by the deed 1776, and as the defenders in that action had been assoilzied, it was impossible to found upon the judgment to any other effect, than as negativing the allegation of fraud; and therefore matters stood precisely as if no such action had been raised, and no such judgment pronounced;

and,

2. That as the lands sold to the defenders were specially excepted, and consequently excluded from the effect of the entail 1809, they could not be affected by any judgment pronounced respecting the validity of that entail, but remained subject to the effect and influence of the entail 1776, which therefore, quoad them, was the subsisting investiture.

On the other part, it was contended by Lord Medwyn, that as it was

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undoubted that the entail 1809 was in direct
and as it was impossible, if the party in pos
these deeds had not had power to execute tha
have found that he had so; and as the Cour
judgment of Lord Balgray, finding that 'so fa
cerned, he had the power to execute the dee
'1809;' and as this judgment had been affir
it necessarily followed that the entail 1776, c
was annihilated, and consequently the title of

The case having been again remitted fo
Judges,

Lords Justice-Clerk, Glenlee, Pitmil
Meadowbank, and Mackenzie, transmitted t
dered the Cases offered for these parties, with
by the Lords of the First Division to us, with
cellor and judgment of the House of Lords in t

In our former opinion we referred to the case
in point; and we have additional reason to be
affirmance of the judgment therein by the Hou

It is pleaded by Messrs. Dickson that the ir
was not recalled by that in 1809, in so far as
Cuninghame and Lord Medwyn; but we consi

In the first place, one of the sales to Mr. C
powers contained in the tailzie 1776 itself,
Court; and the second sale to that gentleman
by a judgment of the Court, long ago final, an
even by appeal. There can therefore be no
nihilated the investiture 1776 to the length tl

With regard to the sale to Lord Medwy
General Dickson proceeds on the narrative, t
zie 1776, he had sold a considerable "part
Kilbucho,) and thereby become liable to a d
tancy at the instance of the said John Dic
against me. But whereas the said John Dic
agreed not to object to the sales already ma
for payment of certain debts contracted by
declarator of irritancy against me, upon c
underwritten;"—he therefore granted the
different order of succession from what was
it referred to the sale made to Lord Medw
servation of the feu-right granted to his Lo
only of these lands. On this entail Mr. Jol
he propelled the succession to his son Davi
inter alia, the fee of the lands that had bee
exception of the feu-right in his Lordship'
himself in liferent, both father and son wer
for the county of Peebles, for their respe
these lands purchased by Lord Medwyn.

Thus we consider that the investiture of 1776 was recalled, and annihilated also, with respect to the lands sold to Lord Medwyn, as well as those disposed of to Mr. Cuninghame. The deed 1809 ratifies the sales, because it proceeds on the narrative of them, and makes the non-challenge of them the condition of granting the deed. And further, it ratifies the sale to Lord Medwyn, by acknowledging the fee-right in his person; and the pursuer ratified that deed by taking possession under it.

2. We think that the deed 1809 is in contravention of the other in 1776, if the same could be said to be still in existence; for the former contains a different order of succession from that in the latter, and any alteration was prohibited under the sanction of irritancy and forfeiture of the contraveners. It also prohibited alienations of the whole or any part of the estate; it contained likewise a condition that the heirs should possess the estate under that tailzie alone, and by no other right—all under the sanction of forfeiture in case of contravention. But, as already mentioned, the tailzie 1809 ratified the sales made in contravention of that in 1776; and the pursuer and his father both repudiated the deed 1776 as their title of possession, and expressly made up their investitures under the tailzie 1809.

Nothing, then, can be clearer than that if the pursuer David Dickson's father had contravened the tailzie 1776, the pursuer had, when the present action was instituted, equally done so. He then stood infeft on the entail 1809, and yet he founds on that in 1776, which expressly declares that he shall possess upon it, and it alone, under the penalty of forfeiture. He is therefore in the same situation in which Mr. M'Culloch stood in pursuing a reduction of deeds under an entail which he had repudiated, and must therefore have a similar judgment applied to him.

With regard to the other pursuers, they too are situated precisely as were a number of the pursuers in the case of Barholm. "They (as the Lord Chancellor observes in that suit) in fact adopt, as far as this cause is concerned, that which is done by Mr. M'Culloch. They adopt his disclaimer, and join in his prayer, that the property may be adjudged to the pursuer;" and therefore his Lordship thought that this Court "were perfectly correct in considering that the situation in which these other pursuers stood, did not differ from the situation in which Mr. John M'Culloch himself stood."

We are of opinion that this judgment is strictly applicable to the present cause. As Mr. Dickson himself has contravened and indeed repudiated the deed 1776 in so many ways, he cannot have any right to claim under it; and the other pursuers, by desiring that he shall forfeit his father, and take the estate, cannot bestow upon him any additional title.

When the case came to be advised, the Judges, with the exception of Lord *Craigie*, concurred in the above opinion; and thereupon the following *interlocutor* was pronounced:—'The Lords having resumed consideration of the reclaiming petition for David Dickson, Esq. and others, answers thereto for John Cuninghame, Esq. and for the Honourable John Hay Forbes (Lord Medwyn,) respectively, and advised the same, with the summons, defences, and the several mutual revised Cases, and whole pleadings of the parties upon the merits; and having particularly

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'considered the opinions of the other Judge
'of the Act of Parliament, in which opinion
'jection to the title of the pursuers, founde
'entail 1776 by the judgment of the House
'tail of 1809 as valid and effectual; and h
'the parties in their own presence; and hav
'of renunciation executed by the pursuer o
'and recorded in the Register of Renunci
'1824; and having further considered the
'summons, and other procedure, particular
'the other Judges consulted in the whole
'Parliament; find that the defender John
'to take the benefit of the objection which
'said to the title of the pursuers, and susta
'ingly: Find, on the merits, that the fiss
'formity to the power of sale contained in
'irregularity has been pointed out which c
'the second sale is secured from challenge
'as regards the other defender Lord Med
'not be held as a valid and effectual limi
'General William Dickson, the author of
'sons of reduction which are founded o
'entail: Find, separatim, that even if tha
'subsisting investiture of the estate of K
'David Dickson, Esq. by making up a t
'entail 1809, which is inconsistent with t
'from maintaining any action upon the la
'to his title to pursue is in no respect re
'cuted by him, or any other proceedings
'lite; and find that the other pursuers
'insisting in the conclusions of the prese
'the desire of the reclaiming petition, an
'interlocutor reclaimed against; and of
'the reasons of reduction, assoilzie the d
'sions of the libel, and decern; and fin
'fenders in expenses.'

Pursuers' Authorities.—(1.)—*Merits.*—Shewcha
p. 320, and authorities there); Hope's Min. Pr.
Vol. II. p. 489; Robertson's Ap. Ca. 207; Kerr,
Garnock, Nov. 28. 1796, (Craigie and Stewart's A
(15513.)—(2.)—*Res Judicata.*—2. Bell, 273, (5.
May 22. 1798, (No. 4. Ap. Tailzie); 1. Ersk. 6. 54
Bannatyne, Dec. 14. 1814, (F. C.); Agnew, Jul
4. Ersk. 3. 3; Kames' El. p. 173.—(3.)—*Title.*—
and Stewart's Ap. Ca. p. 126); Campbell, Feb. 5. 17
1762, (15417); Turner, Nov. 17. 1807, (No. 16. Ap.
E. of Mar, 7798; King, 7799; Cranstoun, 7801;
(Kilk. p. 445); Irving, April 2. 1770, (H. of L. n

Defenders' Authorities.—(1.)—*Merits.*—1. Ersk. 1. 47; Sandford, p. 124.—(2.)—*Res judicata.*—4. Stair, 40. 16; 4. Ersk. 3. 3; 1. Ersk. 6. 54; 1. Ersk. 7. 13.—(3.)—*Title.*—Gordon, Nov. 14. 1749, (Kilk. p. 445); Gilmour, March 6. 1801, (No. 9. App. Tailzie); Mackenzie, May 17. 1826, (ante, Vol. IV. No. 277, and 8. Wilson and Shaw's Ap. Ca. p. 302); 1. Ersk. 3. 49.

No. 257.

March 3. 1829.

J. Swan, W. S.—W. Patrick, W. S.—Cranstoun and Anderson, W. S.—Agents.

J. H. Lothian, W. S. Pursuer.—*Lothian.*
Mrs. Tod and Husband, Defenders.—*Jeffrey—A. M'Neill.*

No. 258.

Process—Judicature Act—Reclaiming Note.—1.—Held not a sufficient objection to the competency of a reclaiming note boxed on the last reclaiming day, (being a Saturday,) that six copies were not delivered to the agent of the opposite party till Monday.—2.—A record, insufficient in statement to enable the Court to decide the cause, ordered to be opened up, and a new one prepared.

March 3. 1829.

1st Division. Lord Meadowbank.

Lothian having raised an action against Mrs. Tod and her husband for payment of a business-account, in which a record was closed, the Lord Ordinary, in the circumstances, decerned against her, to the effect of attaching her estate, but assoilzied the husband. The reclaiming days expired on Saturday the 3d of January, and on that day a reclaiming note was lodged by Mrs. Tod, but no intimation of this was made by delivery of six copies to the opposite party till Monday.

Lothian, for the Pursuer, therefore objected, that as it was enacted by the 9th section of the Judicature Act that the party reclaiming shall, within twenty-one days from the date of the judgment, box a reclaiming note, and shall at the same time give notice of his application for review by delivery of six copies of the note to the known agent of the opposite party, and it shall in no case be competent for either party, from and after the said 11th day of November, to bring any interlocutor under review of the Inner House by the form of reclaiming petition, as now in use, but only in the mode thus directed;' and as this rule had not been complied with, the Court could not competently receive the note.

Lord Balgray.—There is no declaration of nullity in the statute.

Lord Gillies.—We cannot construe the act so judaically as is here intended for.

The Court accordingly repelled the objection; and being of opinion that the record had not been made up so correctly or fully as was necessary to give judgment, recalled the interlocutor, and remitted to the Lord Ordinary to open up the record, and prepare the case of new.

J. H. Lothian, W. S.—A. Johnston, W. S.—Agents.

No. 259.

G. SCHUURMANS and SONS, Pursue
STEPHEN and SONS, Defend

Jury Court—Mercantile Contract.—A question relativ remitted to the Jury Court, without any findings as to t

March 3. 1829.

1ST DIVISION. Lord Meadowbank. D.

STEPHEN and SONS, merchants in Aber pursuers, merchants in Rotterdam, requesti of wood, the pursuers, through their agent panied by a specification of prices, per 'the Stephen and Sons in consequence gave an o them at Aberdeen, accompanied by an invo set forth in English cubic feet. In measurin made use of string measure, whereas the p have employed calliper measure; and these ing very different results, a dispute arose,— that they had not received the quantity to the pursuers averring that they had. An a pursuers for payment of the full invoice p nary pronounced this interlocutor:—'Fi 'agreement entered into by the parties, the 'the quantity of timber set forth in the li 'to be ascertained by measurement;—that 'upon was the *cubic* foot, English measur 'necessarily implies, and must be held 't 'body, consisting of six square and equa 'addition of the words English measure 'any arbitrary measure, though occasio 'would produce a result apparently exhi 'number of feet, but of feet not solid, o 'and was only meant and intended to dis 'to be those of England, as differing fro 'country; and therefore that it being 'round timber by the calliper, the appa 'solid body, but one which is only so de 'arbitrary and improper application of a 'ing, it cannot be understood to have be 'in their said agreement to refer to a c 'taken by the calliper, but only to that 'language, the term could be applied; 'said agreement, Aberdeen must be hel 'with these findings, remits the case to

The pursuers having reclaimed, the 'disposed of in the Lord Ordinary's in 'to go to the consideration of a Jury, 't 'remitted the whole cause to the Jury 'the statute.'

A. DOUGLAS, W. S.—J. K

W. MAULE, Esq Pursuer.—*Sol.-Gen. Hope—Forsyth—Robertson.* **No. 260.**
Hon. W. R. MAULE, Defender.—*D. of F. Moncreiff—Keay—Murray.*

Prescription.—1.—A party holding a fee-simple assignation of a lease in his own favour, and being also institute under an entailed assignation granted by the same party of the same lease, and having enjoyed possession of the subjects for forty years, and done certain acts referring his possession to the fee-simple assignation—Held that he had acquired a prescriptive fee-simple right, and that the entailed assignation was extinguished.—2.—The same party having right in fee-simple, as heir of his father, to the lease of another subject, and also as institute under an entailed assignation made by his father; and having possessed for more than forty years—Held that his possession must be imputed to the entailed assignation, and therefore he had not acquired a prescriptive right under the fee-simple title;—and.—3.—A remote heir-substitute is not entitled to have his minority deducted during the part of the prescriptive period to which he had no immediate right to the estate.

March 4. 1829.

1st DIVISION. Lord Newton. H.

JAMES fourth Earl of Panmure was proprietor of the estates of Panmure, Brechin, and Ballumbie, the latter of which was entailed. He married Lady Margaret Hamilton, daughter of the then Duke of Hamilton, but had no issue. He had a brother Harry, proprietor in his own right of the estate of Kelly, who was his heir at law, and the next heir-substitute under the entail of Ballumbie. The Earl, having engaged in the Rebellion of 1715, was attainted, and his estates forfeited. He went abroad, where he died a few years thereafter. His Countess had, by her marriage contract, a right of liferent of the family seat of Brechin, and an annuity of £100 during her life on the estate of Panmure. She was allowed by Government to enjoy these rights, and a claim made by Harry under the entail to the estate of Ballumbie was sustained. Harry had several children; but the only sons who survived him were William, and John, a member of the Faculty of Advocates, and afterwards a Baron of Exchequer. He had also a daughter Jane, who married Lord Ramsay, son of the Earl of Dalhousie. In the event of William and John dying without male issue, Dr. Harry Maule, Bishop of Cloyne, was the heir-male and representative of the family of Panmure.

In 1719 the estates of Panmure and Brechin were purchased by the York Buildings Company; and, on the 23d of April 1724, they granted a lease of the house and parks of Brechin for 99 years, at a rent of £50, to Harry Maule and his assignees, but without mention of heirs, to commence from the termination of the Countess's liferent. On the same day they gave a lease of the house and parks of Panmure, also for 99 years, at a rent of £100, from and after the 15th of May, to the Countess and her assignees, without mention of heirs. The Countess, on the 15th of June in the same year, executed a fee-simple assignation of the lease of Panmure, under reservation of her liferent, to Harry Maule and the heirs-male of his body—whom failing, his other heirs and assignees whatsoever. In this way Harry acquired right to the leases of both Brechin and Panmure, subject to the burden of the Countess's liferent.

On the 14th of April 1730, Harry, with consent of his two sons Wil-

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liam and John, executed an entail of his est
William and the heirs-male of his body—wh
the heirs-male of his body—whom failing, to
created of his own body—'whom failing, to
'Bishop of Cloyne in the kingdom of Irel
'and the heirs-male of his body,' &c. On th
liam (who had acquired right to a bond of £10
patrimony, afterwards reduced to £9000,) gra
binding himself to employ the £9000 in the
taken conformably to the above destination.
liam having acquired right to Ballumbie fro
cuted, with consent of his brother John, a new
same series of heirs as those called to the entail
June, Harry executed an assignation of the lea
William and a series of heirs, without limitatio
to revoke; and two days thereafter (the 8th) h
ation, which proceeded on this narrative:—'A
'with consent of my sons above and after named
'zie dated the day of April last bypast, for
'tinuance of my family of Panmure in the n
'Maule, did settle and provide my lands, bar
in manner therein mentioned;—'and that said
'house of Brechin, and others specified in the
'formerly appertain in property to the said fam
'it is therefore most just and reasonable the sam
'of the lease thereof above written, should desc
'self-same heirs to whom I have provided my
'—therefore he assigned the lease 'to the said
'eldest son, and the heirs-male to be lawfully
'which failing, the said Mr. John Maule, my yo
'male lawfully to be procreate of his body—
'heirs-male to be procreate of my body—which
'Lord Bishop of Cloyne in the kingdom of Ire
'and the heirs-male procreate or to be procrea
'to myself the use and possession of the said
'and others specified in the foresaid lease or ta
'my life from and after the commencement th
take place till the death of the Countess.

This deed was fortified by all the usual pro
solutive clauses in entails, and contained a war
the proper register. The assignation by the C
of the Panmure lease of 15th June 1724, also th
by Harry Maule of the Brechin lease, dated
original leases, were recorded, on the 20th of July
bative Writs. Thereafter, on the 3d of October,
sent of Harry, (for any right which he had under

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to him, on the 15th of June)—and he, with her consent, (and on the same narrative as that contained in the above entailed assignation of the lease of Brechin,) assigned the lease of Panmure in favour of William, and the same series of heirs as in the entails of Kelly and Brechin, and subject to the same fetters, from and after the death of the longest liver of Harry or the Countess. Both of the entailed assignations to the leases of Brechin and Panmure contained a clause, that it should not be lawful to the heirs to subset the subjects 'for any longer space than during the 'lifetime of the granter, or his legal possession of the subjects'—a declaration that they should have the effect of delivered writs, and a power to revoke. This power was never exercised. The whole of these entails of Kelly, Ballumbie, and of the leases, were executed in duplicate, and one set delivered to John afterwards Baron Maule, and the other deposited by Harry in his own repositories.

On the 6th of December 1761 the Countess died, and on the 23d of June 1784 Harry also died. John then obtained possession of the duplicates which were in his father Harry's repositories. Immediately thereafter William made up titles to Kelly by a special service in fee-simple, and expede a general service before the Sheriff of Forfar, as 'legitimus 'et propinquior hæres masculus linea et provisionis dicto suo patri.' No mention was made of the leases. In 1745, 1758, and 1764, William (now created Earl of Panmure by an Irish patent) executed three separate dispositions of his whole estates in favour of a different series of heirs from those called by the above entail. In 1765, a large portion of the forfeited estate (including the subjects comprehended in the Brechin lease) was purchased by him; and he thereupon expede a Crown charter, including the estates of Kelly and Ballumbie in favour of himself and the heirs-male of his body—whom failing, his brother John and the heirs-male of his body, without any limitations; and on this charter sasine was taken in August of that year. In the mean while his sister Jane, who had married Lord Ramsay, had a son, who became Earl of Dalhousie; and the latter having married, had a family, of whom the defender, the Honourable William Ramsay, afterwards Maule, was the second son. In 1775 Earl William executed an entail of his whole estates, with all right of property and possession which he had in them, in favour of his brother John and his heirs-male—whom failing, the Earl of Dalhousie in liferent, and his second son, the defender, in fee. Thereafter, on the 12th of June 1779, Earl William made another entail of Panmure to his brother John and his heirs-male—whom failing, his own nearest lawful heirs and assignees whomsoever; and again, in September of the same year, he executed another entail of Panmure, with a destination, after the heirs-male of John, to the Earl of Dalhousie in liferent, and the defender in fee. These deeds were of the nature of mortis causâ settlements, and were not published. On the 2d of July 1781, John, then Baron Maule, died; and in his repositories the entails of 1730 were found, along with a document bequeathing them to Lieut. Thomas Maule, who was the grandson and representative of the Bishop of Cloyne, now dead.

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Soon thereafter Earl William executed a deed
lation, and revocation, ratifying the entails which
and 1779, in favour of the Earl of Dalhousie in lif
in fee—revoking those found in his brother John
signing the leases, so far as they then subsisted, to
in October 1781, he executed another entail, con
estates, in favour of himself, and the heirs-male of
ing, the Earl of Dalhousie in liferent, and the def
tiplepoinding was, about the same time, raised b
deeds found in John Maule's repositories, to wh
Thomas, the grandson of the Bishop, were called
followed by an action of exhibition and declarat
and improbation, at the instance of the Earl Willi
livery to him of these deeds, for having them set a
right to the estates and leases declared. At this
was the son of Lieut. Thomas Maule, and great gr
was a pupil, and he was cited personally to the re
and curators edictally. On the 4th of January 17
whereupon the Earl of Dalhousie, and his son the de
were sisted as parties, his father appearing as his
In February of the same year, a reduction and decl
Thomas, as heir-male of the Bishop, and heir-male
of Earl William, for setting aside the entail execut
the Earl in favour of the defender, and for having
the estates of Kelly and Ballumbie, and to the lease
mure, agreeably to the entails of 1780. Mutual
brought of services by each of these parties, claim
of tailzie and provision to the Earl—Thomas unde
and the defender under the entail of October 1781
wise raised by Thomas against the defender, as r
liam on the passive titles, for implement of the bo
in 1730. All these processes had in view the same
whether the deeds of 1730 were still subsisting an
case Thomas would have been entitled to prevail
defender was entitled to succeed under the entail of

After they had been conjoined, the Court, on th
pronounced this interlocutor:—'Find that the de
'by the deceased Mr. Harry Maule of Kelly, with
'tioned, in the year 1730, of his lands and estate
'deed of tailzie executed by William Earl of Pa
'said year, of his lands and estate of Ballumbie, ar
'positive and the negative prescription; and that t
'ploying £9000 sterling, executed by the said Ea
'in the aforesaid year, is cut off by the negative pre
'fore sustain the reasons of reduction of these thre
'decern, and declare accordingly: Find that the sai

'mure had full power to make the deed of tailzie executed by h
'favour of the said Mr. William Ramsay Maule and his adminis
'in law; repel the reasons of reduction of that deed of tailzie, and
'sie the said William Ramsay Maule and his administrator in law
'the process of reduction-improbation and declarator at the insta
'the said Lieutenant Thomas Maule against them, in so far as the
'relates to the estates of Kelly and Ballumbie, and also from the p
'against them for implement and performance of the prestations
'tained in the obligation for the £9000: Find that the said Mr. Wi
'Ramsay Maule is entitled to be served heir of tailzie and provisi
'the said deceased William Earl Panmure, his grand-uncle, in virt
'the aforesaid deed of tailzie in his favour, and remit to the mace
'proceed in his service accordingly on the brieve brought before t
'by him and his administrator in law: Find that the said Lieute
'Panmure, and house and parks of Brechin; and decern against the
'Mr. William Ramsay Maule, and his administrator in law, in the c
'clusions of declarator and removing in the foresaid action at the insta
'of Lieutenant Thomas Maule, so far as the same respects these leas
'and remit to the macers to proceed in his service in so far as rega
'these two leases;——but find that he is not entitled to be served heir-mal
'tailzie and provision to the said William Earl of Panmure, in virtue
'the deed of tailzie of the estate of Kelly, executed by the said
'Harry Maule, nor in virtue of the deed of tailzie of the estate of
'lumbie, executed by the said William Earl Panmure, and that his
'vice of the brieve taken out by him cannot proceed with regard to
'said estates of Kelly and Ballumbie, and remit to the macers to disn
'same accordingly, in so far as concerns these two estates; and
'cern.' *

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* The following notes of the opinions of the Judges were laid before the Court.

"ALVA.—Consolidation would not do by itself; but, joined to all the circumstances, sufficient to put an end to the leases. [He changed at the vote.]

"MONBODDO.—If Lord Panmure had had only one right to the leases, there would been difficulty; but he had two rights, the one absolute, and the other fettered; and there he must be understood to have possessed on the unlimited right; and so, indeed, Lord mure has explained himself.

"BRAXFIELD.—The question as to leases is the most difficult of the whole. I never any tailzie of a lease but those in this cause. The statute 1685 does not relate to sub incapable of infeftment; so that it is neither the better, besides, a lease is a personal right, and the right itself is qual nor the worse for recording, but it is the subject of a s from alienating. A lease is a fence at with prohibitory clauses, these will bar subsequent forty years, it would not hurt a proper subject of prescription, so that if a man possess habente; but my doubt is as to him, although it were to be shown that the lease flowed is nothing to be got adjectione Positive prescription does not run when pear to me that there was room for prescription. Positive prescription does not run when Lord Panmure doing something dominii; and as to the negative prescription, it does n deed, and the first in succession for an action, until there was a contravention of the d the instance of the heir of entail inconsistent with it. The assignation here is a co What action could there have been brought to inter as long as Lord Panmure lived? It would be a sole

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Against this judgment a petition of appeal was immediately presented on behalf of the defender; but an arrangement was afterwards made, which was carried into effect in the form of a submission and decree-arbitral, by which the appeal was withdrawn—the judgment as to Kelly, Ballumbie, and the bond affirmed, but that relative to the leases reversed—a sum of £500 ordered to be paid to Thomas, and £3000 to be vested in trustees—part to be paid to him at certain periods, and the interest drawn by him and his heirs till the expiration of the leases. This arrangement was accordingly acted upon for several years, and the defender entered into possession of the whole subjects. Thomas died in 1789; and, in 1809, his son, the pursuer, brought an action of reduction of the submission and decree-arbitral, containing a conclusion of removing from Panmure and Brechin, in which the Second Division, on the 9th of March 1813, assoilzied the defender; but the House of Lords, on the 10th of May 1816, found that 'they ought not to be considered as being, or 'having in law the effect of, a submission or decree-arbitral, but as a form 'adopted, in which an agreement previously made betwixt Thomas Maule, 'the appellant's father, and George Earl of Dalhousie, parties to the said 'submission, was concluded;' and remitted to proceed accordingly. On the 2d of December 1817 the Second Division sustained the defences, and again assoilzied the defender; but the House of Lords, on the 10th of July 1819, reversed this judgment, in so far as it sustained the defences generally; ordered the decree-arbitral to be reduced, as a decree-arbitral affecting any rights of the appellant; and declared 'that, under the 'circumstances of this case, the interlocutor of the 1st of March 1782 is 'not to be considered as final and conclusive against the respondent with 'respect to the leases in question; and therefore, as to so much of the 'appellant's action of reduction and declarator as seeks a declaration of 'the rights of the appellant to such leases, it is further ordered and adjudged, that the said interlocutor of the 2d of December 1817 be, and 'the same is hereby affirmed; but without prejudice as to any question

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law, to say that a right could be lost by prescription, while no action could be brought to interrupt. It has been said that the heir might have brought an action for registration. I deny that. This is not a deed which ought to go to the register. Besides, registration does not prevent prescription. It is said [that it was meant by the parties that all should go together. True; and this would have happened, had the deeds 1730 been followed forth; but if a man has lost one estate by his negligence, that is no reason for his losing his other estate, when there was no negligence on his part.

"PRESIDENT.—I agree with what Lord Braxfield says as to prescription, and I admit that consolidation is not a proper expression; but I think that it was the intention of the parties to keep all the subjects together, and it would be hard to separate the two capital messuages from the rest of the estate for a long term of years. I incline to think that the right to the leases was absorbed in the jus nobilius of the estate. Lord Panmure had a settlement many years after he had got rid of the fetters of the entail. It would be strange that this personal right should rise up and overturn what he had done.

"ANKERVILLE.—Non valens agere is pleadable against positive prescription; but I think that non valens agere applies not here; for there lay an action for registrating at the instance of the heir, and that in terms of the leases themselves."

'between the parties, in any other action, touching any property com-
'prised in the deeds of tailzie in the pleadings mentioned.'

The pursuer then, in 1821, in terms of the above reservation, brought the present action, concluding for reduction of the whole deeds executed by Earl William between 1745 and the period of his death, and a declarator of his rights, under the entails of 1730, to Kelly, Ballumbie, and the leases of Brechin and Panmure. On the 5th of June 1823, and 1st of June 1824, the First Division sustained a defence of res judicata. (See ante, Vol. III. No. 62.) But the House of Lords, on the 26th of May 1826, while they affirmed the judgment as to Kelly, Ballumbie, and the bond for £9000, in respect the judgment of the 5th of March 1782 had not been competently impeached, reversed the interlocutors, 'so far as 'the same find that all right and interest which the appellant claims in 'the leases of Brechin and Panmure, under the summons of reduction and 'declarator in the said interlocutors mentioned, were totally excluded, and 'that the subject-matter of the action then in question touching such leases 'was res judicata by all the several judgments referred to in the interlocu-'tors complained of, in as much as the said decreet of the Court of Session 'of the 5th of March 1782, instead of excluding, expressly affirmed the title 'under which the appellant claimed such leases; and the judgment of this 'House of the 10th of July 1819, in the said interlocutors mentioned, ex-'pressly left all questions open to both parties with respect to the said 'leases, notwithstanding such judgment, or any of the proceedings in the 'Court of Session to which such judgment referred, such judgment of this 'House having declared, that, under the circumstances of the case, the 'said decreet of the 5th of March 1782, was not to be considered as final 'and conclusive against the respondent with respect to such leases, and 'having therefore, as to so much of the appellant's action of declarator and 'reduction, then before the House, as sought a declaration of the rights of 'the appellant to such leases, founded on the said decree of the 5th of 'March 1782, affirmed the interlocutor of the 2d December 1817, then 'complained of; but having also expressly declared that the affirmance of 'such interlocutor by this House was without prejudice to any question 'between the parties in any other action touching any property comprised 'in the deeds of tailzie therein mentioned, the intent and meaning of the 'whole of such judgment being to leave all questions respecting the right 'to the said leases, as well as to the rest of the property comprised in the 'deeds of tailzie therein mentioned, open to be discussed in such manner 'as the same might be properly discussed in any future proceeding pro-'perly instituted for that purpose: But as it appears that the Court of 'Session, in pronouncing the interlocutors complained of, have not en-'tered into any question touching the right to the said leases, except the 'question, whether, by the several judgments in the said interlocutors 'mentioned, all right and interest which the appellant claimed under the 'summons of reduction and declarator then before the Court were totally 'excluded, and whether, therefore, the subject-matter of that action re-'specting such leases was res judicata by the judgments referred to in

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'such interlocutors, so that the right of the a
'such leases has not been properly discussed i
'and declarator then before the said Court, acc
'contained in the judgment of this House of th
'the true intent and meaning of that judgmen
'that this cause be referred back to the Cour
'same respects the right and title to the said
'Court do proceed therein in such manner as sl
'judgment, and with the former judgments of
'be just.' (See 2. Wilson and Shaw, p. 451.)

The case having then returned to this Court to these leases, was reported by the Lord Ordir heard in presence of the whole Judges for sever

On the part of the defender the main plea we Brechin by Earl William was to be ascribed tion of the 6th of June 1730, executed in his fa and recorded on the 30th of July 1730; and tl mure was to be imputed to the fee-simple ass 15th of June 1724 by the Countess in favour o the 20th of July 1730, and to which the Earl h service. In support of these allegations, the de the following acts of possession in reference t obtained, on the 16th of December 1740, in an of Forfarshire against a tenant for cutting peat of part of the lands, in which he founded on signation to him, and produced an extract of it the Earl for nine years of the Brechin parks lease of the same parks, also for nine years, in mure, he referred to these acts of possession :– ten years in 1737, to which his brother John 2. Another lease in 1740 for nine years, to w scribing witness. 3. Another in 1748 by Jo Earl, for 13 years. 4. Another lease in 174 29 years, and one on the same day for 19 year clauses of absolute warrandice; and, 5. The the fee-simple assignation in a process before tive to certain services prestable by the cottag afterwards advocated, and in which he found that assignation. The defender therefore co had been enjoyed, from the death of his fathe legal interruption, upon these fee-simple tit

* In the mean while the defender brought an action a tained repayment of the money placed in trust under the a (ante, Vol. II. No. 27.)

† As the speeches of the Judges, which are in the App arguments advanced on both sides, it is only necessary pleas of the parties.

quired a right under the positive prescription, and the entails had been extinguished by the negative prescription. No. 26

On the other hand, the pursuer maintained, that the possession of the Earl must be imputed to the entailed assignations, under which he was bound to possess; that the fee-simple assignations were the deeds of the makers of the entails, and as such the heirs could not challenge or reduce them; that the acts condescended on were insufficient to constitute a prescriptive possession; and that as his father was minor from 1740 till 1761, his minority must be deducted from the 40 years, which terminated in 1774; and further, that as he himself was minor from 1773 till 1794, when the succession had opened to him, his minority must also be deducted. March 4. 1

The majority of the Judges delivered opinions finding that the lease of Brechin was prescribed; but being equally divided as to Panmure, the case stood over for the opinions of Lords Pitmilly and Meadowbank, who had been absent, and for that of Lord Fullerton, who had not then taken his seat. An additional hearing was ordered in regard to Panmure; and thereafter the Court pronounced this judgment:—'Find that the 'minority of the pursuer, pleaded in this case, affords no interruption of 'the course of prescription, either negative or positive, as pleaded by the 'defender. With respect to the lease of the house and parks of Brechin, 'sustain the defences, and assoilzie the defender from the conclusions of 'the present action applicable to that lease. With respect to the lease of 'the house and parks of Panmure, repel the defences, sustain the reasons 'of reduction, and decern; and remit to the Lord Ordinary to proceed 'further in the cause, as to his Lordship shall seem just.'*

Pursuer's Authorities.—3. Stair, 5. 18; 3. Ersk. 8. 23; Welsh, June 21. 1808, (No. 8. Ap. Prescription); Lumsden, June 13. 1811, (F. C.); Kinloch, March 1. 1808, (No. 7. Ap. Prescription); M'Dougal, July 10. 1739, (10947); Speeches in Bargany Case, (1. Wilson and Shaw's Ap. Ca. Appendix.)

Defender's Authorities.—Smith, June 30. 1732, (10803); M'Dougal, July 10. 1739, (10953); Douglas, Feb. 2. 1753, (10955); Porterfield, Dec. 6. 1771, (10698); Pollock, Jan. 28. 1778, (10702); Maxwell, June 21. 1808, (No. 8. Ap. Prescription); Yule, March 4. 1813, (F. C.); Gordon, Dec. 21. 1784, (10968); Grant's Creditors, Jan. 31. 1792, (10971); 3. Ersk. 7. 3; 3. Ersk. 8. 58; Ayton, July 31. 1756, (10956); Bargany Case, Dec. 23. 1793, (11171); Duke of Buccleuch, Nov. 30. 1820, (F. C.)

D. Fisher, S. S. C.—Fotheringham and Lindsay, W. S.—Agents.

Mrs. Mary Anne Holmes or Shiells and Husband, Pursuers.— No. 261.
D. of F. Moncreiff—Cowan.
R. Reid, Defender.—*Sol.-Gen. Hope—A. M'Neill.*

Legal Diligence—Inhibition—Sequestration—Adjudication.—1.—Non-compliance with the provisions of the act 1693, c. 12, as to inserting in the service copies of inhibitions the names and designations of the witnesses, does not infer nullity, but merely punishment of the messenger.—2.—The effect of an inhibition is extinguished by an intervening sequestration followed by a discharge on a composition, though the inhibiting creditor have not ranked, so far as regards the bankrupt's interest in his property, so that an adjudication cannot proceed to the effect of attaching that interest;—but,—3.—Observed, that the inhibition remains effectual quoad real securities granted prior to the sequestration, spretâ inhibitione.

* For opinions of the Judges see Appendix.

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March 4. 1829.
2d Division.
Ld. Cringletie.
F.

The pursuer Mrs. Shiells, in the year 182
against the defender Reid on the dependence
ultimately obtained decree. Shortly after the
tion, Reid granted an heritable bond for £600,
taken, and he was thereafter sequestrated und
Mrs. Shiells made no claim in the sequestrati
Reid was discharged, on payment of a composi
discharge, Mrs. Shiells brought the present proc
heritable property belonging to Reid, and over
had been granted. In defence it was pleaded, 1.
ineffectual, in respect of its not having been pro
That the effect of the intervening sequestration w

The execution of the inhibition returned by th
forth that the copy served on the defender bore
ations of the witnesses present, but concluded as f
'inhibition, subscribed by me, did bear the date he
'and signeting of said letters, and was executed, a
'in presence of the two subscribing witnesses,
'Matthew Slater, both residenters in Irvine;' a
duced a service copy of inhibition, alleged to have
him, which bore,—'This I do, upon the first d
'hundred and twenty-three years, before witnesses
names or designations of the witnesses. This, how
not admit to be the copy actually served, though
averment that it was not.

The Lord Ordinary, on hearing parties, *ordered*

Pleaded for the Defender—

1. The act 1693, c. 12, requires, as a solemnity r
that the copy 'shall bear at length, and not in figu
'of the delivery thereof, as also the names and des
'nesses, in such sort as the execution and indorsatio
'the same;' and although no express sanction of n
the statute, it necessarily follows that where a statu
diligence is disregarded, the diligence is inept; and t
of the statute has been relaxed in practice as to copie
has never been decided that the neglect did not crea
to the citation, although the objection is not allowed
exceptionis. No relaxation, however, has ever been in
gence; and, on the contrary, this very objection was
tained by the Court with reference to an arrestme
Stewart v. Brown, (ante, Vol. III. p. 56.) It is true, th
had borne that the copy served did contain the names
of witnesses, a reduction would have been necessary; t
does not bear this, and there is therefore no bar to p
tion by way of exception, (as was also decided in the

case,) and it is sufficiently substantiated by production of the copy, unless the defender will undertake to show that that was not the copy actually served.

2. Supposing the inhibition validly executed, it has been rendered ineffectual by the intervening sequestration. The adjudication by the trustee frees the lands of any burden created by a prior inhibition, and if sold to a purchaser, they will be completely disburdened of any such lien,—the only effect of the inhibition being to give the creditor inhibiting a preference on the price in the ranking. But when a bankrupt is discharged on a composition, he obtains his estate just as it stood vested in the trustee by the adjudication, viz. freed from the lien of any prior inhibition; and as the discharge extinguished the personal debt, except as to the composition, which the defender is willing to pay, there is no debt in virtue of which the pursuer can adjudge.

Pleaded for the Pursuers—

1. The messenger's execution here contains all which it is required by law to specify. It therefore being perfect, no objection to the manner in which the diligence was executed can be listened to without a reduction. But further, the act 1693 requires the copy to bear the names and designations of the witnesses, only under the sanction of deprivation of the messenger, not of nullity of the execution; and although, in the case where no sanction is attached to a statutory provision, nullity may be inferred, yet where an express sanction of punishment on the officer is alone attached, that must be held to have been the only sanction intended by the Legislature. Accordingly copies of summonses (which are included along with inhibitions in the act 1693,) are not held to be inept, when they want the names and designations of witnesses; and as to the case of Stewart v. Brown, there is a distinction between copies of arrestment and copies of inhibition, the former not being served on the party, (to copies served on whom alone the act 1693 applies,) and falling, it was thought, under the general words of the act 1681.

2. Although, when a sequestration is brought to a close by distribution of the estate, all prior real burdens are extinguished, the same result does not follow when the estate is not distributed, but is restored to the bankrupt on a composition; for, in the latter case, heritable debts still remain a burden on the lands. The trustee's adjudication in fact flies off, and the estate stands in the bankrupt's person, as before the sequestration; and so it was found as to an inhibition in the case of Stewart, Feb. 23. 1813, (F. C.) It is true, the personal obligation of the bankrupt is extinguished by the discharge, except as to the composition; but the real lien remains over the estate, and is a sufficient foundation for an adjudication.

On these Cases coming out for advising, the following opinions were delivered:—

Lord Glenlee.—In order to make out a title to adjudge, Mrs. Holmes attempts to make out a subsisting inhibition. We must consider this case as if it were a reduction of the bond against the heritable creditor, and he was defending

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himself on the ground that there was no inhib
imported that all the regulations of the act 1
require a reduction, and would just sist proces
tion were brought, the execution would be se
just the same as it was in the case of Stewart
thing as to whether the witnesses present were
evidence as to that; and therefore, as in th
merits. Now, there is no doubt that, in so fa
restments and inhibitions are in pari casu. Whe
sanction of nullity is of no consequence, unl
would be valid; but does such a thing as inhib
unless the copy be as there described? It is
copy alone which lays on the nexus. Now, is it
same way, that lays the prohibition on the ma
posed to lay the case of summonses entirely o
party does not appear at all, whether, notwiths
absence could be good where the copy of citati
rather think it would not, though the Court ha
party appears and pleads no process. I incline
inhibition on this defect is sufficient; and as
shall say nothing on it at present.

Lord Alloway.—If we could hold that the
v. Brown must be followed, there would be nc
tinction between inhibition and arrestment; the
—both prohibitory diligences. But I confess I
ment. Summonses are included in the same s
to adopt a rule as to arrestments, different from
rule as to these is clear—that if there has been
not listen to an objection founded on a copy
otherwise the consequences would be most s
country depend on judicial proceedings. Ther
the objection is valid, but whether we cannot
without a reduction? My doubts of the judg
confirmed by what passed in the case of Fras
charge on diligence, the opinions delivered in
adverse to the judgment in the case of arrestme

Lord Justice-Clerk.—I think it right ths
what passed in the case of Stewart v. Brown, a
of what had been done as to summonses. I w
given full effect to; but it was pointed out that
a case in 1820, Wilson v. Spreull. We requir
us; and the opinion of Erskine quoted explain
had relaxed the rule of the act in regard to sum
passage, b. 2. t. 5. § 55, '2dly, That greate
ciple on which we found ourselves at liberty
provisions of the statute. Now it is said th
interferes with it. This does not appear to m
there between the judgment of the Inner Ho
expenses; for they still only allowed the decre

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that there was some irregularity; and besides, there is no proof that they differed from us; it was not a judgment, and only two Judges differed. Then, as to the case of Brown, the Court unanimously adhered to the interlocutor of the Lord Ordinary, and I have no reason to doubt its correctness. The only question, therefore, is, whether there is any distinction between inhibition and arrestment? Now I cannot see any, as serving the copy inhibition on the party is indispensable to its constitution. As to the sanction of nullity not being added, it was considered in Lord Fife's case, and the Court held the injunction imperative; if not followed, a nullity was inferred, though there was no special declaration to that effect; and this was affirmed in the House of Lords. We are therefore bound to give effect to the act 1693; and when pleaded in this way in an attempt to adjudge, I think it may be listened to without reduction. I do not think the execution altogether unexceptionable; if it had borne that the copy left contained the names and designations of the witnesses, I could have understood the objection that there must be a reduction; but that is not the case. The execution here bears,—" which copy of inhibition was subscribed by me, did bear the date hereof, contained the date and signeting of said letters, and was executed as aforesaid," &c. It does not say that it was executed in terms of the statute; and we are therefore obliged to look at what the messenger actually did. *

The Court, however, although the majority were for sustaining the objection to the execution of the inhibition, considered it advisable to have the point fixed by a judgment of the whole Court, and accordingly directed the Cases to be laid before the other Judges for their opinion. The following was returned:—

Lords Balgray, Gillies, Cringletie, Meadowbank, Medwyn, Corehouse, and Newton.—There are two questions in this case on which our opinions are required:—1st, Whether the objection to the inhibition, founded on the defective nature of the copy of the execution served on the debtor, is well founded; and, 2d, Supposing the inhibition effectual, are the objections to the adjudication well founded?

On the first question, it appears to us that the enactments of the statutes 1681, c. 5, and 1686, c. 4, relate exclusively to the principal executions, and that it is only in virtue of those of the statute 1693, c. 12, that the copy in question is defective. But we do not think that the solemnities required by this latter act, one of which no doubt is, that the copy shall bear the names and designations of the witnesses in the same way as the principal execution does, are enforced by the penalty of nullity of the execution.

This penalty, it will be observed, is in the acts 1681, c. 5, and 1686, c. 4, expressly declared to be the consequence of failing to observe the forms there prescribed. But while these statutes, with their sanctions, must have been fully in the view of the Legislature in 1693, it annexes no such penalty to the neglect of the requisites it was introducing in regard to the copies. It merely declares that the messenger who shall omit them shall thereby incur deprivation of his office. The distinction thus made betwixt the sanctions by which the required forms are enforced in the case of principal executions and of copies, seems to be founded on reasonable grounds. The principal execution

* Lord Pitmilly was absent from indisposition.

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is returned to the creditor, who, if it appears remedy matters by a second execution; but h left with the debtor. There seems no reason Legislature, in passing the act 1696, meant to the one it has specified; and we do not think going further by adding to the penalties of th

As to the case of Stewart against Brown, of the Court cannot have considered it as a d would not have requested the opinion of the o

In regard to the second question, we think allowed to proceed in hoc statu.

The pursuers cannot adjudge in the charact the defender's discharge under the sequestrat the composition. Their preference under th served to them; and it is necessary, in the fi preference is. Supposing the sequestration to rupt's heritable property to have been sold un derived a benefit from their diligence only in t tee's adjudication for behoof of the creditors i joyed a preference over those of their co-ad tracted posterior to the inhibition; and as the is struck at by this diligence, they would have the share of the price allotted to the heritable drawn as adjudgers, had no such security beer first kind seems to be excluded by the recall of remains effectual. The property has been rep burden of the heritable bond, and the heritabl fore, to have his security reduced ex capite inh a reduction alone, and by operating on the he can open up a fund for their further payment. debtor's estate, while the heritable security is be most unjust, and contrary to all principle. place, to reduce the heritable bond, which the the extent to which they would have had right able creditor, had the sequestration proceeded competent to them to adjudge the estate, to th the right of the heritable creditor which has b rendered attachable by them in virtue of their

Matters seem to us to be much in the sam spretâ inhibitione, conveyed away his estate. can adjudge, he must replace the estate in his ance. In the present case it is only the heri estate which can be attached by the pursuers; by the recall of the sequestration, is no way af

Lord President.—I concur entirely in the tion, that if this objection to the inhibition blunder in the copy left with the debtor, it wil the record of inhibitions. This record serves

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dealing with the person inhibited, but also with the inhibitor. A creditor whose debt is secured by an inhibition duly recorded, may, nevertheless, have pressing occasion for his money, which, ex hypothesi, he cannot obtain from his debtor. But he will probably have little difficulty in obtaining a loan on an assignation to the debt and diligence thus duly recorded. But if the validity of the inhibition is to depend, not on the security of the record, but on the correctness of a copy never seen by any one but the person inhibited, no such loan can ever be obtained; or if obtained, ought the security of the creditor assignee, so trusting to the record, to be cut down on account of a blunder in such copy?

Lord Mackenzie.—I concur in the result of the above opinion, though not without considerable difficulty. I was Ordinary in the case of Stewart; but, as far as I can recollect, the point agitated before me in that case was chiefly, if not solely, the effect of the execution in barring any question respecting the copy, which point afforded no valid plea in that case, and which affords none in the present case. At any rate I do not consider the case of Stewart as sufficient to fix the point, that the want of mention of the witnesses in the copy of an inhibition creates a nullity; and I now think that such want does not create a nullity. What weighs with me is this—that the mention of the witnesses in the copy is not, by the nature of the inhibition, an essential of the diligence. If it were such, I should think the want of it must cause nullity, notwithstanding the circumstance that the creditor inhibitor has no opportunity of seeing the copy; for I hold that the creditor must take his risk of all failures by the messenger, in observing the natural essentials of the diligence in the copy left for the debtor, as well as other things;—as if the messenger should, for instance, in the copy, omit the name of the creditor, his own name, or a material part of the letters, or the command given by virtue of them, there plainly must be a nullity, whatever might be the hardship on the creditor, who might not see the copy. But I incline to think that the mention of the witnesses in the copy is not an essential of the diligence from its nature, but only a requisite intended to form a check upon the proof of it. Therefore the want of it does not, in its own nature, imply nullity; and if so, I see no authority for nullity, since the statute 1693 does not create a nullity, but supports its enactment by a different sanction.

On the cause being put out for judgment, the Judges of the Second Division delivered the following opinions:—

Lord Justice-Clerk.—There can be no doubt that the opinions decide the question. But I have not changed mine; and I cannot adopt it in consistency with the decision in the Earl of Fife's case, affirmed by the House of Lords, and the case of Stewart v. Brown, as to this very same statute.

Lord Glenlee.—I am in the very same situation. It appears to me perfectly clear that when the statute 1693 points out a necessary requisite, if this requisite be not complied with, the execution may be improved. It appears incomprehensible why a penalty on the messenger should make this requisite unnecessary, especially when we consider that under the act 1540 no nullity is declared, but only a penalty imposed; and yet we have frequently reduced executions, because the requisites of that act were not complied with; and I cannot see how the doctrine here can be held consistent with these decisions.

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Lord Pitmilly.—I was not present formerly, and I tion to the case, as I saw the majority clear one way.

The Court, in respect of the opinions of the con objections to the inhibition, and found that the ceed in hoc statu.

Pursuers' Authorities.—(1.)—Loch, January 15. 1706, ((3745); 4. Bank. 6. 9; 4. Ersk. 2. 5-6; M'Donald, Jan. 11. 1825, (ante, Vol. IV. p. 331); Duchess of Argyll, June 16. 17 Feb. 26. 1825, (ante, Vol. III. p. 590.)—(2.)—2. Bell, 503; Irving v. Cliffe, June 12. 1824, (ante, Vol. III. p. 129.)

Defender's Authorities.—(1.)—2. Ersk. 5. 55; Tait on E 22. 1824, (ante, Vol. III. p. 56.)—(2.)—54. Geo. III. c. 137.

H. Cowan, C. S.—J. W. M'Kenzie, W.

No. 262.

W. Wallace, W. S. Pursuer.—
H. M'Kissock, Defender.—

Agent and Client—Triennial Prescription.—1.—A writer prescription, both as to constitution and payment.—2.—L rizing the business to be done, but without evidence of a the client to the country agent, not sufficient to elide presc

March 4. 1829.
2d Division.
Ld. Mackenzie.
T.

Action by Wallace, W. S. for payment of to have been incurred on the employment It appeared that in 1807 the pursuer had beer ness for the defender through the intervention who acted in that matter as the defender's co Beggs, who was an indorser of a bill which dorsed by M'Kissock, having been charged Ewing to obtain a suspension, whereupon Ew following letter:—'I enclose charge given J 'at the instance of Robert Cuttle of Manch 'bill of suspension, on the ground of no ad 'time required. Include M'Kissock also, M'Kissock had received no charge for payme no evidence of his having authorized Ewing clude his name in the suspension; nor did it formed of the proceedings which were going that the pursuer was subsequently (in 1809 some further business for Hugh M'Kissock defender was a partner, and by their authori suspension, conducted by the pursuer in tl defender, an account of £14: 5: 7 was incu he, in the year 1826, raised an action agains viously paid for the two pieces of business rized by him.

The defence was—no evidence of employ

scription. The Lord Ordinary pronounced this interlocutor:—'Sustains 'the plea of triennial prescription; finds there is no sufficient proof of 'the debt libelled by the writ of party; and therefore appoints the cause 'to be enrolled in the roll of motions, that the pursuer may say whether 'he makes reference to the oath of the defender.' His Lordship added this note:—'The Lord Ordinary considers the triennial prescription as 'applicable to accounts of this sort, and to the constitution as well as 'payment of such accounts. Then he considers that there is no sufficient written proof of the constitution of the debt libelled. There is 'neither direct authority from the defender to the pursuer, nor express 'general or special authority from the defender to Stewart Ewing, nor 'written evidence under the hand of the defender, sufficient to show 'that Ewing, though without express authority, was acting as his general agent in this way. Then the sort of mixed conjectural proof which 'the pursuer offers, seems excluded by the prescription. If the pursuer 'relied not on his immediate employer Ewing, or upon Beggs, but upon 'the defender, for payment of this account, he ought to have claimed it 'within the years of prescription at least, and not have let it lie over, 'when other accounts were paid to him by the defender. Put the case 'that Stewart Ewing was pursuing the defender, must not the prescription apply? and if so, why not against the present pursuer?'

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The pursuer reclaimed, but the Court adhered.

W. Wallace, W. S.—W. Mercer, W. S.—Agents.

J. Graham, Pursuer.—*Keay—Small Keir.*
J. Forbes and P. Kilgour, Defenders.—*Sol.-Gen. Hope—Buchanan.*

No. 263.

Trust — Factory — Title to Pursue.—A party having, by a deed of factory, authorised his factors to invest a sum of money in trust to themselves for behoof of his wife in liferent, and son in fee, and exclusive of his jus mariti, and not to be affectable by his deeds; and the factors having done so—Held that the granter had no title to call the factors to account in relation to the sum so vested in trust.

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1st Division.
Lord Meadowbank.
D.

The pursuer Graham, in 1787, married Elizabeth Ewen, daughter of John Ewen, merchant in Aberdeen, by whom he had a son John. In 1788 a postnuptial contract was executed, by which Graham assigned and disponed to 'himself and the said Elizabeth Graham alias Ewen, his spouse, in conjunct fee and liferent, and for her liferent use allenarly, during all the days of her lifetime after his decease, in case she survive him,—and to the said John Graham their son, and any other child or children to be born of the said marriage, equally amongst them in fee—whom failing, to the said Elizabeth Graham alias Ewen, her heirs, executors, or assignees,'—the sum of £500, payable out of the estate of his deceased father. On the same day, and being about to go abroad, Graham granted a factory to two gentlemen to uplift the money, and invest it agreeably to the terms of the postnuptial contract. This they did, and placed it on bond in the hands of Gordon, Barron, and Company.

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In 1794 Graham returned to this country, receive
the money, and being again about to go abroad, e
in favour of Patrick Barron and William Forbes,
of £440. That deed proceeded on the narrative,
his 'desire that the said sum of £440 sterling, sh
'main settled at interest, either on the same sec
'heritable or moveable, as may be thought most
'provision for my wife and son in my absence,
'debts or deeds, but as a permanent fund of subsi
'and any other children that may be procreated o
'of my decease;'—'and seeing it is necessary to n
'managing that money for the benefit of my wife
'my other affairs in my absence;'—therefore
Barron and Forbes to be his factors and commissio
authorized them 'to take charge of and manage
'sterling for the benefit of my wife and son, or a
'may be procreated of the marriage as before expre
again invest it in such security as they might think
'names, and payable to themselves as trustees for t
'of my said spouse and children, and failing of the
'for behoof of herself in liferent, and her heirs a
appointed them to pay the interest to her and her s
mariti in relation to both the principal and interest
should not be in the power either of her or himself
'hurt or prejudice the right of the children of the
'of them, the heirs and successors of my said spou
the above terms was then granted by Gordon, B
to Messrs. Barron and Forbes as trustees; and th
men paid £240 to the son (for which they took his
India, and the balance was subsequently paid by
Company to him and Mrs. Graham, for which the
discharge, both on their own account, and by the s
a separate deed of his father. On the return of th
he brought an action against the defenders, the repr
Barron and Forbes (now dead,) founding on the de
cluding for count and reckoning. In support of
tended, that by the marriage-contract the fee of
vested in him; and that as the deed of 1794 was
factors were bound to account to him for the mod
disposed of the money. On the other hand, it was
deed of 1794 was not a simple factory, but was an in
suer in favour of Barron and Forbes as trustees for
who thenceforth had the exclusive right to the mone
had no title to demand an accounting.

The Court, on the report of the Lord Ordinary
fence.

LORD GILLIES.—It is an entire mistake to say that this is a factory. It is, in truth, a conveyance to third parties, by which the pursuer divested himself.

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LORD PRESIDENT.—To some effects, it is no doubt a factory.

The other Judges concurred.

A. Brown,—J. Morison, W. S.—Agents.

W. REMNIE, Petitioner.—*A. M'Neill.*
W. and A. CONNELL, Respondents.—*H. J. Robertson.*

No. 264.

Inhibition.—This was an application for recall of inhibition, in which the sole question related to the expenses. The Court refused them.

March 5. 1829.
1st DIVISION.
H.

F. Hamilton, W. S.—Wotherspoon and Mack, W. S.—Agents.

A. CALDWELL and Others, Suspenders.—*Greenshields—Skene.*
P. CAMPBELL, Charger.—*Sol.-Gen. Hope—Shaw.*

No. 265.

Process—Turning charge into a Libel.—Question raised, but not decided,—1.—Whether it be competent under the new form of process to turn a charge into a libel;—and,—2.—Whether, if it be so, the record must be made up as in the case of a suspension or an ordinary action.

CAMPBELL and BURNSIDE, W. S. having been employed as agents on a sequestrated estate, the charger, as in their right, presented a petition, under the Act of Sederunt 6th February 1806, against the trustee and the suspenders, creditors alleged to be ranked on the estate, to have the business account taxed and decerned for. The petition was ordered to be served, and was intimated to the agent for the suspenders, but not to themselves. No appearance was made by them; but answers were lodged for the trustee, and decree was pronounced, which was issued as a decree in foro. A suspension was then brought by the suspenders of the decree, which they maintained was irregular, as the petition had never been served on them. The record was prepared by reasons of suspension and answers, both in regard to this objection and the merits of the case; and in the revised answers the charger stated, that although the objection was unfounded, yet he was entitled to have the charge turned into a libel, and, before closing the record, he made a motion to that effect. This was opposed, and in the mean while the suspenders executed a summons of reduction. The case was heard before Lord Probationer Fullerton, who reported it to the Court, and stated, that although the turning of a charge into a libel might be inexpedient, yet as it had been sanctioned by numerous decisions, in order to do justice between the parties, without the necessity of another action, he was of opinion that

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1st DIVISION.
Ld. Corehouse.
S.

No. 265. March 3. 1829.

the charge should be turned into a libel, reserving penses.

The Court having concurred in this view, but it competent to pronounce judgment on the report of t remitted to the Lord Ordinary to hear parties furth again came before his Lordship (Corehouse,) a diffi him as to the nature of the record which ought to b being given to the motion. This difficulty rested o the charge were turned into a libel, the process woul into an ordinary action; and therefore the record, a cature Act, ought to be made up by condescendenc pleas in law. His Lordship then verbally report Court, with the view to regulate the practice in f that although, by the old practice, a charge could b at any stage of the process, and even by the Judge in the case of Campbell, Feb. 22. 1827, (ante, Vo been found that this could not be done after the rec question, therefore, came to be, how was the reco whether as a suspension, or an ordinary action? A Lordship that the latter was the correct form, but th be made in initio litis.

The Lord President.—There may be a difficulty i to be made at that time, because, until the facts appear u be difficult to judge whether the charge should be turne

Lord Balgray.—As the turning a charge into a libe position in favour of the charger, he must indemnify the penses he may have incurred; and therefore, if in this been unnecessarily suffered by the suspenders, they ough motion is granted.

Lord Gillies.—When a charge is turned into a lib by an equitable permission than interposition of the Co the assumption of irregularity on the part of the ch here is as to the sort of record which should be prep thought it should be made up as in the case of an ordin

Lords President and Craigie having concurred in

The Solicitor-General, for the charger, having then to withdraw the motion,

The Court, in consequence, were not required to to the Lord Ordinary.

J. Cullen, W. S.—Campbell and Burnside, W. S.

J. TAYLOR, Pursuer.—*Whigham.*
MISS MALCOLM, Defender.—*Jameson—Monro.*

Process—Erasure.—Held that an erasure in the date of a summons is a good objection to it.

TAYLOR, a writer in Edinburgh, brought an action against Miss Malcolm, in defence against which she pleaded, inter alia, that the date of the summons was written upon an erasure, and therefore could not afford a legitimate warrant of citation. The Lord Ordinary having sustained this defence, and dismissed the action, Taylor reclaimed, and contended that the erasure was immaterial, because the date of signeting adhibited by the Keeper of the Signet was not written upon an erasure, and that date formed the proper date of the summons.

On the other hand it was stated, that the date of a summons is that introduced into the body of it by the Writer to the Signet, bearing to be given at Edinburgh, on such a day, under the Royal Signet, and that the date adhibited by the Keeper had been ordered to be put for the purpose of checking attempts to forge the Signet, which had formerly been frequent; and therefore that that date must be regarded as altogether extrinsic of the summons.

The parties being at variance as to the practice, a remit was made
'to the Deputy Keeper of the Signet to report concerning the practice
'of the office on the point discussed between the parties, and particularly
'whether cases occur of difference between the date expressed in the sum-
'mons, and that of appending the Signet thereto, or of erasure or other
'vitiation of such date.

On advising the subjoined report by the Deputy Keeper, the Court, holding the date of the summons to be that inserted in the body of it, adhered.*

J. TAYLOR,—J. SHAND, W. S.—Agents.

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* "In obedience to the above remit, the Reporter has made inquiry at the Signet Office, and also applied to the Commissioners of the Signet, as to the practice adopted relative to the matters in dispute, and he now begs leave to report,

"1. With regard to summonses which pass upon a bill, they bear the date of the warrant passing the bill, and the date of signeting is marked by the officer at the time of attaching the Signet. In those cases, the officer considers it his duty to see that the date of the summons corresponds with the date of passing the bill. If the date be left blank, the officer either fills it up with his own hand, or desires it to be done by the person who wrote the summons. If a wrong date has been inserted, and this happens almost daily, either in the case of summonses which pass upon a bill, or of other Signet letters which pass upon a bill or other warrant, it is usually altered in one of two ways. Sometimes the wrong date is erased, and the proper date is written upon the erasure; at other times the wrong date is deleted, and the proper date is written on the margin of the writ. When the date has been corrected in either of those ways, the officer at the Signet does not hesitate to signet the writ, as he conceives that if any error is committed in this matter, it is done periculo petentis. The officer, however, generally informs the person presenting the writ that the erasure or deletion should be mentioned in the signature of the writer to the Signet who signs the writ, and that a marginal note, if introduced, should be signed by him.

"2. In the case of summonses which do not require a bill, it is not considered necessary

No. 267.

C. HUNTER, Advocator.—*Skene—A.*
LORD KINNAIRD'S TRUSTEES, Respondents.—

Presumed Payment — Settled Account — Landlord and Tenan
rent by a landlord to a tenant for five years consecutively presu
and a settlement of their mutual claims under the lease.

March 5. 1829.

1ST DIVISION.
Ld. Corehouse.
D.

THE late Lord Kinnaird granted a lease to Hu
teen years from 1802, at a rent of £315 for th
thereafter at £325; and Hunter was also to pay
outlays by his Lordship. After the expiration
of Lord Kinnaird brought an action against Hu
Perthshire for certain alleged arrears of rent
In defence Hunter stated, that these arrears wer
into consideration the increased rent originally a
first three years, and the per centage; but that
from in consequence of certain counter claims w
Kinnaird, and that numerous settlements had b
He accordingly produced receipts for five co
vember 1816 to November 1820 inclusive, bear
of his rent' for each particular term. He ther
receipts afforded evidence of a settlement of al

To this it was answered, that as the amount
the lease, and the per centage was not denied,
that either the additional rent or the per centa
the defence was rested upon alleged counter c
no effect could be given to the presumed di
ceipts.

The Sheriff decerned against Hunter; but
Ordinary, 'in respect of the advocator's dist
'lord or his factor agreed that the additional
'be abated, and that discharges in full for
'years from 1816 to 1820 are produced un
'who framed the lease, finds it presumable
'vious to 1820 are due; and in respect the
'prove the reverse by the writ or oath of
'cause, assoilzies the defender, and finds hi

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by the Commissioners, or by the officers at the Signet, t
that of affixing the Signet. The officers at the Signet a
called upon to notice the date of a summons which pas
care that the date is not more than a year and day befo
at the Signet Office, and that it is not posterior to the
monses which do not require a bill bear date on the da
Office, or, on the day previous, the summons being co
it is presented at the Signet Office; and it rarely hap
place in the date of those summonses.

"The summons, in the present case, is an ordinary p
a bill."

To this interlocutor the Court unanimously adhered.

Lord Balgray observed, that independent of the general rule establishing a presumption in favour of a tenant from consecutive discharges, this case was distinguished by the circumstance that every one of the receipts bore to be for 'the balance of his rent,' thereby necessarily implying that the *balance* had been ascertained, struck, and settled.

Advocates' Authorities.—3. Erak. 4. 4; Fraser, Feb. 14. 1827, (ante, Vol. V. No. 211.)

Thomson and Ferguson, W. S.—Tod and Hill, W. S.—Agents.

R. Wilson, Pursuer.—*Skene—Thomson—Coventry.*
R. and A. Reddie, Defenders.—*Forsyth—Jeffrey.*

This was a special case, in which the Court adhered to certain findings of the Lord Ordinary, reserving all questions of expenses.

R. Wilson,—A. Paterson, S. S. C.—Agents.

R. Wilson, Pursuer.—*Skene—Thomson—Coventry.*
A. Reddie, Defender.—*Forsyth—Jeffrey.*

Agent and Client.—An agent having delivered up a discharge of an inhibition to a trustee on a bankrupt's estate, without getting payment of a sum of expenses which had been incurred by him for his client, and which expenses he was entitled to have received as preferable in respect of the inhibition—Held, on the failure of the trustee, that the agent could not recover these expenses from his client.

The defender Reddie, having a claim of £88: 4: 8 against one Stedman, employed the pursuer Wilson, writer in Edinburgh, to recover the same. Wilson accordingly raised an action against Stedman, on the dependence of which he used inhibition. Thereafter Stedman conveyed his property to Mr. Bain, accountant in Edinburgh, as trustee for behoof of his creditors; but Reddie did not accede to the trust. Bain having sold certain lands belonging to Stedman affected by the inhibition, entered into a correspondence with Wilson as to obtaining a discharge of it from Reddie. While this was going on, Wilson wrote to Reddie in these terms:—'Before selling the lands, Mr. Bain, as I mentioned to 'you when here, should have got your consent to discharge the inhibi- 'tion. The consequence of his not doing so is, that the purchaser will 'not pay till the inhibition is discharged, and you are not obliged to dis- 'charge it till your debt is paid. But if all your expenses are paid, and 'the debt due to you admitted, I shall agree that you discharge the in- 'hibition, and rank (except as to expenses) with the other creditors.' In answer to this Reddie wrote—'As I mentioned to you, I leave you to 'act as you would do in your own case.' Wilson accordingly made an agreement with Bain on these terms; and some time thereafter he sent to Reddie a discharge for signature, enclosed in a letter, of date 25th

No. 269. March 5. 1829.

August 1823, which bore as follows:—'There is to
'G. Stedman's creditors on Thursday first along
'when the price is to be paid. The trustee will div
'or three weeks thereafter at the utmost. It was
'you should be ranked for the full amount of your
'creditor, and that your expenses should be paid in
'in full of the expenses arose from an inhibition
'That inhibition must of course, in virtue of the a
'charged; and I therefore now send you a discharg
'Be so good as return it to me in course, with a no
'have incurred for postages &c., in order that th
'Till the discharge is produced, the purchaser woul
&c. Reddie accordingly signed the discharge, and
son, who immediately delivered it to Bain without c
the expenses, which amounted to £27: 19: 7½. Bai
payment of the price of the property from the purc
divide it among the creditors, unless certain claims
lowed to be deducted as preferable. This the credi
to; and after some time a summons of multiplepoin
neted 10th February 1824) was raised in his name
creditors, Wilson attending the meetings of credi
Reddie, who, being in Edinburgh on the 5th of Feb
mandate, of that date, 'to uplift what sum may be f
'the funds of George Stedman, and grant a proper
No copy of the summons of multiplepoinding was s
Wilson having agreed for him to dispense with ci
ning of the induciæ; but it appeared that in the c
Reddie was occasionally informed of what was going
any objection to the proceedings. In this multiple
lodged by Wilson for Reddie and the commissioners
also creditors; and, after considerable litigation, de
was obtained against Bain in June 1826, and finally
and the other creditors were sustained. It now app
Bain's affairs were in a state of embarrassment; and
sign the fund in medio, he was apprehended, in D
caption proceeding on the decree for consignation,
liberated on condition of his granting a trust-deed f
ditors, which was done, but without the prospect o
consequence being obtained. Thereafter Wilson raise
Reddie, concluding for payment of certain business
those for the £27: 19: 7½ of expenses incurred in the
Stedman, and for the expenses of the process of mul

In defence Reddie pleaded—

1. As to the expenses in the process against Sted
of them would have been obtained in full, had not

delivered to Bain the discharge of the inhibition before these expenses were paid, and that he consequently must himself be responsible for them. No. 269. March 5. 1830.

2. As to the expenses of the multiplepoinding—that it was not authorized by Reddie, and was an improper expense in which he should not be subjected; and,

3. That at any rate Reddie could only be liable for a share of it, as other creditors were joined in the same claim with him; and also that Wilson himself should bear a proportion of the expense, he having an interest in the process to the extent of the £27 : 19 : 7½, for which he had become responsible by his negligence in delivering the discharge without having obtained payment of these expenses.

The Lord Ordinary, after receiving a report from the Deputy Keeper of the Signet as to an alleged practice of agents giving up discharges before receiving payment, pronounced this interlocutor:—'The Lord Ordinary having heard parties' procurators on the closed record and whole process, finds as to the expenses, amounting to £27 : 19 : 7½, which were to be paid preferably out of the price of Stedman's heritable property on the inhibition being discharged, that the pursuer acted on his own responsibility in handing to Bain, the trustee, said discharge without obtaining payment of the said expenses for his client; and therefore that he has no claim for the amount against the defender;—that the pursuer, in the recovery of the debt due to the defender by Stedman, was authorized 'to act as he would do in his own case;' and that the steps he took were in concert with the other creditors, and that they were proper in the circumstances of the case, and that the defender from time to time was informed of what was going on, and made no objection to the proceedings: Therefore repels the objections to that part of the account, that the business for which it was incurred was unwarranted or improperly conducted; but finds that the pursuer must consider himself as a claimant on the fund to the extent of £27 : 19 : 7½, for whose behoof, as well as that of Dr. Murdoch's commissioners and the defender, the expense was incurred, and must restrict his claim against the defender in proportion to the debt of £83 : 4 : 8 due to the defender; sustains the said accounts stated in the summons as they shall be taxed, and remits them to the auditor for that purpose; finds the pursuer liable in expenses, appoints an account thereof to be given in, and remits to the auditor to tax the same.'

Both parties reclaimed,—Reddie, at the advising, however, giving up his second defence.

The Court adhered, except as to that part of the interlocutor regarding the allocation of the expenses incurred in the multiplepoinding, as to which their Lordships remitted to the Lord Ordinary to hear parties further.

Lord Justice-Clerk.—I am most clearly of opinion that this agent must be responsible for giving up the discharge without receiving payment. There

No. 269. March 5. 1829.

is no proof in the report of any such general practice as is alleged; and in this particular case, when we look at the letters, it was impossible for this defender, living in the country, to deduce any other conclusion than that he was to get immediate payment of the expenses on the inhibition being discharged. Wilson, no doubt, says in his letter of the 25th of August, 'Send me the discharge;' but still it was his duty to get payment before delivering it; and I rather think he should have gone at once to the purchaser, and received payment from him on delivering to him the discharge. His conduct was like delegating his duty to Mr. Bain; and having thus trusted Bain, he must be liable for the consequences, both on general grounds, and in respect of the special correspondence.

The other Judges concurred.

Their Lordships, on the question regarding the allocation of the expenses in the multiplepoinding, thought the interlocutor not quite specific, and that it would be advisable that he should hear parties again upon it.

R. Wilson,—A. Paterson, S. S. C.—Agents.

No. 270. Misses Christina and Margaret Alison, Petitioners.—*Russell.*

Process—Reduction—Public Records.—In an ordinary action of reduction (not reduction-improbation) founded on defects in the writing of the original deed, the production is sufficiently satisfied by an extract; and the Court will only authorize the transmission of the original from the records, when required, in the course of the cause, in modum probationis.

March 5. 1829. 2d Division. T.

Jeffrey having raised an action of reduction (not reduction-improbation) of a collateral bond granted by him to the Misses Alison for the regular payment of interest on a bond and disposition in security, on the ground, inter alia, that the date of the principal bond had been filled up in the collateral bond sought to be reduced, by a different person from the writer of the rest of the bond, without this being mentioned in the testing clause, the Misses Alison lodged an extract to satisfy the production. Jeffrey objected to this, as not being a sufficient satisfaction; and the Lord Ordinary, holding the objection good, prorogated the time, to enable Misses Alison to satisfy the production by producing the principal bond itself. They thereupon presented a petition for warrant on the Keepers of the Records to transmit the bond in question to the clerk of the process. On this petition being moved, Mr. Thomson, as Deputy Keeper of the Records, submitted to the Court, that, except in a reduction-improbation, an extract was sufficient in order to satisfy the production; and that if production of the bond was afterwards required to substantiate the reasons of reduction, it could be obtained for that purpose in the course of the process.

The Court, concurring in this view, found that the production was sufficiently satisfied by the extract, and therefore refused the prayer of the petition hoc statu, reserving to the petitioners to apply for production of the original deed in the course of the cause.

A. Robertson, W. S. Agent.

W. M'INTOSH, Advocator.—*Robertson.* No. 271.
ISABELLA SHILLINGLAW, Respondent.—*Jeffrey—Macallan.*

DECLARATOR of marriage contracted by a promise subsequente copula. The Commissaries found the marriage proved, and the Court refused a bill of advocation. March 6. 1829. 2D DIVISION. Bill-Chamber. Consistorial. R.

J. M'LAURIN, W. S.—D. GRAY, S. S. C.—Agents.

J. COWAN, Suspender.—*Sol.-Gen. Hope—Henderson.* No. 272.
AGNES WATT, Charger.—*Jeffrey.*

Legal Diligence — Erasure. — Warrant of imprisonment inept, in which the surname of the party against whom it was directed was written on an erasure, though it was repeated without this defect in an after part of the warrant, and although the warrant referred to a petition on which it was written, wherein he was fully designed.

IN the month of January last, the charger Agnes Watt presented a petition to the Justices of Peace of the county of Dumfries, setting forth that she was pregnant of a child of which the suspender was the father, and that he was in meditatione fugæ, and therefore praying for warrant to apprehend him, and imprison him till he should find caution judicio sisti in any action to be brought at her instance for recovery of aliment for the child of which she was about to be delivered. Watt made oath accordingly in this petition, and warrant of immediate apprehension and imprisonment was granted by the Justices, with a recommendation to the Justices of other counties to grant their warrant in aid thereof. March 6. 1829. 2D DIVISION. Bill-Chamber. Lord Newton. T.

Cowan had in the mean time come to Edinburgh, where he was followed by a messenger from Dumfries with the warrant. A petition was thereafter presented to the Justices of Peace for the county of Edinburgh in name of Watt, and of Campbell, a solicitor, as her mandatory, setting forth 'that John Cowan, designed in the petition to the Justices of the county of Dumfries prefixed, has arrived in Edinburgh; and he mentioned this day to a person with whom he was in company, that he is about to go to Liverpool by the first vessel he can engage with, and that he intends to sail from that port to India;—that in terms of the recommendation of the Justices of the county of Dumfries foresaid, the petitioner now humbly makes the present application,' praying in ordinary and correct form for warrant to apprehend the said John Cowan' for examination, and thereafter to grant warrant for imprisonment 'until he find caution de judicio sisti, in terms of the original petition and warrant thereon.'

On this petition a warrant was granted, by virtue of which Cowan was apprehended and brought up for examination; and after a proof allowed of his intention to flee the country, and certain other procedure, the following warrant was granted, being written on the same sheet with the petition to the Justices of Edinburgh:—'The Justices having resumed consideration of this petition, warrants thereon, and the petition from Dumfries-shire, and *pursuer's oath, and other* procedure thereon, with

No. 269. March 5. 1829.

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March 5. 1829.

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No. 271.

DECLARATOR of marriage contracted by a promise subsequente copula. The Commissaries found the marriage proved, and the Court refused a bill of advocation.

March 6. 1829.

2D DIVISION. Bill-Chamber. Consistorial. R.

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No. 272.

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March 6. 1829.

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Cowan had in the mean time come to Edinburgh, where he was followed by a messenger from Dumfries with the warrant. A petition was thereafter presented to the Justices of Peace for the county of Edinburgh in name of Watt, and of Campbell, a solicitor, as her mandatory, setting forth 'that John Cowan, designed in the petition to 'the Justices of the county of Dumfries prefixed, has arrived in Edin-'burgh; and he mentioned this day to a person with whom he was in 'company, that he is about to go to Liverpool by the first vessel he can 'engage with, and that he intends to sail from that port to India;—that 'in terms of the recommendation of the Justices of the county of Dum-'fries foresaid, the petitioner now humbly makes the present application,' and praying in ordinary and correct form for warrant to apprehend the 'said John Cowan' for examination, and thereafter to grant warrant for imprisonment 'until he find caution de judicio sisti, in terms of the ori-'ginal petition and warrant thereon.'

On this petition a warrant was granted, by virtue of which Cowan was apprehended and brought up for examination; and after a proof allowed of his intention to flee the country, and certain other procedure, the following warrant was granted, being written on the same sheet with the petition to the Justices of Edinburgh:—'The Justices having resumed 'consideration of this petition, warrants thereon, and the petition from 'Dumfries-shire, and *pursuer's oath, and other* procedure thereon, with

No. 272. March 6. 1829.

'the defender's declaration and pursuer
'*for the petitioner, restricting the am*
'grants warrant to constables of Court
'John 'Cowan' to the jail of Edinburgh
'sufficient caution de judicio sisti acte
'books of the county of Edinburgh, to
'tioned in the original petition, and rest
'the said minute, viz. the sum of £70,
'aliment, expenses of process, and dues o
'ment of said aliment to be brought at t
'the said John Cowan in a competent Cou
'date of such caution. One word delete b

The words in the above warrant in ital note, signed, however, by the Judge; an former part of the warrant was written on a stood John 'Watt.'

Cowan, having been imprisoned on this wa pension and liberation on various grounds, c to advert to one, viz. That his name in the w written on an erasure, and consequently the thority for his incarceration.

To this it was answered, that there could b supposing the word 'Cowan,' which was wri delete, because he being named in the petition written, and also in the subsequent part of the sufficiently described as 'the said John.'

The Court, however, on the bill and answe by the Lord Ordinary, unanimously, in respect bill, and granted liberation.

W. MARTIN, S. S. C.—CAMPBELL and BURNSID

ACT OF SEDERUNT.

March 6. 1829.

The Lords of Council and Session considering tha usage, all extracts of the decrees of this Court, and of kingdom, bear the dates at which such decrees respecti that, under the present regulations as to the extracting Acts of Parliament and Acts of Sederunt of this Court, may arise, as to the exact dates at which extracts of de the signature of the extractor, do therefore enact and or the 1st day of May next, there shall be annexed to all e handwriting of the officer by whom the extract is signed, written, by whom it has been collated, and at what date signature of the extractor; and in all cases where such do made, the extract shall be held as improbative; and it sha to any of the parties interested in the issue of the caus relates, to complain summarily to the Court by which the of the neglect of this regulation, and to crave that a fine o imposed upon the extractor who has been guilty of such ne cases be awarded and levied, without remission, by the pa

MARY WHITE and Others, Petitioners.—*Monro.*
R. STEVENSON and Others, Respondents.—*J. W. Dickson.*

Process — Factor loco Absentis. — Two parties having presented petitions, the one praying for the appointment of a factor loco absentis in regard to a person abroad, and the other for a factor loco tutoris, on the assumption that he was to be presumed dead, the Court refused to grant the prayer of the latter; but, while they granted that of the other, they named the person suggested as factor loco tutoris to be the factor loco absentis.

WHITE and others were proprietors of one half of a tenement in Portsburgh, and Daniel Stewart of the other half. Stevenson had, during Stewart's minority, been appointed his curator; and Stewart having gone abroad, he continued to take the management of the property. A dispute having arisen between him and White and others, mutual petitions were presented, the one by White and others, praying that one of their number should be appointed factor loco absentis; and the other by Stevenson and the relations of Stewart, stating that as he had not been heard of for more than twenty years, they presumed he was dead, and praying for a factor loco tutoris to his heirs, who were pupils. The Court were disposed to give effect to this latter petition; but a difficulty was started that the prayer was for a factor loco tutoris, which, if granted, would proceed on the assumption that Stewart was dead. On the suggestion of Lord Balgray, the Court granted the prayer of the other petition, which prayed for a factor loco absentis, and appointed the party suggested by Stevenson and others.

G. MONRO, S. S. C.—GIBSON and HECTOR, W. S.—Agents.

JAMES BOAZ (LIDDELL'S TRUSTEE,) Pursuer.—*Rutherfurd—A. M'Neill.*
MARGARET LOUDON or LIDDELL, Defender.—*Sol.-Gen. Hope—Houston.*

Bankrupt — Husband and Wife.—Circumstances under which it was held that a property purchased by a wife with money borrowed stante matrimonio was not attachable by the creditors of her husband.

IN 1818 James Liddell, the husband of the defender, purchased certain heritable subjects, which, on the 9th of February 1820, he sold for £100 to one Donaldson, under the burden of a considerable debt upon the property. On the 21st of the same month, Liddell became bankrupt, and was thrown into prison. He was afterwards liberated on the Act of Grace, and repeatedly imprisoned. In November 1820 Donaldson sold the property to John Liddell, father of William; and John thereupon entered to possession, and drew the rents. In 1825, while William Liddell was utterly insolvent, his wife, the defender, borrowed £70 in separate sums from different friends, which she paid to John, her husband's father, who executed a disposition of the subjects in her favour, under burden of the debts, exclusive of the jus mariti; and this sum, it was alleged, she repaid to the lenders by means of funds advanced to her by her brother. A sequestration under the Bankrupt Act having been awarded of her husband's estates in 1826, Boaz, as trustee, brought ar

* Lords President and Craigie were absent during the rest of the Session, and the quorum was completed by Lord Corehouse.

No. 274. March 7. 1829.

action of reduction of the disposition and infefti fender, but not of John's title, nor of that in fav

In support of this action Boaz maintained—

1. That the whole conveyances were truly a c tect the property of the bankrupt from his credi

2. That as the money with which the property l John Liddell had been borrowed by the wife c marriage, it became his money, and therefore the to him.

To this it was answered—

1. That the purchase was a bonâ fide transact ance of the friends for the support of the family ;

2. That as the husband was utterly bankrupt w rowed, it was manifest that it must have been adv for behoof of the defender alone, and did not fall

The Lord Ordinary sustained the defences an no expenses due, and issued the subjoined note.*

Both parties having reclaimed, the Court adh altered as to expenses.

C. Fisher,—R. Bell, W. S. *A*

No. 275.

L. Mackersy, Petitioner.—*D. of F. Moncreiff Russell.*

A. M. Guthrie, Respondent.—*Gord*

Et è contra.

Bankrupt — Sequestration — Affidavit. — A creditor who cla joint acceptance by the bankrupt and another, having omitted an marginal note, stating that the bankrupt was the primary oblig note could not be regarded; and as it did not appear from the which of the parties was the primary obligant, and as no value w the vote of the creditor was objectionable.

* "The Lord Ordinary is of opinion, that as the pursuer has conveyances by which the subjects in question passed from the l John Liddell, he is not entitled to maintain his first plea in law ceeds on the supposition that John Liddell was fully entitled to the cause was here argued, taking the facts as stated by the de her examination under the sequestration, and rested on the positi rowed by her fell under the jus mariti, the subject was purchased in which case she could not legally take the disposition so as to e the Lord Ordinary does not think that the money so borrowed di considering that it could not have been lent on the credit of the toriously bankrupt, and that it was borrowed for the express pur the subjects which she had bought, under the condition that they cluding her husband's right; and which, considering his circumstan have thought of acquiring on any other footing. It was admitted money, the husband does not necessarily become bound for the lo nary cannot well see how this can be reconciled with the positio money passes necessarily to him by its falling under his jus mari payment. If the property passes ipso jure to him, the obligation In the particular circumstances of the case, however, the Lord Or was justified in trying the question, and he has therefore found no e

THIS was a competition for the office of trustee on the sequestrated estate of Henry Stephens of Balmadies, in which a number of objections were stated hinc inde, but of which it is only necessary to notice one which was decided by the Court.—Miss Emily and Miss Rose Mary Guthrie held two bills, each for £1000, drawn by them upon, and accepted by the bankrupt and his aunt Miss Ann Stephens. A claim was entered under these bills by the Misses Guthrie, each of whom emitted a separate affidavit. That by Miss Rose Mary Guthrie was expressed in the following terms, in reference to one of the bills dated the 11th of November 1825:—'Item, The sum of £1000 sterling contained in a bill, 'dated the 11th day of November in the year 1825, drawn by the de- 'ponent and the said Miss Emily Guthrie upon and accepted by the said 'Henry Stephens, with interest thereof from the 14th day of November '1826; that no part of which debts has been in any way paid or compen- 'sated, nor does the deponent, or the said Miss Emily Guthrie, hold 'any security for the same, save and except the said bills themselves.' There were then written upon the margin, but not subscribed by Miss Guthrie or the Magistrate, the following words:—'And the deponent 'understands and believes that the said Henry Stephens is the principal 'and primary obligant for the said debt, and bound to relieve the said 'Miss Ann Stephens, the other obligant.' Miss Rose Mary Guthrie having voted for Mr. Guthrie, Mr. Mackersy objected, that as the marginal addition was not verified by her signature, or that of the Magistrate, it must be disregarded; and as, ex facie of the bill, it could not be ascertained which of the parties was the primary obligant, and as nothing was stated to that effect in the body of the affidavit, it must be presumed that the two acceptors were jointly and severally primary obligants, and therefore a value ought to have been put on the security of Miss Stephens; and as this had not been done, the vote was objectionable.

To this it was answered, that the marginal addition must be read as part of the affidavit; and as it was there expressly stated that the bankrupt was the primary obligant, and bound to relieve his aunt, it was not necessary to put a value upon her obligation.

The Court, however, holding that they could not regard the marginal addition, pronounced this interlocutor:—'In respect it does not appear 'from the bill of Nov. 11. 1825, nor from the oath of verity applicable 'thereto, that Henry Stephens was the real and primary obligant, sustain 'the objection to the vote of Miss Rose Mary Guthrie; and, with this 'finding, appoints the petitioner A. Murray Guthrie to lodge a minute, 'showing the real amount and state of the whole votes, and how they will 'be affected by the above finding in determining the present competition 'for the office of trustee.'

A dispute having then arisen as to the influence of this finding, which involved a discussion of other votes, the Court remitted the case to the Lord Ordinary to hear parties further.

J. BENNET, W. S.—A. STORIE, W. S.—Agents.

No. 276.

W. AITCHISON, Advocator.—*Green*
J. AITCHISON, Respondent.—*D. of F. I*

Service—Conquest—Expenses.—In an advocation by a
out by an elder brother as heir of conquest of his immedia
survived him for some time, but died without making up t
the question whether the property which had been acq
heritage or conquest; but found that as there was no co
of conquest, the younger brother was not entitled to o
Chamber cases, a simple adherence to a Lord Ordinary's
does not carry the additional expenses.

March 7. 1829.

2D DIVISION. Bill-Chamber. Lord Newton. T.

BASIL AITCHISON, architect in Glasgow, d
property acquired by himself by singular titl
infeft. He left a son, a minor, and two b
William, younger than himself. The son co
perty, but without having served heir to his
when he died. Thereupon William, the you
self served heir of line to Basil; and upon th
out a brieve of service as heir of conquest,
advocation, on the ground that Basil having
there was no room for the doctrine of conque
to take all the real estate as heir of line. O
swers, the Lord Ordinary refused it, adding
'dinary cannot subscribe to the advocator's
'having left a child, who died without mak
'alter the character of his succession as to co
'it naturally was, into heritage. As the son
'perty remains in hæreditate jacente of the
'up by the father's heirs, who, as his broth
'whom the law makes a division of his succ
'quest. The Lord Ordinary sees no reaso
'child in the present case should prevent th
'cess this should convert the right remainin
'from conquest into heritage.'

William having reclaimed, the Court d
general question referred to in the Lord O
gued; but, on the cause coming out for ad
held that there was no necessity to decide th
'in respect that the brieve purchased by th
'heir of conquest in general, and that th
'they adhered to the Lord Ordinary's inte
advocation.

The cause was again enrolled this day to
effect of finding expressly the additional ex
House due to the respondent; but as th
where additional expenses do not follow

Lord Ordinary's interlocutor finding expenses due, and as they had not been specially craved and allowed when judgment was pronounced, the Court refused to make the explanation asked.

R. and A. KENNEDY, W. S.—J. CAMPBELL jun. W. S.—Agents.

W. and J. LAING, Suspenders.—*Wilson.*
J. A. CHEYNE, Charger.—*Maitland.*

BILL of suspension refused by the Lord Ordinary; and on a reference to oath, (which proved negative,) the Court adhered.

W. C. HALDANE, W. S.—W. WILLIAMSON, S. S. C.—Agents.

GERRIT SCHUURMANS and SONS, and MANDATORIES, Complainers.—*Rutherfurd—Hopkirk.*

G. GOLDIE, (TRUSTEE on the Sequestrated Estate of J. C. TWEEDIE,) Respondent.—*Cockburn—A. Lothian.*

Bankrupt—Sequestration—Expenses—Trustee.—1.—A creditor on a sequestrated estate by several bills, having claimed a preference as to one of them which was disputed by the trustee, and having succeeded in a litigation in obtaining a decree establishing his preference, with expenses—Held that no part of the expenses on either side could be allocated on him as one of the body of creditors, in respect of his other claims.—2.—Although a trustee who had litigated with a creditor averred he had no trust-funds, the Court refused to find him liable in expenses of process personally, but only qua trustee.

THE complainers Gerrit Schuurmans and Sons were creditors of one Tweedie, on whose sequestrated estate the respondent Goldie was trustee, for the contents of six bills, amounting to £360: 3: 3½. For one of these of £54: 2: 7 they claimed a preference, which was disputed by the trustee, and in the mean time they ranked along with the other creditors, and drew a dividend of 4s. 6d. per pound, under reservation of their preference as to the bill above mentioned. This question of preference gave rise to a litigation, in which the Court ultimately decided in favour of the complainers, and further found them 'entitled to their 'expenses against the other creditors, and the said George Goldie qua 'trustee.' (See ante, Vol. VI. No. 488, p. 1110.) The expenses on both sides amounted to £286. 7s., which sum the trustee charged against the general estate, whereby there arose a deficiency of funds to the extent of £230: 7: 5. To meet this, the trustee allocated the amount on the several creditors in proportion to their claims; and, among the rest, he allocated on the complainers the sum of £24: 5: 7, as the share effeiring to the amount of the five bills for which they had ranked as ordinary creditors.

Against the trustee's judgment imposing this allocation, the com-

No. 278. March 7. 1829.

plainers presented a petition and complaint, spect of the terms of the interlocutor finding penses against the 'other' creditors, and of t lished in the cases of Girdwood and Comp Vol. I. No. 199,) Scott, June 12. 1822, (ante Tastet and Company, Dec. 1. 1825, (ante, V not be subjected in any part of the expenses tion with themselves.

To this it was answered, that the complain in five bills besides that as to which the pre be considered, in respect of their ordinary del of creditors disputing the preference, and as s expenses which fell to be charged against th tion to that debt, and that in this respect the cases previously decided.

The petition and answers having come to gray as Ordinary officiating on the Bills du pronounced this interlocutor:—'In respect 'ation of a judgment of a Court of Justice 'expenses, must be to keep that party inde 'that suit; and also in respect of the decisi 'Company,' &c.; 'and in respect that the di 'that the complainers are creditors aliunde 'distinct from the subject-matter of dispute 'along with the other creditors who were o 'is not consistent with the principles of la 'said decisions; therefore alters the allocat 'no part of the expenses on either side of 'be allocated so as to affect the claim of 'and ordains the trustee to alter the schem 'finds the complainers entitled to their ex 'count to be given in, and remits to the 'decerns.'

The respondent reclaimed to the Second the sequestration was depending.

Lord Glenlee.—The interlocutor is r

Lord Pitmilly.—The cases referred to port the interlocutor, and the distinction trustee can never be admitted, as this wou to be both complainer and respondent; a here must be kept indemnis of the whole e

Lord Alloway.—I entirely agree. Eve on the point, I think the general principle

Lord Justice-Clerk.—I am entirely ciple, on the decisions, and on the words

Rutherfurd.—We are of course entitled to the expenses of this discussion, and we move for decree against the trustee personally. He says he has no trust-funds, and we cannot be obliged to go against the individual creditors to recover our expenses in a new action against them. No. 27 March 7. 1

Lord Justice-Clerk.—We can only give expenses against him qua trustee.

The Court accordingly adhered to the Lord Ordinary's interlocutor, with additional expenses against the respondent, but qua trustee only.

J. G. Hopkirk, W. S.—J. Cook, S. S. C.—Agents.

J. Harvie and Curator, Advocators.—*Jameson—Russell.*
W. M'Intyre, Respondent.—*Sol.-Gen. Hope—Gillies.* No. 279.

Apprentice—Minor—Process—Expenses.—1.—A minor who entered into an indenture of apprenticeship with consent of his elder brother, (whom he held out as his curator,) and a curator nominate not having interfered, or stated that he was truly the curator, though in knowledge of the indenture, held bound.—2.—Where a case has been decided on the merits, and the Ordinary has found expenses due, an adherence by the Inner House carries the additional expenses.

March 7. 1829. 2d Division. Lord Medwyn. F.

In 1826, the advocator Joseph Harvie, while between sixteen and seventeen years of age, entered into an indenture of apprenticeship for four years with the respondent M'Intyre, a cartwright in Glasgow. Before this Joseph Harvie's father had died, having in a trust-deed of settlement nominated James Harvie, the boy's uncle, to be his curator; but he lived with his elder brother John, who became a party to the indenture, which bore to have been entered into by M'Intyre on the one part, 'and Joseph Harvie, brother of John Harvie, flesher in 'Glasgow, with the special advice and consent of his said brother, and he 'as cautioner and taking burden for the said Joseph Harvie, on the other 'part.' Joseph entered into M'Intyre's employment; but having, in August 1827, deserted his service, M'Intyre presented a petition to the Magistrates of Glasgow, praying for warrant of imprisonment against him till he should find caution to return. Answers were given in to this petition in name of Joseph Harvie, stating that James Harvie, the uncle, was his curator, and pleading, inter alia, that the petition was incompetent as against a minor having a curator, without calling the curator. The Magistrates then appointed M'Intyre to make the curator 'a party 'to the action for his interest.' Accordingly M'Intyre caused a copy of the petition and interlocutor to be served on the curator, with this requisition by the officer,—'You are hereby required to conform your-'self to the above copy petition and deliverance thereon, and I require 'you to sist yourself as a party to the before-mentioned action, and that 'within the space before mentioned.' The curator made compearance, and a record was made up by revised condescendence on the part of Joseph Harvie and his curator, with answers for M'Intyre.

In his answers to the condescendence M'Intyre stated, 'that he was 'not told by the defender or his brother that James Harvie was the 'guardian of Joseph. On the contrary, the parties distinctly informed

No. 279.
March 7. 1829.

'him that John Harvie (with whom, as was l
'living at the time) was Joseph's tutor;' tha
'minor intended to enter into indentures wit
'and frequently saw the minor in the respon
'ture was executed—he made no objections
'called frequently at the respondent's shop o
'fectly satisfied with his occupation, and ev
'for the purpose of purchasing the necess
'trade.'

On the other hand, Harvie and his curato
'and his agent were both well aware of the
'ing been left considerable heritable proper
'being under the guardianship of a curato
'father's deed of settlement;' but they did
that James Harvie was the curator alluded
vised condescendence, deny the above-quo
M'Intyre's answers. They pleaded, howev
without consent of the minor's curator, wa
dated by any after homologation on the p
that the whole proceedings were inept, in
been called in the original petition, and tha
tion served on him was not a competent mo

The Magistrates pronounced an interloc
as a good indenture till reduced, and or
turn to M'Intyre's service. An advocation
the Lord Ordinary pronounced this inte
indenture is entered into by the advocat
"special advice and consent of his brother
'of the witnesses to it is another brother, A
'the respondent in the answers in the In
'the averment in the revised condescende
"formed him that John Harvie (with wh
"he was living at the time) was Joseph's t
'the said answers, and not noticed in th
'James Harvie, who says he acted as the
"intended to enter into indentures with t
"and frequently saw the minor in the r
"indenture was executed;' and that 'he
"tract, although Joseph was in his empl
'that the advocator entered into his ap
'1826, and continued therein till the end
'or objection of any sort from any person
'the respondent was not bound to reco
'for the apprentice, and to make him an
'and that the order of the Magistrates
'ciently implemented, in such a summa

possession, the defect could not be cured by sisting, but that the proceedings must be regular from the beginning. The creditors, to be called by special citation, are only those in possession. Infeftment alone will not do—there must be possession also. No. 280. March 7. 1829.

Lord Justice-Clerk.—I am of the same opinion. The Act of Sederunt 23d November 1711, in reference to such creditors, calls them creditors in known and real possession by labouring the ground and uplifting rents. The Lord Ordinary's ratio is not right.

Defender's Authority.—Marchmont, June 28. 1727, (2240.)

J. Hamilton, W. S. Agent.

J. Taylor and Sons, Pursuers.—*Jeffrey—Hopkirk.* R. Hall, W. Marshall, and Others, Defenders.—*M'Neill.* No. 281.

Reference to Oath.—Held that a reference to the oath of a party, as to whether he is liable for a debt, is incompetent—this being a question of law.

This was a branch of the case noticed ante, Vol. V. No. 419. It was an action at the instance of Taylor and Sons against the defenders as a committee of creditors, in which, among other claims, Taylor and Sons alleged that Marshall and another of the defenders Hodge were liable to them for £80 : 11 : 5, as the value of a quantity of soap. After the report of an accountant, decree was pronounced against Hodge for this sum; but Marshall was assoilzied. Taylor and Sons having then discovered a letter, which, they alleged, created a liability by Marshall, attempted to found upon it; but this not being permitted at this stage of the cause, they 'referred to the oath of the defender William Mar-'shall whether he was not jointly liable to the pursuers, along with the 'defender Patrick Hodge, for the sum of £80 : 11 : 5 sterling, being 'the value of 29 cwt. 13 lb. of white and yellow soap sent to Mr. Hodge 'on the 31st of August 1822, referred to at pages 8, 9, and 10 of the 'accountant's printed report, and for which Mr. Hodge alone has been 'found liable.' March 10. 1829. 1st Division. Lord Newton. S.

The Lord Ordinary, 'in respect what is proposed to be referred is a 'question of law, and not a matter of fact, refused to sustain the refer-'ence;' and to this interlocutor the Court adhered, without prejudice to an amended reference.

The Court were of opinion that it was necessary that the pursuers should refer the facts on which their libel rested, and from which they inferred a conclusion of liability against Marshall, so as to exhaust the case against him.

M'Callum and Dalgleish, W. S.—A. Douglas, W. S.—Agents.

No. 280.
March 7. 1829.

each other, all on one and the same day; and th
cited ‘ all others who are or pretend to be cr
‘ Hamilton,’ by leaving at the cross of Edinbu
Leith, a copy of citation ‘ for each of the said

The Lord Ordinary having repelled a prel
on the falsity apparent on the face of the execu
creditors named in the summons had sisted
process, Hamilton reclaimed, and offered to rep
cution if considered necessary, and contended
tors to sist themselves could not obviate the
1681, which required them to be personally cite
admitted that the execution was false, in so fa
personal citation to the individual creditors; bu
the sisting of the creditors obviated all objecti
edictal citation was sufficient, none of the cred
in possession of the lands.

The defender alleging, on the other hand,
possession, the Court appointed him to give i
‘ personal creditors, not personally cited, he
‘ session of the estate, or rents thereof.’ The
in a minute, stating that he had some time
deed for behoof of his creditors, on which in
it was declared that the trust should not com
the trustee, and should subsist till any advanc
by him should have been discharged; that tl
come under considerable obligations and adv
heir retained the estate, and under the directi
tors, and by a factor appointed in virtue of
possessed the estate and drew the rents, acco
ditors, who must consequently be held to be
required to be personally cited under the act

The pursuer having given in no answer to
called the Lord Ordinary's interlocutor, su
fence, and dismissed the action with expense

At the first advising, when the minute was ord

Lord Alloway.—I am startled with the obje
the parties were in possession, I would hold this
action the party may pass from the objection; bu
must follow the words of the Act of Parliament.
who were creditors in possession? And I think
It is said there is a trust-deed, and that the trust
was, were not the heritable creditors entitled to
he is dead, where is his possession? The only
pursuer; and the errors in the execution are of n
is enough.

Lord Glenlee.—I am of the same opinion.

No. 282. R. Woodward and Others, Pursuers.—*Ja*
J. Wilson, Defender.—*Wh*

Process—Landlord and Tenant.—Held competent for a l arrears of rent, to conclude for the rent of a subsequent ter bygone.

March 10. 1829.
1st Division.
Lord Meadowbank.
D.

The pursuers, in December 1828, brought fender for payment of arrears of rent of a ho to Martinmas 1828; and they further conclud year's rent of the said property, 'which will b 'the term of Whitsunday 1829, the said ter 'and bygone, with the legal interest of the sa 'the said term of Whitsunday next, and ther conclusion the defender objected, that it w action for a debt which was not then due; and he had offered security for payment of the r due at Whitsunday next.

The Lord Ordinary repelled 'the dilator 'objection that one of the terms' rent pursu 'Whitsunday next, and cannot be competentl and to this interlocutor the Court, without l pursuers, adhered.

T. B. Ferrie, W. S.—W. Duthie,

No. 283. H. Scott, Pursuer.—*Cockbu*
J. Wilson and Magistrates of Hamilt
Forsyth.

Burgh Royal—Custom—Expenses.—Held,—1.—Tha no right to exact payment of a penny as custom on each by a resident brewer, for the purpose of being converte brewery;—and,—2.—That although expenses are not against a defender.

March 10. 1829.
1st Division.
Lord Newton.
D.

Wilson, as tacksman of the customs of t ing to the Magistrates and Council of that t before the Magistrates against Scott, a bre the dues, at the rate of one penny per boll, bolls of barley brought by Scott into Ham converted into malt, and used in his brew of expenses, of which he recovered payment action of reduction and declarator against concluding to have the decree set aside, a Magistrates had 'no right or title, either b 'custom, use, and wont, or otherwise, to i 'inhabitants of the said burgh of Hamilto 'man to collect from the said inhabitants

No. 284. March 10. 1829.

remitted to the Sheriff of the county where the parties resided tigate into the facts, and with power during vacation to pro interim order, either for a small sum of aliment, or for the son his father into his house, as to him should seem meet.

No. 285.

J. POLLOCK, Suspender and Pursuer.—*D. of F. Moncreiff*
R. MENZIES and SON, Respondents and Defenders.—
J. WILSON, Respondent and Defender.—*Sol.-Gen. Hop*

Interim Possession—Harbour.—Interim possession by two tenants of a p the limits of the harbour of Leith allowed to be regulated by the harbour-

March 10. 1829.

2D DIVISION. Admiralty. F.

MORTON and COMPANY, shipbuilders in Leith, were te Chalmers of a piece of ground situated on the Water above the old bridge, and having a quay or breastwork t lease which expired in 1826. Morton, one of the partn ventor of the slip called 'Morton's patent slip,' used fo raising vessels out of the water in order to repair them inclined plane projecting a considerable way under wate when the tide is full, the vessel to be raised is place ebbs, the vessel comes to rest on the slip, and she is machinery up the inclined plane to a dock or yard w executed. More than seven years before their lease e Company erected on the premises rented by them fr their slips, which extended eastward parallel to th cupying a space of about 104 feet in length; and th this slip for repairing vessels as long as they reta question. When Morton and Company's lease e Menzies and Son, also shipbuilders in Leith, who Morton and Company's lease for the last three mo obtained from Chalmers a lease of the slip and p sessed by Morton and Company, for the purpo This lease did not include the ground in front of but merely the 'use of a passage of three feet bi vessels, 'along the top of the quay eastward fro 'far east as the shipbuilding frame and slip in th 'extend, being 104 feet or thereby.'

Shortly thereafter the pursuer Pollock obtain of the rest of the premises which had been p Company, including that part along which the to Pollock made express reference to that prev and Son, and the purpose for which it had be remainder of the premises to Pollock to be us 'use of the quay for unloading vessels, subjec 'by the said Robert Menzies and Son, und 'three feet passage along the top of the '

No. 285.

March 10. 1829.

'contain no clause for regulating the manner in which the ves
'parties shall pass each other in going to or returning from th
'ive yards;—that this matter must be governed by the same
'regulate the passage of vessels in other parts of the river
'Finds it instructed by the printed regulations of the Tow
'Edinburgh that a matter of this kind is regulated by the
'or his deputies;—therefore prohibits and interdicts th
'Menzies and Son from removing, at their own hand, any
'ing to the suspender, when stationed at the quay,—reser
'spondents, when they find it necessary to have any ves
'to the suspender removed for the purposes mentioned i
'apply to the shoremaster in terms of law, and of the
'tions before mentioned; and with respect to the shorem
'and interdicts him from removing or causing to be re
'sel belonging to the suspender, except according to th
'be observed with regard to other vessels passing each
'or going from or approaching other docks in the river,
'the parties interested to insist in a process of declarat
'respective rights, either in this Court or in the Court
'shall be so advised, and reserving all objections to sa
'the suspender liable in the expenses incurred by hi
'the 23d day of August last, and in no other expense;
'any petition against this interlocutor, and decerns.'

Pollock thereupon brought a reduction and suspen
assoilzied in the reduction, and refused the bill of
ditional expenses.

Lord Justice-Clerk.—When I originally read th
most difficult point was, whether this spot lay within the
visited the place, and I am satisfied that that plea has
doned. That difficulty being removed, we are to con
merits. I cannot persuade myself that Menzies would l
and to send vessels right into the river, so as not to i
would interrupt the fairway of the river. But here a s
fore Menzies made his bargain, and the use of it, with t
Pollock. A similar burden was reserved; and the q
and Son, in the use of their slips, are to be prohibite
thority of the harbour-master, what is necessary to t
possible for any one to imagine that the stipulation
any other intention than that the slip was to be use
Morton; and it must have been evident that it cou
allowed to keep vessels where he insists on keeping
contrary to the fair and just interpretation of the b
Menzies would not be entitled to have vessels anch
contrary to the regulations of the harbour, but only
and no injury could be sustained. I think this is

No. 286.
March 11. 1829.

might leave them out of certain American funds
funds, he afterwards made a will, partly in favo
nothing was realized from them. After his deat
the present action against the defender, (who ha
the above disposition,) concluding for payment o
contained in it.

In defence it was stated, that the discharge
father was found put up along with the disposi
that by that deed she had agreed to deduct £5
father has or may leave me by will at his death:
suer's claim was extinguished, and it must have
father, by preserving the document, that effe
The Lord Ordinary decerned in terms of the
joined note.*

The defender having reclaimed, the Court
the pursuer to support the interlocutor, and the
altered the interlocutor, and assoilzied, but fo

Lord Gillies was of opinion that the dischar
ture, was intended to meet a claim of the nature o

Lord Corehouse was entirely of the same opi
be presumed that the father intended that the dis
having put it up along with the deed in question.

Lord Balgray concurred.

A. Blair, W. S.—Scott and Hannay

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* "This case is to be determined upon a fair interpre
testator, as the same can be gathered from the terms
from it alone; and after fully considering the whole cl
the testator's purpose was to bestow the provision o
over and above the sum included in the discharge gran

"In the first place, he expressly burdened the estat
vision; and, secondly, he imposes upon him the obli
certain fixed day, with a fifth part more in case of f
seem to me to be extremely inconsistent with the su
payment whatsoever should be made, and that the pro
tinguished by the operation of the discharge now four

"But, thirdly, the testator declares in express te
daughter before named 'shall, with what they have a
faction,' &c.—thereby, as it appears to me, giving th
provisions were over and above all former payments

No. 289.
March 11. 1829.
2d Division.
Ld. Cringletie.
F.

In 1690, an Act of Parliament, was passed
Magistrates of Montrose:—'Anent the peti
'sented to their Majesties high Commission
'of Parliament be the Magistrates, Town C
'bitants of the burgh of Montrose; shewin
'tioners having always, since the settling o
'Scotland, been very zealous for encourag
'within the said burgh; and that it being b
'chine, the teinds yrof not being competent fo
'and the place being so populous, that one m
'dergo the charge; and the petitioners being
'helper or second minister's stipend; they de
'be laid on and paid be the haill inhabitan
'of any houses within the said burgh, at fyv
'that the kirke of Montross being a mensall
'voluntarily condescended to by all the s
'fore they might have power to call their s
'there is no other fond or maintainance for
'the petitioners be themselves can make no
'the said fond by the said annuity witho
'craveing that their Majesties high Comm
'Parliament would be graciously pleased t
'aforesaid fond of fyve per cent. of free re
'and that the tennants, inhabitants, and
'dained to pay the same to the Magistrate
'trosse yearly, and that for the end forsa
'Magistrates and Town Counsell to call
'said petitione fully bears: Which petiti
'the day and date of thir presents, read
'high Commissioner and three estates o
'heard and considered the same, their M
'three estates of Parliament aforesaid h
'the desyre of the said petitione, and ha
'according to the tenor thereof.'

At the date of this statute Mr. John
ster of Montrose, and was allowed a s
continued after the passing of the act, a
of the annuity. On the occasion of a v
cil came to a resolution, that whoeve
should 'have as much stipend as Mr.
'and allowing the annuity out of the
'John Mill did.' In 1711, the thea
'accept and take his hazard of the a
quently drew back from it, the produc
the £600 Scots allowed as stipend. I
ing by this time come to yield about

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by them to the minister, and therefore I think they are bound to levy a sufficient provision, but that they are not bound to levy further.

Lord Pitmilly.—Although the precedents of Borrowstounness and Edinburgh may bear on this case, yet they cannot rule it, as it must depend on its own particular circumstances. There is not much difficulty in the construction of the act; it extends to all houses built subsequent as well as prior to its date, and extends to shops also. It is only to be applied to the support of the second minister; and the Magistrates, in my opinion, could not even apply it to the support of a third without an Act of Parliament. Then we come to the question, whether they must levy the whole annuity? Now, though it be clear that whatever they do levy they must give to the clergyman, yet when we come to consider whether they are bound to levy the whole five per cent., we must look to the practice. At the time the act was passed, the great eventual increase in the amount of the annuity beyond the first minister's stipend could not have been foreseen. I am satisfied, however, that down to the year 1814 the whole five per cent. was levied. But the ministers have never in any instance taken the annuity, whatever it might amount to. This would have been necessary to have established their right, and I think it would have done so. But in every instance a fixed stipend has been paid, though it has borne reference to the amount of the assessment; and it is material to observe how it is referred to particularly in the contract of Mr. Esdaile, who does not reserve a right to the fund, but to an augmentation out of the fund; so that what in practice has been given is not the fund, but a stipend out of the fund. I am of opinion, therefore, both on the words of the statute and on the practice, that there is no obligation on the part of the Magistrates to collect the whole five per cent., but that they are only bound to levy as much as will give a suitable stipend, although whatever they do levy they must pay to the minister.

Lord Alloway.—I entirely concur. The object of the statute is to raise a fund, which the Magistrates can apply to no other purpose, though they are not bound to levy more than is necessary for a suitable provision.

Lord Justice-Clerk.—This case presents some difficulty, and I do not entirely concur on all the points. I have very great doubts whether or not, in case of a defalcation in the fund, there exists any right in the second minister to come forward and ask a provision beyond its amount. This was a contract between the Legislature and the Town of Montrose, and it fixes five per cent. on all houses; and, in construing the act, we must look to the reverse, if the burgh had fallen off. I think in that case the Magistrates would have fulfilled their obligation by handing over the whole fund to the minister. I am also struck with the idea, that if this fund became extravagant, it would be a fair thing, if the excess became exorbitant, to consider whether it was not beyond the intention of the Act of Parliament to provide a stipend for another minister. But I do not see any evidence of exorbitancy, if five per cent. be levied. The Magistrates did not cease to levy five per cent. till 1814, and the averred excess is only £67 above the £315 voluntarily offered, and therefore I doubt if, under this act, we are now authorized to say that the Magistrates may let down the rate. But the very worst aspect for the minister is, that the five per cent. is a fund out of which the minister is entitled to have an adequate stipend. Now, that being the case, the question is brought to this—The Magistrates offer £315, and the minister says he will be content with £342. The difference is so trifling, that I wonder it was ever disputed. But this person has no claim for a manse or glebe, and the Legislature has declared

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provision, but that they are not bound to levy further.

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No. 289. March 11.1829.

' tion of the deficiency, and necessary and incide
' and decern; and find neither party entitled to e

H. Inglis, W. S.—Gibson-Craigs and Wardla

No. 290.

Mrs. Fergusson, Pursuer.—
A. M'Gachen, Defender.—W

Passive Title—Annus Deliberandi—Gestio pro Hærede.—
an alleged heir, in which the day of compearance is within
sisted, but is liable to be dismissed.—2.—Under a summon
charge to enter heir, together with the general averment
tion, it is not competent to found on alleged gestio pro hæ
titles does not of itself infer gestio pro hærede, so as to sul

March 11.1829. 2d Division. Ld. Mackenzie. T.

The late Mr. George M'Gachen, who live
suer Mrs. Fergusson, died in the month of J
able bond for £800 over some property in B
was his immediate elder brother, and as su
to this bond; and two months after his brot
as follows to the agents of the pursuer, in wh
mained sealed up:—' I am about to make u
' A. M'Gachen to the heritable debt of £80
' and sasine for this purpose. As they we
' other papers, it will be necessary that one
' livery of them, and I hope it will be conve
' day or two.' After some correspondence,
the bond and sasine, and they were accordin
agent, who granted his receipt for the s
the pursuer gave the defender a charge t
thereafter served him with a summons setti
cluding against him and another surviving
of the deceased, as heirs or executors cha
otherwise representing their brother in co
debt alleged to be due her by the deceas
being within the year, the defender plea
that the action was incompetently brough
of the annus deliberandi. The Lord
defence, and dismissed the action with ex

More in support of the Reclaiming No
that he was about to make up titles, and
purpose, and took possession of them.
entitled to plead the annus deliberandi.
objection is, that the process should be
old Act of Sederunt 18th June 1613, n
shall not be ' raised' within the year; b
tice so far back as the time of Elch
Ratter.) But here there was gestic

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Craig bound himself in warrandice absolutely, and the others from fact and deed, with the exception of Porter, who was not taken bound in any warrandice. The price having been paid to the trustee, he liquidated the claims of Porter under his security, and retained the balance for distribution among the personal creditors. Porter had paid the rent to the landlord down to Martinmas 1825; but the rent effeiring to the period between that time and the date of the assignation to Houldsworth, who had then entered into possession, was unpaid. When the half year's rent fell due at Whitsunday, Houldsworth, in order to prevent the landlord selling the machinery in liquidation of this portion of the half year's rent, paid the whole, taking, however, a separate receipt for the rent, effeiring to the period before he entered into possession; and for this sum he raised an action against Craig and his trustees before the Sheriff of Lanarkshire, and thereafter brought a supplementary action against Porter, concluding for relief from him likewise. The Sheriff having decerned against all these parties, Porter brought an advocation, in which he contended—

1. That as the rent was payable at two fixed terms, Houldsworth was not entitled to be relieved of any part of the rent which fell due at the Whitsunday after his entry; and,

2. That, at any rate, he (Porter) being an heritable creditor, and as such merely a consenter to the assignation on receiving payment of his debt out of the price from the trustee to whom it was paid, and not from Houldsworth, and not having bound himself in warrandice, could not be liable in relief to Houldsworth, whose only claim lay against the trustee and creditors; and further, that as he was entitled to payment of his debt out of the price, without any claim of deduction for the rent due at the date of the assignation, on the part of the trustee and creditors had they paid it, so neither could Houldsworth, who came in place of the trustee and creditors as their assignee, have any such claim against him.

On the other hand, it was pleaded for Houldsworth—

1. That as the rent of the coal-work necessarily arose de die in diem, though not exigible till the arrival of the term, and as, by the assignation granted to him, he merely bound himself to relieve the disponers of the rent from the date of his possession, he undoubtedly had a claim of relief for the rent paid by him for a period prior to his entry.

2. That by the terms of the assignation to Porter, and also by the mere fact of his having been in possession of the coal-work, he was liable to the landlord in payment of the rent up to the period when he quitted possession, and Houldsworth entered thereto; and,

3. That Porter being so liable, and having, along with the other parties to the assignation, taken Houldsworth bound to relieve him and them of the rent from the date of his entry only, there remained a clearly implied obligation on Porter's part, as in a question with Houldsworth, to pay the rent during the period of possession, whatever claim he might have to be reimbursed out of the price from the trustee and creditors.

The Lord Ordinary pronounced this interlocutor:—'In respect that

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landlord, one seventh of the output, payable in equal portions at Martinmas and Whitsunday yearly. In 1823 Craig assigned the lease, in security of £230 borrowed money, to one Sinclair, who thereupon entered into possession. Shortly afterwards Craig, having become insolvent, executed a disposition omnium bonorum, including the right to the lease, under burden of Sinclair's assignation in security, in favour of Murray, as trustee for his creditors.

In 1824, the advocator Porter having advanced the sum of £230 to Sinclair, obtained from him, with consent of Craig's trustees, an assignation to the lease, which was declared to be in security 'for payment to him of 'the foresaid sum of £230 sterling, and of any other sum or sums of money 'he may require to advance or expend for payment of the tack-duty or 'lordship due to the landlord, and in general for any advance he may be 'called upon to make as assignee to the said tack,'—Porter being taken bound to pay the rent, and fulfil the other obligations of the lease. Under this assignation Porter entered into possession, and continued to draw the fruits of the subjects down to the 14th of March 1825, of which the respondent Houldsworth entered into a transaction with Craig's trustees, whereby, for 1000 guineas, he obtained an absolute conveyance to the lease in question. The assignation in his favour, after an acknowledgment of the receipt of the price by Murray, Craig's trustee, proceeded thus:—'Therefore we the said William Craig and William Murray have 'sold, assigned, and made over, as we do by these presents, with consent 'of the said James Porter, and of the said Robert Paterson and John 'Walker, original lessees, and also of John Dumbreck and William Mac-'Gregor, two and a quorum of the trustees for the creditors of the said 'William Craig, appointed by minute in their sederunt-book subsequent 'to the granting of the aforesaid disposition omnium bonorum, for all 'right, title, and interest which we or either of us have or can pretend 'to the foresaid lease, agreement following thereon, machinery and 'utensils connected with the premises; and we the said several parties 'with mutual assent and consent, sell, assign, and make over from us 'each and every of us, and our respective heirs and successors, and also 'from the creditors of the said William Craig, to and in favour of the 'said Henry Houldsworth, all and whole' the lease, steam-engine, machinery, and appurtenances. This assignation declared that Houldsworth bound himself, by acceptance of it, to pay to the landlord 'the whole rent 'or lordship stipulated by the said lease and agreement to be paid by the 'said lessees for the coal in the said lands, and also to fulfil and perform 'the whole other obligations and conditions incumbent on the tenants by 'the said tack and agreement, and to free and relieve us, the said William 'Murray, John Dumbreck, and William M'Gregor, as trustees foresaid, 'and us the said William Craig and James Porter, as well as the original 'lessees, our and their foresaids, of the performance thereof, and that 'during the whole years and space of the said lease from and after the 'date hereof.' The deed concluded with a clause of warrandice, where

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Craig bound himself in warrandice absolutely, and the others from fact and deed, with the exception of Porter, who was not taken bound in any warrandice. The price having been paid to the trustee, he liquidated the claims of Porter under his security, and retained the balance for distribution among the personal creditors. Porter had paid the rent to the landlord down to Martinmas 1825; but the rent effeiring to the period between that time and the date of the assignation to Houldsworth, who had then entered into possession, was unpaid. When the half year's rent fell due at Whitsunday, Houldsworth, in order to prevent the landlord selling the machinery in liquidation of this portion of the half year's rent, paid the whole, taking, however, a separate receipt for the rent, effeiring to the period before he entered into possession; and for this sum he raised an action against Craig and his trustees before the Sheriff of Lanarkshire, and thereafter brought a supplementary action against Porter, concluding for relief from him likewise. The Sheriff having decerned against all these parties, Porter brought an advocation, in which he contended—

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2. That, at any rate, he (Porter) being an heritable creditor, and as such merely a consenter to the assignation on receiving payment of his debt out of the price from the trustee to whom it was paid, and not from Houldsworth, and not having bound himself in warrandice, could not be liable in relief to Houldsworth, whose only claim lay against the trustee and creditors; and further, that as he was entitled to payment of his debt out of the price, without any claim of deduction for the rent due at the date of the assignation, on the part of the trustee and creditors had they paid it, so neither could Houldsworth, who came in place of the trustee and creditors as their assignee, have any such claim against him.

On the other hand, it was pleaded for Houldsworth—

1. That as the rent of the coal-work necessarily arose de die in diem, though not exigible till the arrival of the term, and as, by the assignation granted to him, he merely bound himself to relieve the disponers of the rent from the date of his possession, he undoubtedly had a claim of relief for the rent paid by him for a period prior to his entry.

2. That by the terms of the assignation to Porter, and also by the mere fact of his having been in possession of the coal-work, he was liable to the landlord in payment of the rent up to the period when he quitted possession, and Houldsworth entered thereto; and,

3. That Porter being so liable, and having, along with the other parties to the assignation, taken Houldsworth bound to relieve him and them of the rent from the date of his entry only, there remained a clearly implied obligation on Porter's part, as in a question with Houldsworth, to pay the rent during the period of possession, whatever claim he might have to be reimbursed out of the price from the trustee and creditors.

The Lord Ordinary pronounced this interlocutor:—'In respect that

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'the assignation of the lease to the respondent
'Craig, the lessee, and by William Murray, the
'who received payment of the stipulated price
'who grants receipt therefor; and that the adv
'creditor in possession under an assignation of
'of a certain sum advanced to the trustees for
'bound to renounce the said lease on payment
'certain other persons, merely a consenter to t
'debt was to be discharged out of the sum to
'for the lease; and that in respect the claus
'to Craig, who binds himself in absolute w
'Murray and the other trustees, who bind the
'fact and deed only,—but the advocator does
'at all, nor is there any clause binding the a
'the respondent of the rent, which was not d
'nor of any part of it,—and in respect that i
'vocator has received more than the sum due
'his security,—finds that the claim which th
'the portions of rent due from the precedi
'assignation cannot be made effectual against
'lie against Craig and the trustee for his cred
'ingly, decree has been pronounced in fav
'which decree has been acquiesced in; the
'and assoilzies the defender Porter, and dec
'titled to expenses, allows an account to be
'Auditor to tax the same when given in, an
Houldsworth having reclaimed—

Lord Glenlee.—That the Lord Ordinary's i far as it holds that there is no obligation against itself, is very plain. But a case might have happ senter, Porter might have been liable to Houldsw warrandice that the party is not to use his right he consents. But here Porter is not using his r more favourable for Houldsworth than if Porter and they alone had granted the assignation. I r enough that Porter was in possession during the Houldsworth can only make his demand as in t they could not have made any such claim agains thing that I see, no claim can lie in respect of if there be any other grounds, they are not befo

Lord Alloway.—Porter is an heritable c conditions:—1. To apply the produce of the cos 2. To pay the rent, which was also a natural been subject. But he does not pay the rent, th creditors have only a reversionary interest, an could not sell. Porter agrees to vacate, and

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also the machinery. Houldsworth has nothing to do with the arrangements between Porter and the creditors. Now Porter is bound to pay rent for the whole time of his possession; for, in the contract with Houldsworth, the latter agrees only to pay rent after the date of the assignation. The question of warrandice argued here has no application whatever. I think that the Sheriff's interlocutor is very accurate.

Lord Justice-Clerk.—As at present advised, I think that the interlocutor is right. The summons rests the liability of Porter on the assignation alone. And while I am perfectly satisfied that an heritable creditor holding a lease is necessarily bound to pay the rent to the landlord, the question here raised is, whether Porter is liable to relieve Houldsworth under this assignation in virtue of which the conclusions are laid? I can find no words, however, laying such liability on Porter. Houldsworth, no doubt, stipulates that he is to be liable for the rents only after the date of the assignation; but I see he takes warrandice from Craig, and has got decree against him and his trustees, who have still a sum of money in medio on which there are claims, and out of which this man may make good his demands. But there is no obligation of any kind here undertaken by Porter. He only consents, and is not an obligant party; he is no cedent. The claim being put on this particular deed, and there being no obligation in it, we cannot give effect to it.

Lord Pitmilly.—This is not a question at all on warrandice. The important point is to attend to the bargain and obligation undertaken by Houldsworth, who became bound to free Craig and Porter of the rent from and after the date of the assignation. There is no obligation to free them from the rent due before the assignation. Now it turns out that there were arrears of rent due at the time Porter was in possession, and which he was bound to pay to the landlord. Houldsworth has been obliged to pay these arrears to save the machinery. It is true that Porter was only a consenter, but he was so in a deed where he takes an obligation from Houldsworth to relieve him of the rent. Porter was liable to pay this, and Houldsworth might have got an assignation to it from the landlord. But, on common principles of law, having paid rent which Porter was bound to pay, I think that he has a good claim against Porter, as well as against Murray and Craig; and the plain inference from his becoming bound to pay rent after the date of the assignation is, that they were to pay what was due before. I therefore think that the Sheriff's interlocutor is perfectly right.

The Court being thus equally divided, and continuing to be so after the cause had been delayed for further consideration, their Lordships ordered Cases for the opinions of the other Judges. The following were returned:—

Lords President, Craigie, Balgray, Gillies, Meadowbank, Medwyn, and Newton.—We are of opinion, on the grounds which are there stated, that the interlocutor of the Lord Ordinary is well founded.

Admitting that the respondent is entitled to claim relief of a proportion of the half year's rent paid at Whitsunday 1825, the advocator, it appears to us, can only be supposed liable to such claim on two grounds—either as a party to the assignation by which the lease was conveyed to the respondent, or independently altogether of this deed, from the mere circumstance of his having possessed the coal-works previous to the respondent's entry.

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Now, as to the first ground, we do not think there is any thing in the deed which can support such a claim. The advocator does not grant warrandice of any kind; and considering his situation, which appears to us to be that of a mere consenter, we do not see how any can be implied. We are aware it may be said, that, from the latter part of the selling or assigning clause, the advocator is not a mere consenter, but a joint seller and assigner with the trustee for the creditors. But the clause, if it can bear such an interpretation, is in so far inaccurate, and inconsistent with the previous part of it, and with the real situation of the advocator. After stating that the price had been paid to William Murray, as trustee for Craig's creditors, the deed goes on thus:—" Therefore we, the said William Craig and William Murray, have sold, assigned, and made over, as we do by these presents, with consent of the said James Porter &c., for all right, title and interest which we or either of us have or can pretend to the aforesaid lease," &c. It then adds, " And we the said several parties, with mutual assent and consent, sell, assign, and make over from us &c., all and whole the aforesaid tacks." Now, if the word we, in this latter part of the clause, does include the advocator, the passage is, in so far as he is concerned, altogether inconsistent with the right he had to the lease, and of course inept.

The advocator was no party to the bargain by which the lease was sold. The offer to purchase was made to the personal creditors, who, as the price was more than sufficient to pay his preferable debt, were in fact the only parties interested, and it was accepted of without his being consulted. It was necessary, no doubt, that his assignation in security should be vacated; but as his debt was to be paid in full from the price, he was of course bound to clear off the encumbrance. The regular mode of doing so would have been by a renunciation of his security; but as this would have rendered it necessary to have two separate deeds to conclude the transaction, it seems to have been thought better to get the advocator to join as a consenter to the assignation.

His doing so in the character of consenter was all that was requisite to the object in view, which was the extinction of his security. His right, it will be observed, was an assignation in security merely. He might, no doubt, have transferred this right, such as it was, had the respondent wished it as a collateral security. But no such thing was thought of. The respondent had bought the lease itself for a full price, and he was to get a conveyance to the fee unencumbered. The advocator, having no right to the fee, could not convey it either singly or jointly. He could not sell, assign or convey the right of tack itself, and in so far as the assignation bears that he did so, it is plainly inept.

We can consider him, therefore, in no other light than as a consenter, and a consenter in order to save to the creditors the expense of a renunciation of his security, and with no other view. The fact that he did not join the other parties in warranting the conveyance, proves that he did not mean to incur, and that the respondent did not ask him to incur, any responsibility.

We see just as little reason for subjecting the advocator on the ground of his possession.

The respondent, by acquiring the lease, subjected himself to pay whatever rent was due to the landlord, and his right to be relieved of any part of what

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he should thus pay, depended plainly on the terms of his bargain with the cedents. If he has taken care, in treating with them, to secure his relief, they will be liable; but he can make no claim on third parties, who may have possessed the subject before his right commenced, further than his cedents, in whose right he stands, could have made such claim. Now it is clear that the creditors, who are the cedents here, could have had no claim on the advocator for the rents in question. He, no doubt, possessed the coal-works; but he has not in his pocket the profits out of which the rent fall to be paid. In settling his debt with the creditors, he accounted for the whole proceeds of the coal up to the time when he quitted possession of the works—while, on the other hand he takes credit only for the rents he actually paid; so that the fund out of which the rent should have been discharged, having been accounted for to them, must be held to be in their pockets. They accordingly are the parties who are alone liable on either ground.

But the respondent holds a decree against them, which they do not dispute; and as the balance of the price remaining in their hands, after discharging the advocator's debt, is more than sufficient for his relief, it is not easy to see why he should have persisted in his attempt to subject the advocator.

Lord Cringletie.—Mr. Craig, surgeon in Parkhead, was in right of a lease of the coal of Belvidere, and in possession thereof. He assigned the lease to George Sinclair in security of certain sums of money advanced by Mr. Sinclair. Mr. Porter, the advocator, paid the money to Mr. Sinclair, and obtained from him an assignment of the lease, with consent of Craig, in which there is an express obligation imposed on Mr. Porter to pay all the rents during his possession to the landlord, and free and relieve the cedent thereof. In virtue thereof he entered into the actual possession of the coal-work, and paid the rents to the landlord.

Craig having become bankrupt, the respondent Mr. Houldsworth offered to the trustee for Craig's creditors £1050 for the right to the lease, which was accepted; but as they could not convey it without permission and consent of the advocator, who had a right to full payment, the whole parties interested joined in a conveyance of the lease to Mr. Houldsworth.

It is material to attend to the nature, form, and clauses of the conveyance. The trustee for Craig and his creditors, and Craig himself, with consent of the advocator, also of the original lessees for the coal, two and a quorum of Craig's creditors, for all right or title they had in the premises, sold and assigned the subject to the respondent. This would have been no more than a sale by the trustee and Craig, with consent of the advocator and the other parties. But the deed proceeds thus:—'And *we the said several parties*, with mutual 'assent and consent, sell, assign, and make over from us, *each and every of us*, '*and our respective heirs* and successors, and also from the creditors of the 'said William Craig, to and in favour of the said Henry Houldsworth,' &c. The advocator was, therefore, a disponer as well as the rest, and necessarily was so, for he then held both the right to the lease and the possession of the coal-work.

The clause in the conveyance relative to the respondent's entry to possession, and obligation to pay the rents, bound him to pay to the landlord the rent sti-

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pulated by the lease, and to perform the whole oth
the tenants; ' and to *free and relieve us*, the said
' Dumbreck, and William Macgregor, *and us th*
' *James Porter*, as well as the original lessees, (
' and that during the whole years and space of th
' the date hereof,' viz. 12th and 14th March 1825
sun that the respondent was only bound to free a
Porter from payment of the rent after the 14th M
he who was in the actual possession of the coal
liable to the landlord for the rent while in poss
the respondent from payment of rent for the peri
true that there is no express obligation imposed
Houldsworth of the rents prior to the latter's ent
such obligation is implied from Mr. Houldsworth
Mr. Porter from and after the date of the assig
case before quoted, Sir W. C. Fairlie v. Neilson,
could have recovered from Mr. Porter, as tenan
12th and 14th March 1825; but, in addition to
bound, by the right he held to the lease, to pa
session to the landlord. I therefore consider th
paid that rent, comes into the place of the lan
thereof, but of the implied obligation of relief
positive one to pay the rents, entitled to recove

I am therefore of opinion that the interlocu
to be altered, and that the cause should be ren

Lords Mackenzie and Corehouse.—W
nicety, but incline to the opinion that Houldsw

1. We think that Porter, by his possession
primarily liable to the landlord for the rents i
of relieving himself out of the profits, as well
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Craig and the trustees for him and his credi
the lease to Houldsworth, with the view tha
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payable to the landlord *after the date of t*
Craig and the trustees for him and his cred
signed over the lease to Houldsworth from th
tract implied that, after payment of the pric
ditors of Craig, were not to look to Houldsv
for payment or relief of any debt or claim
rent falling due after the date of the contra
passed from his right of affecting this lease
and we think he also passed from all righ

* See Sir W. C. Fairlie against Neilson and Fulto
p. 222.

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arrears of rent due by him to the landlord. There cannot be a doubt, that if Houldsworth had been to undertake such relief, or to take the subject under liability of a claim for such relief, the bargain would have been quite different. In particular, the clause respecting relief from the rents never could possibly have been expressed as it is expressed. This being the case, as before the sale Porter was primarily liable for the rents in question, so after the sale he remained liable in the same way. The only difference was, that his relief, like his principal debt, instead of continuing to affect the lease, came to be good against the price, which the receivers were bound to apply primo loco for payment of that arrear. And the price was amply sufficient to answer it, so that Porter suffered no hardship whatever, and had no reason to hesitate in consenting to such an arrangement. In fact, however, it happened that the trustees delayed performance of their duty in respect to the arrear; and as, of course, the landlord retained his power over the subject, it happened that, though Porter thus stood primarily liable, the landlord levied the rents from Houldsworth, who was obliged to pay, though not primarily liable, in order to free the subject. And the question is, whether Porter be liable to relieve him? Now we think Porter is liable, because the arrear of rent, in which he was the proper and primary debtor, has in this way been unduly paid off by a party who had stipulated in a contract, in which Porter was a party, that he should not be liable for such rent, but only for the rents after the date of that contract. We think that in equity this binds Porter in repetition to that party. We conceive that the accidental circumstance that the landlord, for his own convenience, chose to go against Houldsworth instead of Porter, is of no consequence. A creditor is never allowed at his pleasure to decide on which of two debtors the debt due to him shall ultimately rest. Suppose, then, the landlord had called them both in an action for this rent, Porter, as the tenant who possessed the subject for which rent was payable, at the time when this rent actually fell due, must have been found liable to pay in preference to Houldsworth, who was only tenant afterwards. We think, then, that in equity things must be brought to the same result still, by Porter being subjected in relief to Houldsworth.

2. There is another view of the case from which the same would follow, even dependently of Porter's previous personal obligation. This is, that supposing his portion of rent due to the landlord to have been merely a burden affecting the lease previous to the sale, not personally binding Porter, yet in that view affected the subject of his security, and formed a deduction from the value that subject, which was what he gave up to be sold. Of consequence, as the le was made without deduction from the price on account of this arrear of nt, so after the sale it was the duty of the receivers of the price first of all clear the subject sold of the arrear of rent, before they paid any debts out that price either to Porter or anybody else. To this Porter could not in uity object; for, as the price was the full value of the lease, without coneration of burdens, and as the lease, when held by him in security, and when en over by him for sale, was liable to this arrear of rent, and thereby was minished in value, so in equity must the price, which formed a surrogatum the subject before it could be payable to him or any other creditor. Put case that an arrear of rent had emerged equal to the whole price or value

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of the lease, so that in fact Porter, in giving up th
value, can there be any doubt that in that case i
the receiver of the price to apply it to discharge t
if in fact it had been paid to the creditors witho
them, Porter as well as the rest, must have been
never could be just that Porter in such a case
debt in consideration of giving up a lease that
worth nothing — i. e. in other words, that Hoo
debt out of his own pocket, without any conside
however, it seems sufficiently to demonstrate tha
ers of the price to clear the lease in the first pl
duty, they paid away the price, every receiver o
liable in a claim for repetition, so far as may be
ject for which that price was paid; and Porter
this than other creditors, though it may be th
other creditors, to whom his claims on the pric
however, there seems no reason why he should
worth, as confessedly the part of the price rec
of rent in question.

THE COURT, in conformity with the opi
the Lord Ordinary's interlocutor.

J. STUART, S. S. C.—W. and A. G. I

THE C(

WALTER M'TARG
MRS. E. MONTEITH OF

Process—Multiplepoinding—Title his share of the funds of the deceas with,) having pleaded that the execu thereupon raised a process of multip the other executor—Held,—1.—Tha was not well founded;—and,—2.—T

THE late George M'Tar sons, John, Walter, Henry, died, leaving a widow, the de thereafter Walter, as executo reckoning against her, allegin father's property, and in wh share. In support of this act claring that Walter was the a discharge by him would be that, as Walter was only one c sue such an action by himself, libel that he was the only sur then raised a summons of mu ing Henry, and also his own cl tional legatees under his fathe ncluded a question as to the st ummons the widow gave in ruly no competition, and that ion, all that he sought for in t

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The Lord Ordinary, ' in respect it was ' petitory action that Henry M'Target ' M'Target as pursuer, finds that this pro ' has the effect, among other objects, of b ' is not incompetent or unnecessary; anc ' count and reckoning has been competer ' Walter M'Target, for his own share o ' the deceased George M'Target,' repell both actions, and conjoined the processes.

Against this interlocutor the defende hered.

J. Pattison, W. S.—J. Dunc

No. 293.

J. Scott, Suspender.— J. Boyd and R. Latta, Charg

Removing—Execution—Proof.—1.—Competent bal warning to remove within burgh, in which executi was delete, and another term inserted.—2.—A hou burgh customs, but not used for the purpose of col with part of the customs—Held competent to rem separate tenement, and according to the forms of w burgh.

May 12. 1829.

2d Division.

Lord Medwyn.

F.

After the passing of the bill of susp No. 84. p. 250, (which see,) the expede fore Lord Medwyn. The principal rea execution of warning returned by the ' was vitiated, the printed word ' Whi ' Martinmas' written above it, and tha faith, and did not require to be reduced facie of it; and, 2. That the duty-ho the customs, along with which it was le remove from it as a separate tenement penders continued subtenants of the du not an ordinary urban tenement, the might be given verbally. It was admi had not been used for the collection o merely for the sale of coach tickets; a suspenders designed themselves " sub end of the North Bridge." The Lord of the alleged verbal warning to remo were examined, whose testimony was i the officer deponed positively to his h tinmas; and his son-in-law, who had f execution to the dictation of the office cially directed him to score out the w form, and insert ' Martinmas,' becaus

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Martinmas, and there were several circumstances of real evidence corroboratory of the warning having been to remove at Martinmas. Before any judgment was pronounced, Greig, (who alone had contracted with Boyd and Latta as subtenant, but had afterwards communicated an interest in the duty-house to Scott,) gave in a minute consenting to a decerniture against him; and thereafter the Lord Ordinary, on advising the proof, found, that 'although there is some ambiguity, as well as contradiction in the parole proof, there is sufficient evidence in the real circumstances of the case to support the parole proof which has been adduced, that warning was duly given, as in an urban tenement, to remove from the duty-house at Martinmas last;' and therefore repelled the reasons of suspension, and found the letters orderly proceeded, with expenses.

Scott having reclaimed, the Court refused his reclaiming note, without calling on the chargers' counsel to answer.

Lord Justice-Clerk.—I have made up my mind that the proof taken, in conjunction with the execution, which, although not of itself probative, we are not entitled to throw out of view, establishes that the warning was to remove at Martinmas; and as to the argument that the suspenders were not tenants of the duty-house separately, the suspension sets forth that they were subtenants of it, and we cannot now listen to the plea that it was only held by them as accessory to the duties. When a proof is allowed to support a defective execution, the principal proof is to be expected from the officer and his assistant. It was not necessary here to have had a new printed form, when nothing more was requisite than to score out Whitsunday and insert Martinmas, and the officer says he was instructed to warn at Martinmas, and did so; and his son-in-law swears that he put out Whitsunday and inserted Martinmas, and that is quite sufficient to support the interlocutor of the Lord Ordinary, in addition to the real evidence that the suspenders immediately warned their own subtenants to remove at Martinmas.

Lord Glenlee.—I agree. I cannot comprehend how Scott can be listened to now, for by his own showing he was not an original party to the subtack with the landlord. Her own statement is, that Greig was the only subtenant, and he endeavours to show that Greig was not duly warned, and yet Greig himself, by removing, admits that he was properly warned. Cases may occur where collusion may take place; but it is not alleged here, and therefore it is of no use to go much into the evidence. As to the execution, except scoring out the word Martinmas, there is no defect, and it is more incumbent on the suspenders to show that the execution is false, than on the other party to support it.

Lord Pitmilly.—The Lord Ordinary has only considered the parole proof, and on it I would agree with him. But still I think we may take the execution into view in connection with the evidence, though not probative of itself; and, considering the practice, and the nature of the subject, it may certainly be received as an adminicle, and I am satisfied that the warning was to remove at Martinmas.

The Court accordingly adhered.

A. Hutchison,—G. Lyon, W. S.—Agents.

No. 294. TRUSTEES of SIR WILLIAM ERSKINE, I
CAPTAIN WEMYSS, Defender.-

Trust—Nobile Officium.—A party having conveyed his e
with power to sell part of them for payment of debts and
part, in relation to which no power of sale was given; and
sufficient to pay the debts, the Court authorized the trustee
entailed, in so far as necessary for payment of the debts an

May 13. 1829.

1ST DIVISION.
Ld. Corehouse.
H.

SIR WILLIAM ERSKINE executed, in Ap
estate of Torrie on a certain series of heirs.
1808, he conveyed the lands of Craighouse
of Aitherney, which he held in fee-simple, to
effects, mortis causâ, to trustees, for the pu
house and others for payment of debts an
power to the trustees to sell these lands; a
of Aitherney upon his son Sir John Drumm
heirs entitled to succeed to the estate of
in 1813, and the trustees took possession;
were authorized to sell proved quite insufficie
They therefore brought an action of declar
exoneration, in which they concluded to hav
of Aitherney was liable for payment of the
William,—that they had power to sell that e
ation of the debts,—and that, after payme
bound to execute an entail of the remaining
other lands as might be purchased with th
Appearance was made by Captain Wemyss,
entail of Torrie; but the only serious obj
that the lands could not be sold for paymen
which were truly legacies, and formed a bu

The Lord Ordinary, after ascertaining, l
countant, that the debts greatly exceeded t
the trustees were authorized to sell, and ha

The Court found 'that the lands of Ait
'by the deceased Sir William Erskine to b
'ment of the whole of his debts and obliga
'made by him in his settlements; and in
'report of Mr. Paul that there are not su
'said debts and obligations, independent o
'pursuers, in the discharge of their duty
'the said lands of Aitherney and others, o
'necessary for paying or providing for th
'and that either by public roup or priva
'they are appointed by the trust-deed to
'conveyed;—and that the pursuers, after

'obligations have been paid or provided for, are bound to execute a 'valid deed of entail, settling such part of the foresaid lands of Aither- 'ney and others as shall remain unsold, or the balance of the price 'thereof, or lands to be purchased therewith, if the whole lands shall have 'been sold, upon Sir John Drummond Erskine, now of Torrie, Baronet, 'and the heirs specified in the deed of entail of the lands and estate of 'Torrie and others, executed by the said deceased Sir William Erskine 'of Torrie, his father, dated the 16th of April 1793, and that in the 'terms specified by the aforesaid trust-deed.'

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LORDS PRESIDENT, BALGRAY, and GILLIES concurred in opinion, that as it was undoubted that the lands were liable for the debts of the truster, and might be attached by creditors, and it must have been his intention that the trustees were to have the means of paying off the debts and other burdens imposed on the trust, and only to entail that part of his estate which might remain free, the Court had power to authorize them to sell either a part or the whole of Aitherney for liquidation of these debts; and besides, it was plainly expedient and beneficial for all concerned, that this should be done by the trustees, and not by a ranking and sale. They also observed, that this case was not similar to that of an heir of entail asking powers to sell the lands for entailer's debts, because here there was no entail executed.

LORD CRAIGIE expressed considerable doubts, and thought that the trustees could only sell by the authority of an Act of Parliament.

Pursuers' Authorities.—Harrower, July 7. 1825; Stewart, Nov. 26. 1813, (F. C.)

DICKSON and STEWART, W. S.—WALKER, RICHARDSON, and MELVILLE, W. S.—Agents.

EARL of DUNMORE, Pursuer.—*D. of F. Moncreiff—Tait.*
COLIN M'INTURNER, Defender.—*Skene—Marshall.*

No. 29

Submission—Inducice Legales.—A submission having been prorogated, on the 5th of February 1823, 'to the day of next,' and the next prorogation not having been executed *till* the 6th of February 1824, the Court refused to sustain a reduction of the decreet-arbitral subsequently pronounced, which was brought on the ground that the prorogation ought to have been executed within a year, instead of a year and day.

THE Earl of Dunmore and the defender M'Inturner, on the 26th February and 9th April 1821, entered into a submission to two arbiters, mutually chosen, with power to appoint an oversman,—the decreet-arbitral being authorized to be pronounced "betwixt the day of next, or on or before any other day to which they or he shall prorogate the submission." After the submission had been prorogated to a blank day, an oversman was appointed in August 1822, who, on 5th February 1823, executed a minute of prorogation "to the day of next;" and, on 6th February 1824, he again executed another minute of prorogation. He thereafter pronounced a decreet-arbitral, which was brought under reduction by Lord Dunmore, on the ground, inter alia, that on the expiry of 5th February 1824, without any prorogation of the submission, it fell, and that it was incompetent to execute a prorogation on 6th February.

May 13. 18

2D DIVISIO
Lord Medw
F.

IN support of this reason of reduction, he contended that a blank prorogation, on a particular day, "to the day of next,

†

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May 13. 1829.

was held to subsist till that day year, because (s
3. 29.) that was the latest day with which the bl
but that it could not subsist till the day following,
it would express the very next day to that on whi
executed. Thus, if the prorogation here, dated th
were filled up " to the *sixth* day of February nex
tinue it for a single day, since the " next" appli
month; otherwise a blank prorogation would r
the month in the succeeding year, as the latest d
filled up, which was not the case.

On the other hand, it was argued for M'Intur
ing the extension of a blank prorogation did not a
as that mentioned by Erskine, but was merely th
of a year, to which a great number of our ind
but that in all of these a day is, at common law, a
cordingly Lord Bankton, with reference to subm
time is mentioned in the submission, it lasts only
and, in the report of the case of Menzies in 1665, t
and day" is used, with reference also to the sub

The Lord Ordinary having repelled this r
Dunmore reclaimed to the Inner House, when
the practice was in his favour. The Court, on
to the practice; and minutes were accordingly
practice with regard to summonses, and the fall
the Outer House. Two of the Outer House
the queries directed to them by the parties. T
a summons, of which the day of compearance v
next to come," would, without being
of the day corresponding to its date next yea
the succeeding day; but they were agreed, tl
pronounced on the 5th of February of one ye
fall asleep till the expiry of 6th February ne
produced the subjoined letter from Mr. Parke
missions.* In general, however, the statemei
inconclusive and unsatisfactory.

* " There are many points certainly in the law of arbitrat
doubtful and unsettled. But I am satisfied, that if there
established, both in practice and in the general understan
this—that a submission prorogated on 5th of February 182
must be again prorogated or determined on 5th February
final. Any thing done on the *sixth* of February would be

" I feel the more confident in giving you this answer
casual inquiry on that point alone, but in a deep convic
and a careful investigation of about ten years into all t
arbitrations, even to the minutest details.

" I have no hesitation whatever, therefore, in saying, t
on the 6th day of February, be sustained, it would have
practice and understanding as to prorogations of submissi

Lord Glenlee.—If the prorogation prolongs the submission for a 'year' only, then the interlocutor is wrong; but if for a 'year and day,' it is right. For my own part, I cannot reconcile Mr. Parker's letter with his book; but even taking his opinion as in his letter, I can very well see some reason why a prorogation should last for year and day, although a blank clause of endurance in the submission itself should be held to import only a year; but I cannot conceive, that if we admit the clause in the submission to extend to year and day, the prorogation should not do so also; for in the submission itself the party cannot be bound except by what is expressly declared, while prorogations are not deeds, but semi-judicial acts, analogous to the act of the Lord Ordinary keeping awake processes for a year and day, more than any thing else. It has been found that prorogations and devolutions do not require to be tested; and by the same analogy, even if it were true that it would be limited to a year in the endurance of the submission itself, I do not see the necessity of inferring the same thing as to prorogation; and the arbiter prorogating on the 6th shows what his own understanding was. No. 29 May 13. 18

Lord Pitmilly.—In my own practice, I should have thought the submission must have been prorogated on the 5th of February; but this would have been just on a sort of general understanding. Here, however, Lord Dunmore is pursuer of a reduction, and he must make out the ground satisfactorily, and must shew that it is a fixed point that a prorogation lasts only a year; and so, even if the matter be doubtful, it is against our sustaining it as a ground of reduction. Now, even on the pursuer's own statement, it is very doubtful. The difficulty I had was on the authority of Lord Bankton, and I cannot say the difficulty is removed. I do not think the analogy of summonses is a safe ground, as a different rule applies in different cases. We must confine ourselves to submissions; and when I see the opinion of Lord Bankton and the case of Menzies, I cannot make up my mind to say that the pursuer is entitled to call on us to reduce the decree, at least when the matter is so doubtful.

Lord Justice-Clerk.—I grant that this is a point of some nicety; but my first impressions are not removed by the evidence as to the practice. And in a case of this kind, when we have the opinions of one institutional writer seemingly supported by a decision, I would, unless I saw clear evidence of practice, hesitate to go contrary to these. I do not see any such evidence of practice, and therefore think that the safest course is to adhere.

The Court accordingly refused the pursuer's reclaiming note.

Tait and Young, W.S.—A. H. Manners, W.S.—Agents.

W. Adair, Pursuer and Advocator.—*Cockburn—Wilson.*
Mrs. Adair and Others, Defenders and Respondents.—*Sol.-Gen. Hope—Skene.* No. 296

Marriage.—Circumstances under which it was held that a man and a woman who had occasionally addressed each other, in presence of third parties, as husband and wife, were not married.

No. 296.

May 14. 1829.
1st Division.
Consistorial.
Ld. Fullerton.
H.

This was an action of declarator of legitir
of the late John Adair, which was rested on t
and Janet Scott, (who was also dead,) "were
least lived together, and were reputed such h
and acquaintances." It was directed agai
father, who were entitled to succeed to his h
on the supposition that the pursuer was illeg
ed by the Commissaries, in the course of w
dictory evidence was adduced.

It appeared that the father had been
in opulent circumstances, and in a superi
into dissipated habits, and became acquai
of Janet Scott, who was proved to have
At a late stage of the cause, two witnesses
name of Smith, who had been in the emplo
forward under very suspicious circumstance
band (on whose testimony the pursuer mainl
count of the first matrimonial declaratio
by the parties:—'Depones, that while
with Mr. Adair, the deponent thinks he
mind as any man;—that the deponent lo
man;—that the deponent was also acqua
reputed to be the pursuer's mother, and
about 17 years of age, when the deponen
and his acquaintance with her began by fi
Adair, and he has seen her frequently i
in particular upon a night about Martin
said contract, Mr. Adair and Janet Scot
nent's house at Cross-Arthurlie bleachfiel
resting there for some time, Mr. Adair s
I wish you would give Jenny and me a
nent answered, 'I can't do that; if it sh
lic, I would be affronted.' Whereupon
'you never can be affronted in giving J
my wife;—that the deponent, addressi
said, 'Is it true that you are John Ada
question Janet Scott answered, with fo
his lawful wife;' and by the foresaid t
the deponent means that Janet Scott sa
the deponent then said to her and Mr.
you own yourselves husband and wife
you the best bed in the house;'—that, c
Adair and Janet Scott repeated that t
the deponent's wife was present all th
made a small bowl of toddy, and dra

Janet Scott under the nam
the compliment with thank
Janet Scott were shown to
nent came to them, as the
hand, and told them that
done by at his own marriag
handing the glass, he said
I give you the glass, you m
wife;' and on this being s
saying to her at the same
band and wife, before Willi
said, 'I am John Adair's w
not both of them owned it,
bed;—that the deponent ar
Scott, and wished them go
the said parties in bed tog
next morning;—that the
ing, and asked if they had
'Yes, they had rested very
drank the deponent's bottle
was not ill to do, there not
Adair then requested the d
said he should like to drink
for the purpose;—that the
they all partook of it; and
of Mr. and Mrs. Adair; an
were about to go away, 'N
time;' and then addressing
not afraid of William, but
nent's wife replied, 'If it is
necessity requires;' and the

On other occasions it alsc
Scott as his wife; but althc
pursuer's witnesses as an inn
these acknowledgments were
in low dissipation;* that Sc

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* As characteristic of the evidenc
the following part of the deposition
lepones, that he remembers, in the
of having been in company with the
James Smith in Barrhead, and a wo
hem; and the deponent and one Jo
nd had been invited in by Mr. Ada
omen seated drinking together at
nd taking a glass together, Mr. Ad
l'Allister, got into a dispute as to

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had intercourse with other men; that when baptised as being illegitimate; that Adair s and that, after walking the streets of Glas she was married, during his life, to anothe

The Commissaries having assoilzied the d an advocation, in which he contended that that the parties had solemnly and delibera as husband and wife, and gone to bed as effectually constituted; that although the fallen into low and dissipated habits, this monial union; and that if any doubt w union having taken place on the above o subsequent acknowledgments of each othe

On the other hand, it was maintained b proved that Scott had been an abandoned scribed by the pursuer's witnesses as a vi possible to give credit to their statements that their intercourse was originally of an ledgments were made merely to serve pa though it was necessary, in order to cons repute, that there should be a concurring the friends and acquaintances of the par large proportion of the witnesses agreed connexion of the parties as one of an illi

The Court unanimously refused the b

The Lord President observed that thi again,* where an attempt was made by a Gl riage against a quartermaster in the army she was occasionally called his wife, she trul

Lord Craigie.—If it were possible to be he made the declaration in presence of the been believed, there would clearly have beer

Lord President.—But it is impossible other witnesses of the pursuer, because, alth timate terms with Scott, and although it is common prostitute, yet they characterize he

---

lister spit at Janet Scott across the table, and Sco sat opposite to her, on which the deponent opene the room; and Mr. Adair having come in inter other, one of them with each hand, for by this ti into grips; and Mr. Adair said to M'Allister, 'D that Mr. Adair was sober at this time;—that th Scott had at this time been residing together in a nent had never been in it. The witness further ed to lay claim to Mr. Adair, because, as she sai Scott laid claim to him, because, she said, he wa

* See Farrel v. Barrie, Feb. 1. 1828, (ante, V

Lords BALGRAY and GI
Forbes' Authorities.—Case o
June 31. 1751, (noticed in Dalrym
Defenders' Authorities.- Case o
BOWIE and CAMPBE

J. M'Go
EARL of ST

Process.—A reclaiming n
for the Judges had not the
in respect the process-copy
pended; but the agent fined

T. BAILLIE, S.

MRS. JANE
JAMES HA

Process.—The process-co
this case not having the su
ceived.

D. TURNBULL, W

JOHN ROBERTSO
R. B. ALLARDYCE and J. BO
Bra

Privileged Slander—Judge—Justi
against an action of damages for slan
offender under trial before him.——2.—
tual proof of the falsehood, if no proo
the case of Hagart v. Lord President
preme and Inferior Judges, as that t
cial slander.

Upon the summons in this
to the Jury Court, as mentio
lowing Issue was sent to tri
'are Justices of Peace and
'Kincardine, and in that c
'in the said county on the
'suer was then brought befo
'against him for unlawfully
'he did then and there mak
'punishment: Whether at
'ceeding aforesaid, and in p
'there assembled, the defen
'maliciously, and calumniou
'poacher, was a thief; that
'leather, and that the defenc
'did falsely, maliciously, and

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'effect, to the loss, injury, and damage of
'the time and place, and pending the proce
'sence and hearing of the persons aforesaid
'did falsely, maliciously, and calumniously
'by a respectable farmer now dead that the
'leather; or did falsely, maliciously, and cal
'to that effect, to the injury and damage o
'at £800.'

On this Issue a verdict was obtained aga
but it was subsequently set aside, and a n
was directed against the defenders conjun
defences were distinct, and they were not
Issue having been again sent to a Jury,
witnesses who deponed that the pursuer h
defenders and other justices for shootin
prosecution was conducted by the survey
by the private agent of the defender I
occasion had the surveyor, who was him
any assistance; that the information agai
by this agent; that, after some witnesses
suer's case was given up by his agent, wh
in the penalty to be inflicted; that ther
said that he did not consider that the pur
he was a thief as well as a poacher, on w
mitted that this was not a matter for co
the defender Allardice thereupon said th
agent,—" that the Court was entitled to
that he was informed by Mr. Boswell tha
stealing bee-hives and leather;" that th
could not swear as to the leather, but he
was informed by a respectable farmer
Court fined the pursuer in the full pe
price of the license; and that he had b
payment was made. The defenders, wh
cation, did not adduce any evidence.

The Lord Chief Commissioner direct
'damages was not competent at all agai
'in Scotland for words spoken by then
'such an action lay against Justices c
'were spoken maliciously. With refere
'where the party using the words com
'the complainer, the Jury must be sati
'and the Lord Chief Commissioner di
'to take into consideration the words

* 4. Murra

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'case, and to consider whether Mr. Barclay was honestly discharging his 'duty, and only erred in judgment as to his duty; or whether he acted 'not from a fair desire of doing his duty, but was induced by malice to 'use the words proved. The Lord Chief Commissioner further stated 'to the Jury, as his direction on the law, that malice consisted in speaking from bad motives, and that it may either be preconceived or instantaneous. His Lordship further stated to the Jury that in cases like the 'present, where no evidence was adduced by the defenders to prove that 'the words spoken were true, they must be understood or presumed to 'be false, although no evidence of the falsehood was adduced by the 'pursuer.'

The Jury having returned a verdict in favour of the pursuer, finding each defender liable in £125 of damages, the defenders moved for a new trial, on the ground of misdirection by the Judge; and on this motion being refused by the Jury Court, they presented a bill of exceptions, in which they contended that the Lord Chief Commissioner, instead of the direction on the law given by him as aforesaid, 'should have directed the 'said Jury to have found a verdict for the defenders, by directing them, 'first, that for words spoken by the defenders when sitting in judgment 'as Justices of Peace, and deliberating upon or delivering the grounds 'and reasons of a judicial determination, the defenders are entitled in law 'to complete protection and immunity, even where the words spoken are 'alleged to be maliciously spoken; secondly, and separatim, That the evidence of malice in the present case ought to be direct and express by proof of malice, wholly independent of the alleged intemperance, or even falsehood of the words spoken, and that from the mere absence of evidence of the truth of the words spoken, these words could not be held to be false, to the effect of affording legal or competent evidence of malice against the defenders, acting as aforesaid.'*

H. J. Robertson, in support of the exceptions, contended, as to the first, hat there was no ground for the distinction taken in the Lord Chief Commissioner's charge, between Judges of the Supreme Court and Inferior udges; but that the principle of complete protection, which, in the case f Hagart v. Lord President Hope, had been found to apply to Judges the Supreme Court, should extend equally to all Judges, or indeed ore strongly to Justices of the Peace, who acted gratuitously—who id not the benefit of a professional education, and whose observations uld not have so injurious an effect as if they had proceeded from a udge of the Supreme Court,—and that, by the law of England, all udges, without distinction of supreme or inferior, were entitled to absote protection while acting in a judicial capacity; and as to the second, at the falsehood of an accusation, to the effect of becoming proof of alice, could not be inferred from the absence of evidence in justifica-

* 4. Murray, 529.

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tion, but that malice could only be inferre
proved.

Borthwick, in answer, contended, as to th
tinction between Supreme and Inferior Jud
of our institutional writers, as Stair, (4. 1. 6,
Baron Hume, (Vol. I. p. 402, last edition
Vol. II. p. 48 last edition, p. 56 forme
founded both on the absence of a proper
of their acts or speeches, and on reasons of
assumed that there could exist no wrongs t
Judges for which to make them responsi
sponsibility of Inferior Judges was fixed
Scotland,—and as to the law of England,
same principle;—and with regard to the se
did not put the proof of malice on the fal
but on the whole circumstances, and that
that the Judge was right in that, and alsc
of evidence in justification, the Jury were
der was false.

Mr. Solicitor-General stated, on th
they had adopted the course of bringi
Court in the form of a bill of exceptions
in better shape to appeal the whole caus
to argue the very same question before t
the question of relevancy, the defender
doubt of their cause, were not inclined,
to prolong the argument further.

The Court, not requiring any furth
nions as follows:—

Lord Justice-Clerk.—I have not muc
at present. In the first place, it is a princi
dering bills of exceptions, that we must loc
construction on it, and are not to take an i
essence of the whole charge; and in apply
implying it to have been the opinion of the
case will an action lie against a Supreme J
case where this observation occurs, which i
Having given an opinion on the case of Ha
opinion, which has now been confirmed b
But I did not say then, nor am I called u
conceive grounds to bring that question n
curred in that case, which regarded a cen
sel. But in the opinions even in that ca
where there would be ground of action
from saying that if I go out of the case al
ations against individuals with whom I ha

be called on in an action of damages. I shall reserve my opinion on such a point. Then, laying aside that which does not apply to this case, I find nothing to object to in the charge that "such an action lay against Justices of the Peace, provided the words were spoken maliciously." This case is very different from that of a Judge speaking in language, even the most unmeasured, of the case before him, which I conceive a Judge entitled to do; but here he goes entirely out of his way, and charges the pursuer with crimes of the deepest character, and inferring infamy. From the first moment till now, I never entertained a doubt that this was actionable matter, for which the Justice is responsible according to every principle of the law of Scotland. And as to the other exception, when there was no issue taken in justification, we cannot doubt that the Learned Judge is right in saying that the accusation must be assumed to be false, and therefore I think the bill must be disallowed; for I cannot comprehend how the statement of the abstract principle as to the immunity of Supreme Judges could have affected the verdict.

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Lord Glenlee.—I agree. The observation as to Supreme Judges is extrinsic, and could not affect the verdict. I do not need to say any thing on that point of law; but I am not disinclined to agree with your Lordship, though perhaps it has been rather broadly stated.

Lord Pitmilly.—I am of the same opinion. There is no occasion to go into the question of the supposed distinction between Inferior and Supreme Judges stated in the charge, as the observations on that point have no bearing on the case; and therefore, unless we could concur with what the exceptors say should have been the charge, we must disallow the exception. But I cannot concur with this. I am not bound to know the law of England on this point; but it is impossible for any Scotch lawyer to say that it is the law of Scotland. If the Lord Chief Commissioner's proposition as to Supreme Judges is not well founded, it is just an additional reason for refusing the bill; but I waive giving an opinion on that subject. As to the second exception, I entirely concur.

Their Lordships accordingly disallowed the exceptions, with costs.

Pursuer's Authorities.—4. Stair, 1. 6; 4. Bank. 2. 39; Hume, 1. p. 402 last edition, (p. 45, former edition,) and vol. 2. p. 48 last edition, p. 56 (former edition); Leitch v. Fairie, July 1711, (13946); M'Neill, 1776; (5. Brown's Supp. 573); Sinclair, 1767, (5. Brown's Supp. 4); Dicta in Hamilton, Mar. 10. 1827 (ante, Vol. V. No. 289. p. 569); 1. Blackstone, 3, and Note by Christian; 3. Burn's Justice, by Chetwynd, 138; Deptford Court Martial Willis, C. J. (Digest of Law of Libel, p. 132.)

Defenders' Authorities.—Lord Gifford in Hagart v. Hope, April 1. 1824, (2. Shaw's Appeals,); Robertson, Aug. 4. 1780 ( ); Starkie (Law of Libel, p. 210, and Law of Evidence, 863); Barnardiston v. Soame, 1674 (6. Howell's State Trials, 1074); Holroyd v. Brere and lmes, 1819, (2. B. and A. 473.)

J. Burness, S. S. C.—W. Duthie, W. S.—A. Boswell, W. S.—Agents.

James Tannoch, Advocator.—*Jameson—Cowan.* No. 300.
J. Reed and Others, Respondents.—*Skene—Spiers.*

Process — Instance. — An action in the name generally of "the Commissioners of Police" burgh, held not to set forth a proper instance, the Act of Parliament under which they d not authorizing them to sue by this designation.—2.—The defenders, not having taken objection in due time, held competent to amend the instance by a supplementary sum-ns.

No. 800.

May 14. 1829.
2D DIVISION.
Ld. Mackenzie.
F.

BY the Kilmarnock Police Act the town inhabitants of which are authorized to elect duals to act as Commissioners of Police, with to the police of the town. By a clause marke name actions are to be brought," it is enacte tent to the procurator-fiscal for the said bur any of the said Commissioners for the time l of the said Commissioners, to bring actions, their instance respectively for performance levying and recovering the penalties herein clause it is declared competent to the Tow against the said Commissioners, or to the being, or majority of them, to bring actio in office before any competent court in Sc bezzle, abandon, or misapply any of the f of this act;" and these are the only prov relative to the bringing of actions.

In June 1824 a petition and complaint trates of Kilmarnock, praying for removal been erected by the advocator Tannoch. "The Petition and Complaint of the Cc town of Kilmarnock," and it was signed missioner, and by Kay, a procurator en missioners.

To this petition answers were given i the Commissioners had no power to inte jecting to the instance.

The Magistrates, however, having, a the stair in question to be removed, Ta which he maintained, inter alia, that a Commissioners of Police for the town that title not being a nomen juris, a entitled to sue in the special manner pc ment.

The Lord Ordinary repelled this obj trates to allow a proof as to whether the street. Tannoch having reclaimed objection to the instance.

Pleaded for Tannoch.—The Comm corporate known in law as such, and descriptive name of Commissioners of that pointed out by the Police Act, w tion in this form.

For Reed and the other Commissio constitutes a number of individuals name and character, they are entitle

into execution, in their name as a body; but at all events Tannoch, having gone to issue with them in the Inferior Court upon the merits without stating this objection, was barred from now founding on it, at least to the extent of preventing their amending the instance by sisting the individual Commissioners, as was allowed in the case of the Culcreuch Cotton Company, Nov. 27. 1822, (ante, Vol. II. No. 46. p. 47,) and which had been done. No. 300. May 14. 1828.

Lord Justice-Clerk.—I am decidedly of opinion that the Kilmarnock Police Act does not authorize prosecutions in the form here attempted, and the defect in the instance is not cured by the petition being signed by Reid and a procurator. But then we are bound to attend to the way in which the objection has been taken. It ought to have been taken in limine; but this not having been done, I think the defect may be allowed to be corrected, as in the Culcreuch case.

Jameson.—In that case it was done of consent, and a supplementary action was brought.

Lord Pitmilly.—I agree with your Lordship, and think the defect may be cured by a supplementary action.

Lord Glenlee concurred.

Jameson.—Since the Court think the defect may be cured, we will not insist in a supplementary action being brought, but will consent to the sisting of the individual Commissioners being held sufficient.

The Court, accordingly, concurring with the Lord Ordinary as to the manner in which he had disposed of the cause on the merits, refused the reclaiming note, in respect of the individual Commissioners having been sisted, and that Tannoch did not insist on their bringing a supplementary action.

Gairdner and Robertson, W.S.—Hunter, Campbell, and Cathcart, W.S.—Agents.

W. Carstairs, Pursuer.—*L'Amy.* No. 301.

R. Brown and Others, Defenders.—*Cuninghame—H. Bruce.*

Servitude.—The proprietor of a moss having granted a feu of certain lands belonging to m, with the privilege to the vassal of casting peats in the moss 'for fuel to himself, and for le'—Held that while the vassal exercised the full privilege himself, he could not communicate the right of casting peats, either for fuel or sale, to tenants or subfeuars of the lds to which the privilege attached.

By feu-disposition dated in 1749, the Lord Rosse granted to one William Thomson, "his heirs and assignees whatsoever, heritably and irredeemably, all and haill the room and lands of Nethermoss-houses, some ne possessed by Thomas Scott and John Wilson, and now by John homson, tenant in Walltower, with houses, biggings, parts and pertints thereof, &c.—and also that part of the Milkhall ground lying on the st side of Nethermoss-houses, &c., with fifteen sheep to be grazed upon e said Walltower, viz. ten ewes and lambs, and five yeld sheep, ay May 14. 1829. 2d Division. Ld. Mackenzie. F.

No. 301.
May 14. 1829.

and while the lands of Mosshouses and Milkhall privilege of the flow-moss there, to cast peats b for sale," and "with power to build houses an enclosures therein, and to grant feus thereof, a of property to do, use, and exerce, that he t have done before granting hereof."

This right came by progress into the per while the "flow-moss" mentioned in the disp the lands of Milkhall, became the property of titles flowing from Lord Rosse, which excep by his Lordship "that part of the Milkhall of the Mosshouses, with the privilege of f Walltower muir, &c., and the privilege of poned in feu to William Thomson, late ten

In 1819, the defender Brown granted to for 999 years, of a small portion of the la two feet in front along the highway, and north end." This lease contained the follc landlord's rights entitle him to grant this tenant, yearly between Whitsunday and I map to dig, and two women to wheel th casting peats from the moss or flow of W while the moss or flow lasts, and that with In 1822, he let a similar lease of anothe same privilege, and the tenants under t peats for fuel and sale, while Brown hi same privilege, Carstairs, (after certain p dict against the tenants, which it is u present action of declarator against Br to have it declared,—1. That the pri Thomson, the original disponee;—or said Robert Brown, while he retains t cising the said privilege, has no right t to any other person whatever, and pa grant a privilege of casting peats in for sale to persons feuing or taking b of the said lands of Nethermoss-house

In support of his action the pursue

1. That while the lands in Lord Rc William Thomson, "his heirs and a "for fuel *to himself*, and for sale," ar Thomson, and did not transmit to hi

2. That supposing it did so tran sistently with a fair and reasonable the rule that such rights must be r the servient tenement, could not be

No. 301.
May 14. 1829.

any number of individuals to whom the defender might feu or let portions of the lands, the same unlimited right of casting peats for fuel and sale, which was originally granted to a single feuar.

To this it was answered,

1. That the feu-disposition granted the lands to William Thomson, his heirs and assignees, with this privilege, and that there could be no doubt, therefore, that it was not merely personal to William Thomson, but formed part and pertinent of the lands, and transmitted with them; and,

2. That in all praedial servitudes similar to that now in question, the servitude was for the use of the inhabitants of the dominant tenement, all of whom might exercise the right, unless expressly limited. Thus, if a right of road, or to a well, were given with lands, all the tenants on these lands would be entitled to the use of the road or well, and that, if this were a servitude of peat for fuel only, there could be no doubt of every tenant being entitled to the benefit of it; but that the addition of the privilege of casting for sale, so far from limiting the servitude, rather tended to show that no limit was meant to be imposed to the multiplication of it, as one individual might sell as much as a number, and this the more particularly, as express power to sub-feu was given by the feu-disposition, which thus contemplated a minute division of the lands.

The Lord Ordinary found, 'in terms of the second alternative of the 'conclusions of the libel, that the defender Robert Brown, while he re-'tains to himself the full power of exercising the privilege of taking peats 'from the flow-moss libelled, has no right to communicate the benefit 'thereof to any other person whatever, and particularly that he has no 'right to grant a privilege of casting peats in the said moss for fuel and 'for sale to persons feuing or taking building leases of parts and portions 'of the lands of Nethermoss-houses; and decerns and ordains him to 'desist and cease from attempting to grant such a privilege to feuars or 'lessees of parts of the said lands in all time coming; and further, finds 'and declares as libelled, that the leases granted in favour of the de-'fenders John Murdoch &c., in so far as a pretended privilege of casting, 'winning, and carrying away peats from the said moss, has thereby been 'granted, whether for fuel or for sale, are of no avail and effect in law; 'and decerns and ordains them to desist and cease from casting, winning, 'or carrying away peats from the said moss, either for fuel or for sale in 'time coming.' His Lordship found no expenses due to either party. Both reclaimed, Brown &c. on the merits, and Carstairs as to expenses; but the Court adhered, allowing Carstairs, however, his expenses against Brown since the date of the Lord Ordinary's interlocutor.

Lord Justice-Clerk. — The question is, if the Lord Ordinary has put a due construction on the titles of the parties. I am satisfied that the servitude was not personal to Thomson, but that it attached to the farm as a praedial servitude. We must, however, put on the whole grant that sort of rational construction which must have been in the meaning of the parties, so far as con-

No. 301.
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sistent with the words. The argument of the defende power to subfeu, he may subdivide this property inde each portion a right to cut fuel for use and sale. It important, that the grant gave to this feuar, first, a rig sheep, so long as the moor should be unenclosed, with for use and sale; and I think that the privilege of ca same situation with that of the pasturage. I cannot clusion from that of the Lord Ordinary, which is the of the meaning of the grant, and which does not app ent with its words.

Lord Glenlee.—There has been no possession su tion one way or other. If the grant had been simply t would have been little doubt that it could not be the property into parts. But there is a difficulty, given for the feuar's own use; and I would rather t each subfeuar would have been entitled to cast pea mily. I have, therefore, some hesitation, if the judg giving a right to the sub-feuars to work for their ow

Lord Pitmilly.—I incline to concur with the I clearly was not personal to Thomson; but I think feued out the property, he could not communicate broad as his own. That would be altering the natu and every rule regarding servitudes opposes suc Brown had employed a multitude of his own serv ment, as a manufactory, he might have been restrai only have been excess, while this is an alteration of t multo magis must he be liable to be restrained. I tions from the rule that servitudes cannot be comm rights of shooting or walking; but these rights a that here in question, as the nature and essence of them is, that they must be shared. If this party the feuars to the privilege of casting peats for the have been different. I will not, however, give an op here given a right to cast for sale, we must adh interlocutor.

Pursuer's Authorities.—2. Ersk. 9. 34; Murray, Dec. 8.

Defenders' Authorities.—2. Stair, 7. 9. 13; 2. Erk. 9. 5; (14542, and 2. Hailes, p. 673); Leslie v. Cumming, Nov. 2 1772, (referred to in the papers of the case last cited); Lor

D. Houston,—J. Chalmers,—

J. Roberts, Pursuer.—*D. of F. Moncreiff—More.* No. 302.
J. Potter and T. Reid, Defenders.—*Forsyth—Sandford—Houston.*

Inhibition.—An heritable bond having been granted spretâ inhibitione; but the party inhibited having died, and his heir having sold the property to a person who had acquired right to the heritable bond; and having allowed him to retain part of the price in liquidation of the bond—Held that the inhibiting creditor was not entitled to reduce the bond, to the effect of obtaining payment out of the price so applied in liquidation of the bond.

May 14. 1829.
2d Division.
Lord Newton.
R.

In 1813 the father of the pursuer Roberts executed inhibition against the late James Forrest, wright in Bathgate. In 1817 Forrest granted to the defender Potter an heritable bond for £50 over a piece of ground belonging to him there. No steps were taken by Roberts or his father, during the lifetime of Forrest, (who died prior to 1823,) to set aside this bond, or make the inhibition available; nor was it renewed against Forrest's son. In 1823, Potter having demanded payment of the interest of the bond, Forrest's son applied to the other defender Reid, who advanced the amount on obtaining from Potter an assignation to the bond. Thereafter Forrest's son sold the property to Reid, allowing him to retain out of the price the amount of the bond. Roberts thereupon raised an action, concluding for reduction of the bond and sale ex capite inhibitionis; but he subsequently restricted his conclusions to the bond only; and he contended, that although the sale by the son was valid, yet as the heritable bond had been granted spretâ inhibitione, he was entitled to have it set aside, to the effect of obtaining payment of his debt out of the price allowed to be applied in liquidation of it; and that, according to the decision in the case of Monro of Poyntzfield, when a property has been sold, an inhibiting creditor is entitled to a preference over the price, although he have not adjudged.

In defence it was pleaded, That the inhibition having fallen by the death of old Forrest, the son was entitled to sell the property, and dispose of the price as he pleased; and that although the bond, in so far as it was an heritable security, might be struck at by the inhibition, the personal obligation remained, and made it a good debt, which the son was entitled to discharge by imputing it in part-payment of the price, in the same way as if the purchaser had been a third party, and he had received the price, and paid it over to the holder of the bond.

The Lord Ordinary sustained the defences, and assoilzied; and the Court, after allowing a minute as to an allegation of collusion, for which there appeared to be no grounds whatever, adhered.

Lord Glenlee.—I see no reason to doubt the correctness of the interlocutor. As to the case of Monro of Poyntzfield, it established a very useful doctrine, that where a party has an inhibition affecting a sale of lands, he may have his preference made good over the price without adjudging. But it was never decided that he is to have such preference where he has no inhibition affecting the sale. Now

No. 302.
May 14. 1829.

here the pursuer had no inhibition affecting the sale; an
hibited being entitled to sell, and do with the price wha
paid his father's debt, whether heritable or moveable, it c
object of the minute was to see whether there was any g
been a collusion to defeat the pursuer's claim. There is,
pect any thing of the kind, but rather the contrary.

LORD JUSTICE-CLERK.—When the case was before
in the rule of law now laid down by Lord Glenlee; b
allegation of fraud and collusion, we allowed minutes, w
We must therefore adhere.

LORD PITMILLY concurred.

A. SMITH, W.S.—N. W. ROBERTSON, S. S. C.—D.

No. 303.

ROBERT PATERSON, Suspender.—*D. of F*
J. SAMUEL, (PATTISON'S TRUSTEE,) Charger.—

Bankrupt—Sequestration.—Held (in passing a bill of s
power, under the Bankrupt Act, to imprison the bankrupt fo
while under examination; but liberation granted under the c

May 15. 1829.

1ST DIVISION.
Bill-Chamber.
Ld. Cringletie.
D.

THE estates of Paterson having been sequest
charger Samuel was chosen trustee. At the us
derwent the statutory examinations, and emitte
October 1828, Samuel presented a petition t
shire, praying for a warrant to re-examine
tain circumstances which he alleged had rec
ledge, and to take possession of certain doc
were concealed by him. Warrant was accord
son was brought up on the 19th of Novembe
upon oath, and subjected to an examination,
the 22d. It was again resumed on that day, a
and, after an additional examination, it was ad
cember, when it was again resumed, and adjo
month; on which occasion, and after the exa
closed, Samuel, the trustee, moved the Sheriff
satisfactory answer had been given to certain
of the examinations, Paterson should be cor
should give more satisfactory answers. Pate
tance of time it was impossible he could do
had been unable to examine his books so pa
wished. The Sheriff-substitute, after finding
sonable, and the answers unsatisfactory, grant
until satisfactory answers should be made to t
accordingly imprisoned; but, at his own requ
for examination on the 17th of January 18
being still of opinion that the answers were n
rant for his recommittal to prison. Paterson
pension and liberation, in which he contende

No. 2
May 15

1. That the Sheriff had no power to grant warrant for committing a bankrupt to prison, in respect of giving what may be considered unsatisfactory answers; that by the statute the Sheriff was a mere commissioner appointed to take evidence, and not to act in a judicial capacity; and that, although power was bestowed upon English commissioners, by express enactment, to imprison a bankrupt, no analogy could thence be drawn to the effect of bestowing such powers on the Sheriff.

2. That the proceedings had been most oppressive, both by examining him upon oath, with a view to make him contradict statements previously made upon oath, and by the repeated and harassing examinations to which he had been exposed; and,

3. That the answers were as satisfactory as it was possible for him, under the circumstances, to give; but that he was still willing to give further explanations, if necessary.

The Lord Ordinary reported the case and issued the subjoined note.*

Dean of Faculty, for the Suspender, was at first stopped by the Court.

Cockburn for the Charger.—If the Court are of opinion that the Sheriff had power to commit, (which I presume they are,) then it will be unnecessary for me to say any thing upon that point.

LORD PRESIDENT.—We are all agreed that he has such a power.

Cockburn.—If so, then it is undoubted that the trustee has the right to re-examine the bankrupt; for by the statutory oath taken by the bankrupt, he swears that he will disclose any thing further which may be of importance to his creditors. Here the trustee having discovered that he had been guilty of concealing papers of importance to the estate, applies for a warrant for his re-examination, in the course of which the

* "The Lord Ordinary has no doubt that the Sheriff has jurisdiction to commit a bankrupt brought before him for examination, who either refuses to answer at all, or gives an evidently evasive and unsatisfactory answer to a question put to him. The statute authorizes the Sheriff to issue his warrant for apprehending the bankrupt, or any of his family, &c. in order to force their appearance at the diets of examination. It is a mistake to consider the Sheriff as a commissioner merely appointed to take the examination. He acts as Sheriff; he does not issue his warrant as acting under the statute, but issues it as Sheriff. The purpose of that warrant is to force the appearance of the bankrupt for examination; and the consequence must be, that if the bankrupt declines examination, by not answering at all, or answering evasively, which is the same thing in effect, the warrant must continue in force.

"Whether the jurisdiction or power may be indiscreetly used by the Sheriff, is a different question entirely. In the present case, the Lord Ordinary would think that the Sheriff was right, for the complainer himself admits, that he has not made satisfactory answers to the questious specified, (book marked on the back, 2. p. 187.) But what occasions doubt in the Lord Ordinary's mind is this, that the complainer did attend the prescribed diets of examination,—and afterwards took the statutory oath; and it was after this that he was called on to undergo repeated examinations, and these too on oath, in order to disclose fact which would lead to the conclusion that he had committed perjury; and it is for not answering satisfactorily questions tending to said conclusion, that he has been imprisoned. If the complainer have sworn the statutory oath falsely, he has committed a great crime, and the remedy seems to be prescribed by sec. 33d of the statute, namely, that he is to be proceeded against as a criminal. This bill is marked for the Second Division; but as the sequestration depends before the First, this, as a branch of it, ought to go before it."

No. 303. Sheriff finds the answers to be unsatisfactory.
May 15. 1829. answers were false, for that would be no ground found a charge of perjury. But the bankrupt pretended defect of memory in regard to facts w therefore, his answers just amount to this, that h he is bound to tell.

Lord Balgray.—The examination seems the application of the proceeds of certain bills; h one engaged in extensive business to give any a tance of years, as to how they were applied.

Dean of Faculty.—I do not deny the pow mit, but a clear case must be made out against a strong step is resorted to. This case is char of great oppression. The bankrupt undergo and emits the statutory oath, which must be p as no objection was made. He is then, at the jected to examinations upon oath, at five d matters occurring previous to his bankrupt is called on for explanations which were no time. He is then thrown into prison, and under the pretence that he was concealing p perfectly naked, and when he is again brou endeavours to give every explanation in h unsatisfactory, and is sent back to prison an indefinite period. If he be a fraudulen but the Court ought not to sanction such o of examining a bankrupt.

The Court being of opinion that such a entitle them to interfere and liberate the questions before them, so as to judge whe or not, passed the bill simpliciter.

Suspender's Authorities.—1. Cook, B. L. 430, 7th
Charger's Authority.—2. Bell, 396, 5th edit.

A. Bayne,—W. Alexande

No. 304. James Glen, Pursuer.—*Sol*
Isobel Clark and Others, I

Expenses—Process—Reduction.—Several of the conveying both heritage and moveables, having in duction ex capite lecti, that they were willing to ex he having insisted on raising an action of redu interested being abroad, and not concurring in called all these parties, and refused to pass from those willing to renounce, or to allow decree of r parties were entitled, before the production was matter of expenses, and that they were entitled

No. 304.

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2d Division.
Lord Newton.
T.

The pursuer Glen, heir at law of the deceased Ann Clark, having intimated an intention of bringing a reduction ex capite lecti of a settlement executed by the deceased, whereby she conveyed her whole property, heritable and moveable, to the pursuer's brother William, at present abroad, and to the defenders Isobel Clark and others, it was immediately answered on the part of the latter that they would make no opposition to any reduction concerning the heritage, and a renunciation from all the disponees in the heritage, except William Glen, was offered; it being at the same time intimated, that if the pursuer, instead of accepting the renunciation, proceeded by reduction in consequence of his brother's absence, they should not be held liable in the expenses. The pursuer refused to accept a renunciation, unless from the whole disponees, his brother included; and thereafter he raised a summons, calling all the parties, and concluding for reduction of the settlement, "in so far only as respects the heritable subjects thereby conveyed," and for £100 of expenses. On this summons being served, the agent for the defenders Clark &c. applied to the pursuer's agent for an explanation as to the conclusion for expenses, and was informed by him that the pursuer would not pass from the claim for expenses against any one of the defenders, whereupon their agent wrote to the pursuer's agent as follows: "Under the new form of process I do not suppose that the defenders can be heard against this conclusion until they have lodged defences, which will occasion considerable expense. Now, before incurring this expense, I again repeat the offer made before the commencement of the process, to execute a renunciation, or to consent to a decree of reduction on the head of deathbed in the terms concluded for in the summons; but if, after this, you shall persist in your demand of expenses against these three defenders, and thereby compel me to lodge defences, and incur expenses for them, I have to intimate that they will not only insist on being assoilzied from the conclusion of expenses, but also to have decree against the pursuer for the expenses to be incurred by them in consequence of your refusal." The pursuer's agent having persisted in refusing this offer, defences were lodged, confined entirely to the conclusion for expenses. No appearance was made for William Glen, and on the cause coming before Lord Newton as Ordinary, his Lordship reduced the deed as not produced, and, on a debate as to expenses, found the defenders entitled to their expenses. The pursuer reclaimed, and contended that defences in a reduction, before satisfaction of the production, except with reference to preliminary objections, were incompetent; and therefore that they should be ordained to be withdrawn, and the cause remitted with instructions to assign a day to the defenders who had appeared, to satisfy the production, and proceed in usual form; and at any rate that the defences were unnecessary, as the defenders might have opposed a motion for expenses without lodging defences, and that the expense of them, therefore, should not be allowed.

The Court adhered.

W. Douglas, W. S.—W. Patrick, W. S.—Agents.

No. 305. JAMES PATERSON, Pursuer.—*Cockburn*—
R. SANDERSON and Others, Defenders.—*Jef*

Submission—Stamp.—1.—The circumstance of prorogations by p taining no power to prorogate, not being on a separate stamp, but mission, is not a valid ground of reduction of the decreet-arbitr No ground of reduction that an award as to expenses is for a pro nerally, without the amount being ascertained.—3.—Special case been sufficiently heard.

May 15. 1829.

2D DIVISION.
Lord Newton.
T.

THE defender Sanderson having been empl Paterson to build a house for him, and a dispute h rate of charges, they entered into a submission t their differing, to an oversman (a professional n The submission was dated in May 1827, and was of September, but no power of prorogation was g oversman. In August, however, the parties agre month, and a prorogation was accordingly writt submission. The arbiters, having differed, dev oversman in the beginning of September; and month a second prorogation till the 1st of Novem submission by the parties. Towards the end evaded a request by the oversman to prorogate and threw obstacles in the way of his completing sary for a decision. In these circumstances, t somewhat more rapidly than he would have dc been prorogated; and, on the last day to whi nounced his decreet-arbitral, which found Sande of the account claimed by him, under certain likewise entitled to two-thirds of the expenses submission; but the amount of these was not m

Paterson now brought a reduction of this d 1. That prorogations by parties of a submissio prorogate must be considered as new submis they ought to have been written on a new stam on the original submission.—2. That the ov agreeably to a principle of decision specified in he had not allowed him sufficient time to ans on certain productions made by the opposite pa cree for two-thirds of the unascertained expe finite sum, was inept.

The Lord Ordinary being satisfied that the from the prescribed principle of decision, and allowed Paterson sufficient time, and holdin require a new stamp, or, at any rate, if they not a ground of reduction, seeing it might sti of the penalty, assoilzied the defender, with

The Court adhered, concurring with the Lord Ordinary on these points, and observing, as to the decree being for two-thirds of the expenses, that this was no ground of reduction, although, if the pursuer should be charged for payment of an indefinite sum, he might be entitled to suspend. No. 3 May 15

D. Gray, S. S. C.—N. Grant, S. S. C.—Agents.

William Miller, Suspender.—*Jameson.*
Hugh Miller, Charger.—*Skene—M'Neill.* No.

Suspension.—Bill of suspension of a charge for expenses found due by a pursuer to a defender, who had been assoilzied, passed, the pursuer being also in the course of raising a reduction of the decree of absolvitor.

This was a question as to passing a bill of suspension of a charge on a decree of absolvitor awarding expenses; and the only point which arose was, whether the absolvitor must not be held as conclusive on the merits against the suspender, who had been the pursuer in the Inferior Court, as it had not been brought under review, and therefore that he was liable in expenses? May 1st D Bill-C Lord

The Lord Ordinary, on the merits, passed the bill; and as it was stated from the Bar that an action of reduction of the decree of absolvitor was in the course of being brought, the Court adhered.

Bowie and Campbell, W. S.—J. Gemmel,—Agents.

James Finlayson, Suspender.—*Jameson—Wood.*
James Pedie, W. S. Charger.—*Skene—Buchanan.* No. 30

Removing.—A party who had been ordained to remove from a farm within three weeks, allowed a reasonable period and accommodation to thrash out his grain and dispose of his cattle.

By a judgment of the Second Division on the 14th of February last, Finlayson was ordained to remove from a farm within three weeks, unless he paid to Pedie a certain sum of money, and relieved him from the obligations which he had undertaken to the landlord. Finlayson having failed to do so, Pedie charged him to remove within fifteen days from the farm. Of this Finlayson brought a suspension, on the ground mainly, that as he had on hand a quantity of unthrashed grain, and a large stock of cattle, he ought to be allowed a reasonable period and accommodation for thrashing out the grain and selling his cattle. May 16. 18 1st Divisi Bill-Cham Lord New D.

The Lord Ordinary refused the bill; but the Court having expressed an opinion that Finlayson should be allowed a reasonable time to thrash his grain and dispose of his stock, and Pedie having thereupon consented that he should have the use of the farm, and of sufficient stabling for three months, adhered under this qualification.

J. M'Donell, W. S.—J. Pedie, W. S.—Agents.

No. 308. WILLIAM EWING, Suspender.—*Sol.-Gen. Hope—Rutherfurd.*
ARCHIBALD WIGHT, Charger.—*Jeffrey—Cuninghame.*

Suspension — Decree in Foro — Arrestment.—1.—Incompetent for a defender to suspend a decree in foro on an allegation that expenses decerned for to the pursuer had been incurred to a person not authorized to act as an agent;—and,—2.—In a suspension of a charge by an arrestee, letters from the arresters to the common debtor passing from the arrestments, held satisfactory evidence of the arrestments being loosed.

May 16. 1829.

1ST DIVISION. Bill-Chamber. Lords Craigie and Corehouse. D.

WIGHT, having brought an action of damages against Ewing, obtained a verdict for £150. In the course of the process, different agents had been employed by Wight; but it appeared that the agent who ostensibly acted in the earlier stages of the cause was not the true agent, and that the proceedings were conducted by a person who was not then an agent. An interim decree having been taken out for part of these expenses, and Ewing having brought a suspension, on the ground that they had been incurred to the person who was not an agent, the Court passed the bill: and it was stated by Ewing that their Lordships had upon that occasion intimated, that if an agent permitted his name to be so used, they would inflict punishment on him; and that, in consequence, the charge was abandoned. After the verdict had been returned, and expenses found due, a remit was made to the Auditor, who taxed the expenses at £264: 5: 8, for £37: 13: 6½ of which Wight obtained decree from the Jury Court in his own name,—the rest being awarded to the agents who had been employed subsequent to the time when the cause had been conducted by the person not entitled to act as an agent. In the mean while arrestments had been executed as against Wight in the hands of Ewing, and a multiplepoinding raised; and a charge having been given to him on the decree, he brought a suspension founding upon the arrestments and on the multiplepoinding, and alleging that the £37 of expenses had been incurred to the person who was not entitled to act as agent, and that the charge was truly for his behoof. On the other hand, Wight alleged that the arrestments had been laid on at Ewing's solicitation; and he produced letters, subscribed by the arresters, departing from them. In regard to the expenses, he denied Ewing's statement, alleged that it had been made the ground of an objection to the Auditor, but rejected; and he contended that as the objection to the decree for expenses could only be stated in a reduction, it was irrelevant in a suspension.

Lord Craigie, 'in respect the arrestments specified in the bill appear 'to have been loosed, and also upon the merits, refused the bill, with ex- 'penses;' and observed in a note, that 'if the objection now urged with 'regard to the expenses claimed as having been disbursed by the charger 'himself was stated when the account was adjusted by the Auditor, the 'bill now offered is barred re judicatâ. If it was not stated at that time 'it cannot now be stated in the form of suspension, but only in a reduc- 'tion.' Lord Corehouse refused a second bill without answers; and the Court, without hearing the counsel for Wight, adhered.

DANIEL and ROSS, W. S.—ADAM and BROWN, W. S.—Agents.

R. C. BONTINE, Suspender.—*Baird—Spiers.* **No. 309.**
GRAHAM'S TRUSTEES, Respondents.—*Skene—Christison.*

Expenses.—The Court will not interfere with the decision of a Lord Ordinary as to expenses, except on strong grounds for doing so being shown.

AFTER the bill of suspension and interdict mentioned ante, Vol. VI. No. 17. p. 74 (which see,) had been passed, the Lord Ordinary remitted to a gentleman to inspect the woods on the entailed estates of Graham of Gartmore, and report what were necessary to be preserved for the comfort and amenity of the mansion-house, or were unripe for cutting. Both parties having agreed to abide by his report, the Lord Ordinary disposed of the matter of expenses by finding no expenses of process due, but that the expense of the report must be borne equally by both parties. Against this interlocutor, so far as it found no expenses of process due, the trustees reclaimed; but the Court adhered.*

May 16. 1829.
2D DIVISION.
Lord Medwyn.
T.

KER and DICKSON, W. S.—E. M'MILLAN, S. S. C.—Agents.

J. SCOTT and COMPANY, Pursuers.—*Sol.-Gen. Hope.* **No. 310.**
CAPT. J. BOOG, Defender.—*Forsyth—Robertson.*

Expenses.—A party subjected in expenses for delay in producing a deed.

AFTER some further delay in the case mentioned ante, Vol. VI. No. 128. p. 388, the Lord Ordinary again dismissed the action; but, before a reclaiming note presented by the pursuers came out for advising, the deed there alluded to was received from India. Thereupon the Court remitted to repone the pursuers, reserving to his Lordship to determine all points of expenses. His Lordship accordingly found the pursuers liable in a certain sum as occasioned by the delay; and the Court adhered.*

May 16. 1829.
2D DIVISION.
Ld. Cringletie.
F.

A. PEARSON, W. S.—R. BOOG, S. S. C.—Agents.

MRS. BAILLIE and J. ROGERS, Suspenders.—*Rutherfurd.* **No. 311.**
JAMES POLLOCK, Charger.—*Jeffrey.*

Submission—Summary Diligence.—Held competent to proceed by summary diligence for execution of a decree-arbitral, where there had been no consent in the submission that the decree should be recorded; but where the parties afterwards subscribed a minute, consenting that it should be registered for execution in common form. Question raised, whether an arbiter is entitled to stipulate for remuneration?

DANIEL BAILLIE died in October 1827, leaving the suspender Mrs. Baillie, his widow, and several children, to whom the suspender Rogers was appointed factor loco tutoris. A submission was thereafter entered into between Mrs. Baillie and the charger Pollock to certain arbiters, and, in case of difference of opinion, to an oversman. By the clause of registration, the parties consented that the submission should be recorded for preservation, "and that letters of horning on six days charge, and all other legal execution, may pass upon a decree to be interponed hereto, in form as effeirs;" but no authority was given to record the decree-arbitral itself. By a minute Rogers agreed "to the terms of the foresaid submission," and bound himself to abide by the award of the arbiters

May 19. 1829.
1ST DIVISION.
Bill-Chamber.
Ld. Corehouse.
H.

* In both these cases the Court strongly enforced the principle, that unless it were made clear, beyond the possibility of doubt, that the Lord Ordinary was wrong in his award of expenses, they would not interfere with his Lordship's determination.

No. 311.
May 19. 1829.

or the oversman. The arbiters having differed, the clerk to the submis sion was appointed overaman; but he communicated to the parties, tha as the disputes were of such a nature as to require a professional perso to dispose of them, which he could not do without great trouble, he ha "accepted the office of oversman, on the distinct understanding of bein remunerated for my trouble." An agreement was thereupon made an subscribed by the parties, that the oversman should "have it in h power to charge us, or either of us, with a reasonable gratification for th time and labour bestowed by him in the submission, notwithstanding any law to the contrary." At the same time the omission was discovere as to the recording of the decree-arbitral, and a minute was indorsed o the submission, bearing, that "considering that an omission has occurre in the registration clause, in so far as the parties have not consented th the decreet of the arbiters or oversman should be recorded, and sum mary diligence done thereon, the parties consent that the decree to l pronounced by the oversman be recorded in the books of Council an Session, or others competent, and that letters of horning pass and l directed thereon in common form." The oversman having decerne against Mrs. Baillie, and Rogers as factor, for a sum of money, (but n for any thing to himself,) a charge was given, of which they brought suspension, mainly on the ground that summary diligence was incomp tent. The Lord Ordinary having refused the bill,

Rutherfurd, for the Suspenders, contended, That as there was no clau in the original submission authorizing the decree to be recorded, and the minute was insufficient for that purpose, and merely authorized charge in common form, whereas the charge given was on six days, t diligence was incompetent.

Jeffrey, for the Charger, answered, That the parties had bound thei selves by the submission to pay whatever sum should be awarded; th the amount of that sum was to be liquidated and ascertained by the d cree of the arbiter; that the decree was therefore a relative document, that the case was brought within the principle of the decision findi that summary diligence was competent on a bond for a cash-credit f an indefinite sum, where it was liquidated by an account made up by t proper officer of the bank, although no authority was given to reco that account; but, at all events, the minute supplied any omission in th respect.

Lord Craigie considered that the stipulation which had been made by t oversman, (which had not been pleaded as an objection) vitiated the whole p ceedings, and therefore that the bill should be passed.

Lord President observed, that although there had been a stipulation, yet t arbiter had not decerned for any thing to himself, which would have been fat and he was not prepared to say that a mere stipulation would be so.

The other Judges concurred in this view; and they were also unanimously opinion that the objections to the diligence were not well founded.

The Court therefore refused the bill.

Scott, Finlay, and Balderston, W. S.—P. Hamilton, W. S.—Agents.

W. PAUL, (BOYD'S TRUSTEE,) Petitioner.—*Jameson—Maitland.* No. 312.
W. BOYD and Others, Respondents.—*Cuninghame.*

Bankrupt—Sequestration—Adjudication.—A bankrupt having made up titles erroneously to lands to which he had right, subject to a trust, and on which he had borrowed money, and the trustee on his sequestrated estate having proceeded to make up titles in correct form, and applied for a special adjudication, the Court adjudged all right the bankrupt might have, without prejudice of that of other parties.

May 19. 1829.
1ST DIVISION.
Lord Newton.
D.

IN 1787 Dr. Boyd executed an entail, inter alia, of part of his estate of Culbrattan in favour of his son John, whom failing, his second son Edward, which was recorded. By a separate deed he disponed also to John the other part of Culbrattan, described as possessed by one Hannay. In 1794 he granted a trust-disposition of all his estates, including the whole of Culbrattan, to his wife, his son Edward, and others, as trustees, for payment of his debts and provisions to younger children. He died in the course of the same year, and his wife and Edward were infeft as trustees. John survived his father without making up titles, and was succeeded by Edward, who got himself served heir, and made up titles to his father under the entail and disposition of 1787. He married, and borrowed from the trustees under his marriage-contract £3000, in security of which he disponed to them that part of Culbrattan not embraced in the entail, and which had been conveyed by the separate disposition; and these trustees were infeft. In 1826 the estates of Edward were sequestrated, and Paul having been appointed trustee, and discovered the error in the title of Edward having been made up to his father, and not to his brother John, charged him to enter heir to the latter; and, on the lapse of the charge, applied to the Lord Ordinary, during vacation, for a special adjudication of the above part of Culbrattan. The Lord Ordinary having decerned accordingly, appearance was made by a party having an interest under the trust of 1794, and by the trustees under the marriage-contract, by whom the £3000 had been lent, and who reclaimed on the ground, that as the lands were embraced under the trust, which was still in subsistence, and the adjudication was intended to defeat the heritable security for the £3000, it ought not to be allowed. The Court, however, being of opinion that Paul, as trustee, was entitled to adjudge any right or interest which the bankrupt might have in the lands, and that if he had no such right, the adjudication could not bestow it upon him, or deprive other parties of valid rights, adhered, 'reserving to them all claim of preference on the 'price of the lands of Culbrattan competent to them, in virtue of objec-'tions to the adjudication, the trust-deed founded on by them, or their 'heritable securities, and to the respondent (Paul) his answers thereto, as 'accords.'

STUART and SPROT, W. S.—A. CLASON, W. S.—Agents.

No. 313. COMMISSARY of DUNKELD, Pursuer.—*Sol.-Gen. Hope—Gordon.*
DUKE of ATHOLL, Defender.—*Keay—Jameson.*

May 19. 1829.
1ST DIVISION.
Lord Newton.
D.

THIS was a question whether certain lands belonging to the Duke of Atholl or the teinds, (which were now exhausted,) had been burdened with about forty-six bolls of meal to St. George's Hospital of Dunkeld; and whether a house now belonging to the Duke, and which had been possessed by him and his authors on regular titles for more than forty years, was the property of the Hospital? The Lord Ordinary assoilzied the Duke; and the Court, being satisfied that there was no evidence to show that the burden had been created on the lands, and that the Duke had a good prescriptive title, adhered.

W. H. SANDS, W. S.—H. GRAHAM, W. S.—Agents.

No. 314. JAMES SMITH, Pursuer and Suspender.—*Cockburn—Cuninghame.*
W. and T. HALL, Defenders and Chargers.—*Jeffrey—Jameson.*

Expenses.—Expenses found due subject to modification.

May 19. 1829.
2D DIVISION.
Ld. Mackenzie.
T.

ON the cause mentioned ante, Vol. VI. No. 356, p. 975, going back to the Lord Ordinary, his Lordship, after ordering Cases on the points remitted for reconsideration, found that the expenses in the submission incurred prior to the date of the composition-contract should have been limited to the amount of the composition on the same; and, in consequence of this, he found that the expenses of process, in which the pursuer was found liable, must be subject to modification. Having afterwards modified these expenses to a certain amount, Smith reclaimed as to the modification; but the Court adhered.

J. T. MURRAY, W. S.—GIBSON and HECTOR, W. S.—Agents.

No. 315. CHARLES THOMSON, Suspender.—*Sol.-Gen. Hope.*
WILLIAM THOMSON, Charger.—*Jeffrey—Christison.*

May 19. 1829.
2D DIVISION.
Bill-Chamber.
Admiralty.
F.

SUSPENSION of a charge on a decree of expenses by the Judge Admiral in an action of accounting. The Court pronounced a special interlocutor, suspending to a certain extent, and finding the letters orderly proceeded quoad ultra.

J. W. NESS,—RITCHIE and MILLER, S. S. C.—Agents.

No. 316. STUARTS and FLETCHER, Pursuers.—*Jeffrey—Christison.*
R. M'GREGOR and Co. Defenders.—*Sol.-Gen. Hope—Ivory.*

Retention—Principal and Agent.—A consignee having deposited for custody with the proprietors of a warehouse certain goods consigned to him, but without intimating that they were not his own property, and the owners of the warehouse having subsequently made advances to him, but not specially on the faith of the goods, or with relation to them, and the consignee having become bankrupt—Held that the proprietors of the warehouse were not entitled to retention against the true owners till satisfied of their advances to the consignee.

Action at the instance of Stuarts and Fletcher, merchants in Manchester, against M'Gregor and Company, merchants in Glasgow, for recovery of certain quantities of cotton belonging to them, and deposited in the warehouse of M'Gregor and Company by Neil Snodgrass, commission-agent in Glasgow, and consignee of Stuarts and Fletcher. M'Gregor and Company having pleaded retention for a balance due to them by Snodgrass, the cause was remitted to the Jury Court, where a verdict was taken for Stuarts and Fletcher, subject to the opinion of the Court of Session, on the following special case drawn up and agreed to by the parties:—"On the 14th day of April 1825, the pursuers Stuarts and Fletcher consigned to Neil Snodgrass, cotton-spinner in Glasgow, 36 bales of cotton belonging to them, to be sold on their account. On the 24th day of the same month, the said cotton, having no mark from which the defenders could know to whom the said cotton belonged, was placed by the said Neil Snodgrass in a warehouse belonging to the defenders. In so placing the said cotton in the said warehouse, the said Neil Snodgrass did not make it known to the defenders that the said cotton was the property of the pursuers, and did not conduct himself, with regard to the said cotton, in any way differently from what he would have done, had it belonged entirely to himself. M'Gregor and Company had the cotton placed in their warehouse, and there left with them as the custodiers; and Snodgrass was to pay them warehouse rent in respect of such custody. Snodgrass, with the knowledge of the defenders, drew samples of the cotton, and deposited these samples with certain brokers in Glasgow, with a view to their effecting a sale thereof. While the said cotton remained in the defenders' warehouse, the defenders held the key of the same; and when the said Neil Snodgrass required access to the goods, he obtained the same through application to the defenders, or their porter, who was at the warehouse. The said Neil Snodgrass, at the time of placing the said cotton in the defenders' custody as aforesaid, was indebted to the defenders, for goods purchased by him from them, in the sum of £237. 10s., for which a bill had been granted on the 24th day of March 1825, payable on the 27th day of July following; and which bill, after the said cotton came into the defenders' hands, was renewed by another bill for £240, granted by Snodgrass to the defenders, dated the said 27th day of July 1825, and payable four months thereafter. The said Neil Snodgrass, subsequently to the time of placing the said cotton in the defenders' custody as aforesaid, had certain further transactions with the defenders, in respect of which he became further indebted to them in the sum of £471 : 8 : 3 sterling; and the said sums of £240 and £471 : 8 : 3, amounting together to £711 : 8 : 3, remained owing by the said Neil Snodgrass to the defenders at the time he stopped payment, in the month of September 1825, and the said debt is still wholly unpaid. Neither at the time when the said cotton was lodged in the defenders' warehouse, nor at any after period, did the said Neil Snodgrass specially pledge the same to the defenders for the said debt, or any part thereof, nor was any

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reference made to the said cotton at the contraction of any part of the said debt, or at the renewal of the said bill.. The pursuers required delivery of the said cotton from the defenders, as their property, on the 22d day of September 1825, tendering payment of the freight and warehouse rent; but the defenders refused to make such delivery. The question for the opinion of the Court of Session is, Whether the defenders M'Gregor and Company had a general lien on the said cotton, warehoused as aforesaid, for the payment of Snodgrass's debt? If they had, the verdict and judgment to be for the defenders? If they had not, the verdict and judgment to be for the pursuers?" This question was appointed by the Lord Ordinary to be argued in Cases to the Court.

Pleaded for the Pursuers—

1. Even if the cotton had been the property of Snodgrass, the defenders would have had no lien or right of retention over it for a general balance, as was here claimed, the advances by them to Snodgrass not having been specially made with reference to the cotton in question. The defenders were mere custodiers of the goods, and as such cannot be in a better situation than a carrier or an artisan would be, who could only retain for the carriage, or the consideration for work performed on the goods; and so the defenders, if the cotton had belonged to Snodgrass, might have retained for warehouse rent or charges connected with it, but not for a general balance on their account, they being in a totally different situation from factors, brokers, &c., who may be thought entitled to a general lien.

2. But at any rate, Snodgrass not being the owner of the cotton, the defenders cannot retain as against the pursuers, the true owners, for a balance due by him. A person trusted with the possession of the goods of another, and thereby enabled to hold himself out as owner, (which, however, was not done here,) may bind the real proprietor by pledging the goods for advances; but merely depositing the goods in a warehouse does not bind the owner except for the warehouse rent and charges, and so no claim ever arises as between the owner and custodier to be the foundation of a plea of retention, which is only a means of compelling a counter obligation. Here no counter obligation did exist on the part of the defenders against the pursuers, and consequently there is no room for this plea.

Pleaded for the Defenders—

1. The claim of retention made by the defenders is not for advances prior to the goods being deposited with them, but only for subsequent advances. Now, supposing the goods to have been the property of Snodgrass, all subsequent advances, whether made specially with reference to the goods or not, must be held to have been made on the credit of these goods; and Snodgrass having, on the one hand, a claim for redelivery of the goods, and the pursuers, on the other, a claim for repayment of their advances, although, if both parties were solvent, these might not compensate each other, yet when Snodgrass became bankrupt, the

pursuers were entitled to refuse implement of their obligation, in consideration of his having become incapable of fulfilling his counter obligation, as has frequently been held both in England and Scotland. No. 316. May 19. 1829.

2. Snodgrass dealt with the defenders without informing them that the goods were not his own property, and conducted himself just as he would have done, had they belonged to him; and it is a rule established, from considerations of commercial expediency, that whenever proprietors of goods allow a third party to hold out to the world the appearance of ownership, "the person contracting with him has a right to consider him, to all intents and purposes, as the principal."* The defenders, therefore, are entitled to every remedy which would have been competent to them, had the goods been the property of Snodgrass.

LORD GLENLEE.—My opinion is in favour of the pursuers. I doubt whether such a claim was ever before made. Even had Snodgrass been the real proprietor, and a question had occurred between his general creditors and the defenders, I think, on the authority of the case of Harper v. Faulds, the defenders would not have been entitled to retention in respect of debts arising from extrinsic transactions. The question here, however, is with the true proprietors, and I never heard of a claim, not in consequence of any pledge by the party holding the goods, (who may be held to be authorized to pledge them,) but for a debt absolutely extrinsic, and bearing no reference to the goods, affording a plea of retention against the true proprietor. The very ground of retention fails as against him; for the ground is, that I am not more obliged to restore you your goods, than you to pay my debt; and as I could arrest in the hands of others, so I may retain in my own. But this cannot hold here, as the defenders cannot say, you must fulfil the expectations I had by your goods being deposited with us. There must be a concursus of claims in retention, just as in compensation; and so, if I allow the person in whose hands I have placed my goods to bind me to a certain extent, I will be liable, as if he pledged them for advances on them. But I cannot conceive that an extrinsic claim like this should be sustained.

LORD PITMILLY.—I agree with the opinion delivered, and I do not think there is much difficulty in this case. The nature of the obligation undertaken by Snodgrass was to pay warehouse rent in respect of custody. It is found by the special case that Snodgrass did not pledge the goods, and made no reference to the cotton on contracting the debt after the deposit. It is also established that the debt had nothing to do with warehouse rent of this parcel or any other. It was an extrinsic debt altogether. Then where is the difficulty as to the law? The defenders give up all claim as for prior debts; and as to the rest, we must consider, 1. What was the extent of the obligation when the goods were warehoused? And, 2. Whether any further obligation was contracted afterwards? Now, 1. The goods were warehoused under an obligation to pay warehouse rent, and nothing more; and, 2. The debts subsequently contracted were without reference to the goods. Then how is this different from the case of a banker or bleacher? I see, in one case somewhat similar, that I decided in favour of retention; but I afterwards concurred in adhering to Lord Mackenzie's interlocutor, who altered mine.† Then what dif-

* Dictum of Lord Mansfield, Paley, p. 253, citing 7. T. R. 360.

† Newall v. M'Kenzie, July 2. 1824, (ante, Vol. III. No. 150. p. 206.)

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ference does Snodgrass's bankruptcy make? With reference to this question, it is of importance that the goods did not belong to Snodgrass, but to Stuarts and Fletcher, and that there is no question with Snodgrass's creditors, but with Stuarts and Fletcher, who are solvent; and there being no obligation on them but to pay warehouse rent, I am clear they are under no other obligation.

LORD JUSTICE-CLERK.—The question at first struck me as attended with difficulty; and if any advances had been specially made on the cotton, I should have thought that, in consequence of the ostensible ownership on the part of Snodgrass allowed to be held out by the proprietors, the defenders would have been entitled to retain to the full amount of such advances. I soon became satisfied, however, that there was not a shadow of claim for the renewed bill which had been previously granted. My only difficulty was as to the subsequent transactions; and I own that for some time I had doubts, and I still think the defenders are in the same situation as if the property had been Snodgrass's, being deposited by him without any intimation, or any marks on the goods themselves to show that they did not belong to him. But looking at the contract, which was of deposit-ation only, and under an obligation merely to pay warehouse rent, and looking to the cases, and particularly that of Harper v. Faulds, from the decision in which I would not depart, I am disposed to give way to your Lordships.

Pursuers' Authorities.—1. Stair, 13. 9; 3. Ersk. 1. 37; 2. Bell, 127; Harper's Creditors, Jan. 27. 1791, (2666); Johnston and Manley, Feb. 13. 1818, (F. C.); M'Call and Co., May 18. 1824, (2. Shaw's Appeals, 189.)

Defenders' Authorities.—3. Ersk. 3. 34, and 4. 20; 2. Bell, 124-8. 131; Dictum of Lord Mansfield, Paley's Principal and Agent, citing. 7. T. R. 360; Baxter, Dec. 17. 1800, (App. Compensation, 4.); Hitchiner, Dec. 8. 1803, (14206); Gall, June 19. 1821, (ante, Vol. I. No. 95); Colquhoun, Nov. 15. 1826, (F. C.); Johnston, Feb. 13. 1818, (F. C.); Murray, June 9. 1744, (2626); Brough's Creditors, Nov. 26. 1793, (2585); Balleny, June 7. 1808, (App. Compensation, 5.); Auld, July 5. 1810, (F. C.); Sturgeons, Jan. 20. 1813, (F. C.); Mein, Jan. 17. 1828, (ante, Vol. VI. No. 121. p. 360); Dixon, Landale, and Co. Dec. 3. 1828, (ante, No. 62. p. 132.)

RENNY and HUNTER, W. S.—CAMPBELL and MACDOWALL, S. S. C.—Agents.

No. 317.

WILLIAM BROWN, Pursuer.—*Skene—Buchanan.* WEMYSS and WALKER, W. S. Defenders.—*Cockburn—Rutherfurd.* BILL-CHAMBER CLERK, Defender.—*Forsyth.*

Public Officer—Bill-Chamber Clerk—Agent and Client—Reparation.—1.—Question raised, whether the Bill-Chamber Clerk is responsible for a cautioner in a suspension after a sist has been intimated to the charger, and copy taken, and the bill passed without any objection;—and,—2.—An agent subjected in payment of a debt, and all loss and expenses incurred by his client, in consequence of admitted negligence in regard to a cautioner being received in a suspension who was utterly insolvent.

May 21. 1829. 1ST DIVISION. Lord Meadowbank. S.

PATERSON and FERGUS having been charged by Brown for payment of a bill of £40, presented a bill of suspension on the 2d of July 1813, and Brown employed Wemyss and Walker, W. S., to act as his agents. A sist was granted, which was intimated to and acknowledged by Mr. Wemyss on the 3d; and on the 14th the Bill-Chamber Clerk issued a bond of caution to the agent of Paterson and Fergus, which was returned, on the 20th, executed by Robert Macalpin, who was described as a merchant in

Leith. From a memorandum on the back of the bill, it appeared that, on the 18th of August, a copy had been ordered by Wemyss and Walker, and furnished; on which occasion it was alleged that, according to the practice of the Bill-Chamber, the executed bond must have been exhibited; and there was a marking on the back of the bond, which, it was said, proved that this had been the case. The bill was passed on the 15th of December, in respect of no answers; and, after a long litigation, the letters were found orderly proceeded, and expenses awarded to Brown. Paterson and Fergus had, however, become bankrupt, and it was alleged that, on inquiry, it was discovered Macfarlane was a person scarcely known in Leith; had never been worth one tenth part of the sums embraced in the bond; and that, at the date of its execution, he was an undischarged bankrupt. Brown then brought an action against his agents, Wemyss and Walker, for payment of the debt and expenses which had been decerned for, and for repetition of part of their own account which he had paid to them.

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In defence they pleaded, that it was the duty of the Bill-Chamber Clerk to ascertain the solvency of cautioners, and therefore he was the proper party.

The Lord Ordinary, 'in respect the Bill-Chamber Clerk is not called as 'a party, dismissed the action, reserving to the pursuer, if he shall be so 'advised, to raise a new action against the present parties, and any other 'party he may think proper;' and found him liable in expenses.

Brown having reclaimed, the Court, on the 25th of May 1827, upon payment of the previous expenses, allowed the Clerk of the Bills to be called as a party, and for that purpose sisted process for ten days, (see ante, Vol. V. No. 326. p. 703.) Brown paid these expenses, and then brought a supplementary action against the Bill-Chamber Clerk; who pleaded in defence, that as Brown's agents had taken a copy of the bill, without lodging any caveat against receiving the cautioner, they must be held to have tacitly approved of him, and that the Bill-Chamber Clerk was not liable as surety for cautioners, but was only "responsible for acts of malversation, according to the rules of common law and justice, applicable to the circumstances of the case," as had been established by the Act of Sederunt, June 14. 1779, and by the cases of Stanners and Sibbald. Wemyss and Walker, on the other hand, denied that they had acted otherwise than they were bound to do; whereas Brown averred that they had committed gross negligence.

When the case came to be again advised,

Lord Balgray observed, that the case of Sibbald was erroneously reported; that he had been counsel for the pursuer, and that the circumstances on which the judgment proceeded were these:—In the case of Stanners it had been decided, that where the party had taken a copy of the bill, and made no objections to the cautioner, no liability could be fixed on the Clerk. In that of Sibbald, a copy had also been taken; and when it was argued before the Lord Ordinary, it was supposed that no objection had been intimated to the Clerk, and therefore he assoilzied

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him; but it turned out that the agent had actually written to the Clerk, objecting to the cautioner, and that the Clerk had disregarded these objections, and received him. When the case, therefore, came to be advised in the Inner House, his Lordship, as counsel for the pursuer, read the letter; and the Court, in respect of it, altered the interlocutor, but at the same time delivered an opinion affirmative of the rule laid down in the case of Stanners.

The Court, however, being of opinion that it would be expedient, without at that time deciding as to the liability of the Clerk, to remit the case, as between Brown and Wemyss and Walker, to the Jury Court, made a remit accordingly, and superseded the case as against the Clerk. When it went to the Jury Court, Wemyss and Walker lodged a minute, agreeing to Brown "asking and obtaining judgment for the principal sums concluded for, with interest, exactly as he might have done if he had obtained a verdict," and to move for expenses. The case was then retransmitted, and a motion having been made by Brown, the Court assoilzied the Bill-Chamber Clerk, and found him entitled to expenses against Brown; found Brown entitled to repetition of those which he had previously paid to the Clerk, and to relief from Wemyss and Walker of those in which he had now been found liable, and to full expenses of process.

Defenders' Authorities.—Stanners, March 1. 1796, (13131); Sibbald, Feb. 23. 1785, (13139.)

Greig and Morton, W. S.—D. Fisher, S. S. C.—Renton and Grant, W. S.—Agents.

No. 318.

James Goodall, (Morison's Trustee.)—*Keay—Murray.*
William Finlayson, (Weir's Assignee.)—*Jameson—Neaves.*

Competing.

Right in Security.—A party having granted two promissory notes for the accommodation of the owner of a ship, who executed a vendition of it in security, and got the money by discounting the notes with a banker; and the granter of the notes having become bankrupt, and settled with his creditors for a composition, and thereafter assigned the vendition to the banker—Held, that although the banker, as in a question with the granter of the notes, had right only to a composition on their amount, yet, in a question with the owner of the ship and his creditors, he was entitled, by virtue of his assignation, to recover the full amount out of the ship.

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On the 2d of March 1826, Bruce Morison, sole owner of the schooner Abrinca of Arbroath, then at sea, executed a vendition in favour of James Weir, proceeding on the narrative that Weir "has instantly advanced and lent to me, by bills and otherways, the sum of £600 sterling;" and "therefore, and for his further and better security for the repayment of the said principal sum of £600 sterling, and interest that shall fall due and become payable thereon from and after the date of these presents," he assigned the vessel to Weir, and empowered him to take possession, and dispose of her, if the money were not repaid on or before the 1st of March 1827. On the following day the vendition

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was intimated at the Custom-house, and an indorsement to that effect made upon it; and on the 4th Weir granted two promissory notes for £300 each to Morison, payable twelve months after date, and the vendition was then delivered to him. Morison carried these notes to William Finlayson, agent for the Montrose Bank at Arbroath, with whom he discounted them. It was alleged by Finlayson, that at this time Morison made him aware of the nature of the transaction, and that he advanced the money in reliance on the vendition; but of this there was no evidence, and the vendition was not then transferred to him. The money thus obtained by Morison was applied to his own benefit.

On the 11th of May the estates of Weir were sequestrated, and Goodall was chosen trustee. In July Morison became insolvent, and executed a trust-conveyance of his whole effects, including the Abrinca, in favour also of Goodall, for behoof of his creditors. To this trust Finlayson acceded; but he alleged that he did so relative to a different debt from that of the promissory notes.

In October Goodall, as trustee of Weir, obtained from him a conveyance to the vendition; but in January 1827 Weir settled with his creditors by a composition of 4s. 6d. per pound, obtained his discharge, and acquired right to his whole effects. On the 10th of February Weir executed an assignation of the vendition in favour of Finlayson; and on the same day, and by an arrangement among the parties, and without prejudice to their respective rights, the Abrinca was sold by Goodall, as trustee on Morison's estate, and the price was paid to him. Goodall, as Morison's trustee, on the following day, offered payment to Finlayson of the composition of 4s. 6d. per pound on the £600 due by Weir; but this was refused by Finlayson. A multiplepoinding was then brought by Goodall, to ascertain whether he or Finlayson had right to the price of the vessel. The Lord Ordinary having preferred Finlayson, Goodall reclaimed; and the Court, having some difficulty, ordered Cases.

On the part of Finlayson it was maintained—

1. That as he had discounted the notes, in reliance on the security of the vendition, he was, agreeably to the decision in the case of Sir William Forbes and Company v. M'Nab, entitled to the sole benefit of it.

2. That, at all events, as Weir, by the settlement under the composition-contract, in January 1827, obtained a retrocession of his estates, including the vendition, and as he would have been entitled (on the supposition that he had paid the notes when they fell due) to have operated his relief by means of that vendition, it was quite competent for him to assign it to any party who chose to take that burden upon him; and it was irrelevant and jus tertii to Morison, or his trustee, to inquire whether that assignation was made for full value or not; and therefore it was of no importance in a question with Goodall, as the representative of Morison, that Weir was only bound to pay Finlayson the composition on the 600.

To this it was answered by Goodall—

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1. That as the vendition was executed before any advance was made, it could not be regarded as an effectual security.

2. That at all events, as it was granted merely to secure Weir against being brought under advance, and as no cash was ever advanced by him, he could not avail himself of it as a security in relief; and,

3. That as Weir, at the utmost, could only be called on to advance the composition, Finlayson, as his assignee, could not insist under the security for relief to a greater extent.

Lord Balgray.—This is a question of some importance. It is not a question of double ranking, but a question of property on one side, and a question of retention on the other. There has been a good deal of confusion introduced into the argument from Mr. Goodall being the trustee on both estates, and so connecting their rights and interests in a way which does not subsist in any way; and therefore we must view the question as if there were two separate and distinct bankrupt estates. There are various propositions laid down by Mr. Goodall, which are of no importance in the ultimate decision of the point, and which are argued at some length. 1. He has argued that the original transaction is objectionable, as the vendition was executed before the money was advanced. But this is the case in all securities. No prudent person will advance his monies till the pledge is put into his hands, or his infeftment delivered to him. 2. Neither is there, in my mind, the smallest objection to the transaction, that promissory notes were delivered, and not cash. This was agreeable to the bargain of parties, and is the same in mercantile understanding. The bargain was completed in terminis. It was thereby Morison got the money de facto. It was quite the same as if Morison had got so many bullocks, or so many webs of cambric, and had turned them into cash. 3. Neither do I think that the smallest argument can be drawn from the proceedings in the sale of the ship, which was most properly conducted, with the consent of all concerned, but it was always salvo jure. 4. Last of all, it will be remembered that Morison is not a creditor of Weir. He has not the smallest right to interfere with the trustee or his creditors in the management of his estate. He has a right to redeem his pledge, but no other right on earth. The creditors may discharge Weir without payment of one farthing; but does that confer any right on Morison? His pawn ticket is his bills to Finlayson. Let him produce these to Weir and his creditors, and then he may demand restitution of his pledge. In short, the question comes to be, what is the nature of the rights of the two bankrupt estates? It was not a sale. It was a security. So far, then, it is clear that the property is not transferred out and out, but merely a pledge; and the question comes to be, whether or not has Weir fulfilled his bargain? And has he, or has he not, procured the value which he wanted for this pledge? Weir has done so; and his creditors, who represent his estate, are entitled to maintain so. From them the means were obtained, and these means directly applied to the behoof of Morison. This pledge was part of Weir's estate. It was conveyed by him to his trustee, and again retrocessed to him on the arrangement with his creditors. Mr. Goodall was bound to reconvey.

The case may be viewed in three lights. 1. Suppose Weir had remained

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solvent, and retired his acceptances, could any one dispute but he was entitled to retain? 2. What difference does his bankruptcy make? Does not his pledge become part of his estate? And are not his creditors to retain, as well as himself, till his obligations are fulfilled? If Weir's creditors retired his acceptances, can it be denied but that they are entitled to avail themselves of his securities relative thereto? 3. Now if a trustee could enforce the pledge, what right has Morison or his creditors to insist that the creditors of Weir shall not be entitled to give up the whole estate to Weir himself? Morrison's creditors have got full value from the pledge from Weir's credit; and until they take up Weir's bills, they have not a vestige of right to the ship, which has been legally and properly conveyed to Finlayson as a pledge.

Lord Craigie concurred.

Lord Gillies was of the same opinion; and observed that the whole difficulty of the case arose from the perplexed way in which the facts had been stated, and the erroneous reasoning on which Finlayson had chiefly rested his case. The material facts were these:—Morison, in consideration of bills granted by Weir, delivers to him the vessel in security, and these bills are then discounted with Finlayson. This could confer no right on Finlayson to the ship, any more than if Weir had given Morison an order upon his cash-credit. Then Morison and Weir become bankrupt, and the vessel is conveyed to the trustee on the two separate estates. It is manifest that Morison, and consequently his trustee, could only acquire right to the ship, free of the burden created by the vendition, by paying the bills; and, on the other hand, Weir and his creditors were entitled to hold the ship, in virtue of the vendition, in security of that debt. Weir then settles with his creditors, and reacquires right to the vendition. He then assigns it to Finlayson, who thus acquires right to the vendition, not by virtue of the advance which he had made, but by virtue of this assignation. Morison, the debtor, had plainly no title to inquire what the considerations were which induced Weir to make his assignation. He was bound to pay the debt, and could only redeem the vessel by doing so.

Lord President.—That is entirely my opinion. By the settlement of Weir with his creditors he got back his whole effects, including the vendition, and he then makes it over to Finlayson. If this was an improper preference, it may give rise to a question between Weir's creditors and Finlayson; but how can Morison or his creditors interfere? Morison got the £600, or, in other words, full value for the vendition; and therefore it is impossible to say that he or his estate can be injured by this transaction.

The Court accordingly adhered to the Lord Ordinary's interlocutor.

Goodall's Authorities.—3. Ersk. 1. 33; 4. Bank. 45. 182; Gordon, Feb. 5. 1824, (ante, v. II. No. 635); 2. Ersk. 8. 35 and 36; 1. Bell, p. 8.

Finlayson's Authorities.—2. Ersk. 8. 35 and 36; Sir W. Forbes and Company, May 29. 6, (F. C.).

J. L. Mitchell, W. S.—J. Morgan, S. S. C.—Agents.

No. 319.

MRS. REEVE, Advocator.—*A. M'Neill.*
THOMAS DYKES, Respondent.—*Cuninghame—Handyside.*

Agent and Client—Taxation of Account.—Held to be the duty of the Auditor, in taxing an account between agent and client, not only to deduct from, but to add to the charges, so as to make them conformable to the established regulations.

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1st DIVISION.
Lord Newton.
S.

MR. DYKES, a writer in Hamilton, was employed by Mrs. Reeve as her law-agent; and, on the 14th of February 1826, he rendered his account, amounting to £205, of which he had received £147, thus leaving a balance in his favour of £58. In this account there were several blank charges; and others were stated at a lower rate than that allowed by the regulations. Mrs. Reeve insisted to have the account taxed by the Auditor. This Dykes declined to accede to, as he had rendered it on the footing of an amicable settlement, but stated his readiness to submit to the Auditor an account made up agreeably to the regulations. Mrs. Reeve not having agreed to this, Dykes brought an action against her before the Sheriff of Lanarkshire, founding on a new account amounting to £242 which, after deduction of the £147, left a balance of £95 in his favour instead of £58. The Sheriff found that Dykes, under the circumstances was bound by the first account, and remitted it to be taxed by the Auditor of the Sheriff Court at Hamilton. When the case came before the Auditor, he adopted the Glasgow regulations as the rule, seeing that those for Hamilton had never been sanctioned by proper authority, and proposed, in taxing the account, to increase certain of the charges which were stated below those authorized by these regulations. This was opposed by Mrs. Reeve, who contended that it was ultra vires of the Auditor to make any such addition; but the Auditor proceeded to do so, and reported to the Sheriff, "that the account remitted to be taxed ought, according to the regulations, to be increased to £75 : 4 : 3; but if the Court be of opinion that the Auditor had no power to add to or amend the charges, then the pursuer's claim will fall to be restricted to £46 : 10 : 2 sterling." The Sheriff "approved of the principle on which the Auditor has taxed and reported on said account, in respect that it formed part of the Auditor's duty, under the remit to him, not only to tax off and reduce articles which appeared to be improperly charged, but also to increase and insert charges for articles which he considered as under stated, not filled up, or altogether omitted."

Mrs. Reeve then brought an advocation, in which she contended,

1. That as the account libelled had been rejected by the Sheriff, and he had found that Dykes was bound by the one which he had originally rendered, it was incompetent to decern for any part of that account, seeing that it was not libelled on; and,

2. That, at all events, it was not competent for the Auditor to enlarge the amount of that account; and therefore decree could only be pronounced for the balance, being £58.

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The Lord Ordinary "advocated the cause, sustained the reasons of advocation, altered the interlocutor of the Sheriff, and found the advocator was only liable for the balance of the account remitted to the Auditor in the Inferior Court, being £58," and decerned accordingly; but found no expenses due.

Dykes having reclaimed, and the Court being unanimously of opinion that the judgment of the Sheriff was correct in approving of the principle upon which the Auditor had taxed the account; and that although the original one was not libelled on, yet as the action truly concluded for payment of the business performed, it was quite competent to decern for the balance ascertained by the Auditor; and therefore altered the interlocutor of the Lord Ordinary, repelled the reasons, and remitted simpliciter.

Respondent's Authorities. — Queensberry Executors, July 5. 1825, (ante, Vol. IV. No. 123); Gordon, May 16. 1826, (ante, Vol. IV. No. 370.)

W. STUART, W. S.—W. WADDEL, W. S.—Agents.

No. 320.

R. ROBERTSON, Pursuer.—*Jeffrey—Monteith.*
J. BISSETT, Defender.—*M'Neill.*

Jurisdiction.—Held incompetent for the Court of Session to sustain a reduction of a sentence of Justices of Peace, under the 17th Geo. III. c. 56, 'for the more effectually preventing of frauds' in manufactures, in respect it is a criminal statute, even to the effect of giving civil redress under conclusions for damages in the same summons, and although excess of power was alleged.

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2D DIVISION.
Lord Newton.
F.

BY 17th Geo. III. c. 56, entituled "An act for amending and rendering more effectual the laws now in being for the more effectually preventing of frauds and abuses by persons employed in the manufacturing of hats," &c. it is enacted, inter alia, that it shall be competent to two Justices of the Peace, on complaint being made to them on oath, to grant warrant to search for materials suspected to have been embezzled by workmen; and that in the event of the said materials being found in any house, if the owner of the house "shall not give an account, to the satisfaction of the said Justices, how he, she, or they came by the same, then the said person or persons so offending shall be deemed and adjudged guilty of a misdemeanour, and shall be punished in manner herein after mentioned, although no proof shall be given to whom such materials belong." The punishments authorized under this statute are fines, imprisonment, and in certain cases public whipping.

In the month of January 1828, the defender Bissett, founding on the above mentioned statute, with concourse of the procurator-fiscal, presented to the Justices of Peace of the county of Ayr a petition and complaint, setting forth that a certain individual had obtained from him some cotton yarn for the purpose of being wrought, but that the same had been carried away, and had subsequently been found concealed in the house of the defender Robertson under a search-warrant granted by

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the Magistrates of Girvan, and praying the Justices to grant warrant for citing such witnesses as might be necessary for instructing that Robertson had been guilty of a violation of the statute, and thereupon to fine and amerciate him in one or other of the penalties contained in the act. No information, however, was made on oath either to the Justices or the Magistrates of Girvan, by whom the search-warrant had been granted. After some procedure, the Justices found that Robertson had contravened the statute, and found him liable in the mitigated penalty of £10. On this Robertson raised the present action before the Court of Session, concluding, 1. That the sentence of the Justices should be reduced and set aside, on the ground, inter alia, that they had exceeded their powers in so far as they had proceeded without information on oath, as required by the statute; and, 2. On the same being reduced, that Bissett should be found liable in damages. Against this action it was pleaded, as a preliminary defence, that the proceedings before the Justices, being of a criminal nature, could not be brought under review of the Court of Session. The Lord Ordinary appointed this matter to be argued in Cases.

Pleaded for the Pursuer—

1. The provisions of the statute in question are more of the nature of regulations of police, than for the punishment of a crime, properly speaking; and the Court of Session has frequently exercised jurisdiction in regard to similar Acts of Parliament without objection, as in the following cases—Couper v. Ogilvy, (7388); Guthrie v. Cowan, 1807, (App. Jurisdiction, 17); Buchanan v. Toward, 1754, (7347.)

2. When excess of power by Inferior Judges, under a statutory jurisdiction, is averred, the Court of Session is competent to set aside their proceedings, even although, in the subject-matter of them, it has no jurisdiction,* which is not exactly the case with the Court of Session in regard to criminal matters, this Court having undoubtedly a certain jurisdiction in criminalibus; and,

3. At all events, every Court is entitled to judge of matters not otherwise competent to it, when incidental to a question in which they have jurisdiction. Now here the main object of the action is to obtain civil reparation in the shape of damages; and the reduction is merely incidental, to enable the Court to determine on the matter of damages. They may therefore competently entertain it; and if they did not, no civil remedy would be competent, as the Criminal Court can neither entertain a process of reduction, nor a claim for civil reparation.

Argued for the Defender—

1. This statute is clearly a criminal statute, imposing fine, imprisonment, and whipping as punishments, and proceedings under it are daily brought under the review of the Court of Justiciary; and although in

* See Brown v. Heritors of Kilberry, Nov. 15. 1825, (ante, Vol. IV. No. 150. p. 174. affirmed in appeal, 3. Wilson and Shaw); and Ross, March 2. 1826, (No. 338. p. 514.)

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some similar cases the Court of Session have taken cognizance of such proceedings, the question of their jurisdiction was not raised.

2. Although, where the judgment of an Inferior Court is declared conclusive, excess of power will warrant the superior jurisdiction to review it, still the power to review must rest with that Court having an inherent jurisdiction in the subject-matter of the proceedings, and here, of course, it must lie with the Court of Justiciary as the Supreme Court in criminalibus; but, besides, the alleged excess of power is merely an irregularity in the form of procedure.

3. The reductive conclusions of this action are the primary conclusions, and those for damages are merely consequent on the reduction. It is impossible, therefore, to support the jurisdiction of the Court in a criminal matter, merely by adding a conclusion of damages as for civil reparation.

The Lord Ordinary sustained the preliminary defence, and dismissed the action, but, "in respect the question is not without difficulty," found no expenses due.* Both parties reclaimed, Robertson on the merits, and Bissett as to expenses. The Court refused the reclaiming notes of both parties, but found Bissett entitled to expenses since the date of the Lord Ordinary's interlocutor.

Lord Justice-Clerk.—It is perfectly clear that this statute is from beginning to end a criminal statute. Proceedings under it have frequently been reviewed by the Court of Justiciary, and we can give no countenance to judgments upon it being brought under review of this Court. The conclusion for damages is a mere sequel to the reduction.

The other Judges agreed.

Pursuer's Authorities.—(1.)—2. Hume, p. 70; Porteous v. M'Beam, July 8. 1818, (F. C.); Dictum of Lord President Blair in Berry, Jan. 17. 1809, (F. C.); Couper v. Ogilvy, (7388); Guthrie v. Cowan, 1807, (App. Jurisdiction, 17); Buchanan v. Toward, 1754, (7347); Johnstone, May 15. 1810, (F. C.); M'Kay, Skirving, and Co., Nov. 19. 1813, (F. C.)—(2.)—1. Ersk. 3. 21, (Ivory's edition,) note and cases there referred to.—(3.)—1. Ersk. 2. 8; 2. Hume, 68-9; Dunbar v. Sinclair, 1790, (7395); Leslie v. M'Kenzie, 1785, (7422); Kerr v. Shaw, 1774, (7421); Mair v. Shand, 1778, (7421.)

Defender's Authorities.—2. Hume, 70; Berry, Jan. 17. 1809, (F. C.); Johnstone v. Guthrie, May 15. 1820, (F. C.); Cumming, June 29. 1820, (2. Hume, 70); Meek, June 5. 1812, (F. C.)

J. Henderson, S. S. C.—T. Landale, S. S.C.—Agents.

* His Lordship added the following note:—"It appears to the Lord Ordinary, from the summons, that the action is mainly and principally a reduction of the judgment of the Justices in a complaint founded on the act of the 17th Geo. III. c. 56; and that although there is a conclusion for damages, this is introduced as dependent upon and consequential to success in the reduction. But as the statute appears to be a criminal one, and the proceedings before the Justices entirely of a criminal nature, following on a complaint made with the concurrence of the procurator-fiscal, and for penalties solely ad vindictam publicam, it appears to the Lord Ordinary that the review of these proceedings belongs to the Court of Justiciary, and is not competent to the Court of Session."

No. 321.

M'INTYRE'S TRUSTEES, Nominal Raisers.—*Cowan.*
MRS. JANET BELCH or SCHAW and HUSBAND, Defenders.—*Jameson—Shaw.*

Process—Multiplepoinding.—Process of multiplepoinding held competent as to an heritable bond, to the effect of determining whether the amount was heritable or moveable in a question between the heir and executor of the party to whom it was taken.

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2D DIVISION.
Lord Newton.
F.

MRS. ELEONORA WEBSTER or COVENTON granted to the late Andrew Belch, writer in Ayr, an heritable bond for £1850, said to be for money advanced, but truly in consideration of certain law-accounts due to him, the amount of which was not ascertained. Of this bond, on which Belch took infeftment, Sir James Fergusson and others, trustees appointed in a deed executed by Mrs. Coventon and Duncan M'Intyre, a former husband, now deceased, brought a reduction, directed against Peter Belshes, the nephew and heir of Andrew Belch, and Mrs. Schaw and husband, his executors, on the ground that the amount of the bond had not been advanced, and greatly exceeded the accounts due to Andrew Belch, which the trustees were willing to pay when audited; and also that Andrew Belch, who was Mrs. Coventon's confidential agent, had, in knowledge of the trust, made up her titles to certain property thereby conveyed, and taken the bond in question over it, instead of having it conveyed to the trustees in terms of the trust-deed. Peter Belshes, the heir, appeared, and consented to restrict the amount of the bond to what the accounts of his uncle should be taxed to by the Auditor; and contended, that on this being done, the trustees had no interest to ask decree of reduction, which could only affect the question, whether the amount of the bond, as restricted, should go to the heir or to the executors of Andrew Belch. The accounts were accordingly remitted to the Auditor; and having been taxed to £1411, the Lord Ordinary pronounced an interlocutor restricting the bond to that amount, and, quoad ultra, assoilzieing from the conclusions of reduction, on the ground that the trustees had no interest to insist for a total reduction, but finding Peter Belshes liable in expenses. In this process appearance had been made for Mrs. Schaw and husband, the executors of Andrew Belch, who did not oppose the reduction. They averred, however, that the bond having been illegally obtained by Andrew Belch, the amount due him by the trustees was moveable in his person; and to have this matter decided between them and the heir, they raised a summons of multiplepoinding in name of the trustees, as to the amount of the sum which might be held due under the bond, setting forth that it was disputed between the heir and executors of Andrew Belch, whether this sum was heritable or moveable, and that a process of multiplepoinding was necessary for determining the same.

To this summons the trustees gave in objections, that while the heritable bond was unreduced, a multiplepoinding in regard to it was incompetent; and on the interlocutor above mentioned having been pronounced

in the reduction, the Lord Ordinary, 'in respect of the decreet of absolvitor in the process of reduction betwixt the present parties,' found that 'the present pursuers of the process of multiplepoinding are not entitled 'to insist therein;' and therefore dismissed the same, 'as incompetent.' No. 321. May 22. 1829.

Mrs. Schaw and husband reclaimed, and contended, that wherever the character of property, as heritable or moveable, was disputed, it was quite competent to try that question in a multiplepoinding, as had been done in the case of Dick v. Gillies, and many others.

The Court recalled the Lord Ordinary's interlocutor, and remitted to his Lordship to receive the claims of parties, and proceed.

Lord Justice-Clerk.—I cannot accede to this interlocutor. The question of whether the amount of the bond be heritable or moveable may be competently discussed in a multiplepoinding.

The other Judges agreed.

Hunter, Campbell, and Cathcart, W. S.—A. Monypenny, W. S.—Agents.

M'Intyre's Trustees, Pursuers.—*Cowan.* No. 322.
P. Belshes and Commissioners, Defenders.—*D. Dickson.*
Mrs. Schaw and Husband, Defenders.—*Shaw.*

Reclaiming note by the defender Belshes against the interlocutor of the Lord Ordinary in the reduction mentioned in the preceding case, finding him liable in expenses, refused; and note for the other defenders, for variation of the interlocutor on the merits, refused as unnecessary. May 21. 1829. 2d Division. Lord Newton. F.

Hunter, Campbell, and Cathcart, W. S.—R. and A. Kennedy, W. S.—A. Monypenny, W. S.—Agents.

James Fairlie, Pursuer.—*Sol.-Gen. Hope—More.* No. 323.
Sir Alexander Maitland Gibson and Others, Defenders.—*Cockburn—Maitland—White.*

Road Trustees—Title to Sue or Defend.—A party having taken a toll-bar advertised to be let by the general road trustees of a county, but of which the lease was granted by those of the district in which the toll-bar was placed; and the tolls having been evicted by the erection of check-bars let to a tacksman in another district—Held competent to insist in an action against the general trustees and the district trustees, by whom the lease was granted, for reparation of the loss suffered by the eviction.

In March 1827, the road trustees for the county of Edinburgh advertised that the toll-bars lying in the districts of Corstorphine, Calder, and Slateford, were to be let on the 18th of April, by public roup, from May 1827 to May 1828. The pursuer Fairlie was preferred to the toll-bar at Whitehouse in the district of Corstorphine, and a tack was granted to him by Sir Alexander Maitland Gibson, as convener of the trustees for that district. About the same time the toll-bar of Tynecastle Braehead, in the district of Calder, was let to Robert Latta and Company, in connexion with which two check-bars had previously been erected to the May 22. 1829. 1st Division. Lord Newton. H.

No. 321.

M'INTYRE'S TRUSTEES, Nomi
MRS. JANET BELCH or SCHAW an
Jameson—Sh

Process—Multiplepoinding.—Process of multiplepo
bond, to the effect of determining whether the amoun
between the heir and executor of the party to whom i

May 21. 1829.

2D DIVISION.
Lord Newton.
F.

MRS. ELEONORA WEBSTER or COVEN
Belch, writer in Ayr, an heritable bond f
advanced, but truly in consideration of cer
amount of which was not ascertained. Of
infeftment, Sir James Fergusson and oth
executed by Mrs. Coventon and Duncan M
deceased, brought a reduction, directed ag
and heir of Andrew Belch, and Mrs. Sch
on the ground that the amount of the bon
greatly exceeded the accounts due to Ar
were willing to pay when audited; and als
Mrs. Coventon's confidential agent, had, i
up her titles to certain property thereby
in question over it, instead of having it co
of the trust-deed. Peter Belshes, the he
restrict the amount of the bond to what th
be taxed to by the Auditor; and contend
trustees had no interest to ask decree c
affect the question, whether the amount o
go to the heir or to the executors of Andr
accordingly remitted to the Auditor; and
the Lord Ordinary pronounced an interl
that amount, and, quoad ultra, assoilzieir
duction, on the ground that the trustees
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mons of multiplepoinding in name of the t
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disputed between the heir and executors
sum was heritable or moveable, and that
was necessary for determining the same.

To this summons the trustees gave in c
able bond was unreduced, a multiplepoind
petent; and on the interlocutor above men

No. 323.
May 22. 1829.

westward and eastward of Gorgie loan, al of which no mention was made in the a granted to Fairlie. Possession was taken pany respectively—the latter of whom pr check-bars from passengers, who in co free through the Whitehouse bar. Agai plained to the trustees, but that no relief sequence he presented a petition on th Sheriff of Edinburgh against the trust Latta and Company, praying for remova ward of Gorgie loan, and an interdict ag the westward, at least to the effect of le passengers to pass free through the Whit damages from May to the 31st of Augus

The Sheriff, after some litigation, gra but, before the damages were ascertai against Sir Alexander Maitland Gibson, the Corstorphine district, and Mr. Crans presenting the general trustees, in which the 25th of May 1827, in consequence means of the check-bars.

This action was opposed by dilatory d maintaining, that as the ground of compl not by the trustees of the Corstorphine d der, he was not the proper party; and M had not been granted by the general tru alleged to have been occasioned by them, him; and both parties further pleaded lis action before the Sheriff.

The Lord Ordinary dismissed the actic 'bring a new action against the proper 'have been sustained by him subsequent 'so advised;' and found him liable in ex

Fairlie having reclaimed, and restricte to the damages subsequent to the 31st of

The Solicitor-General was proceeding truly one of non-liability, and therefore ped by the

Lord President, who called on Cockl in what respect the defence could be consi

Cockburn, with this view, began to state riff, and the plea of lis alibi, when he was

Lord Gillies, who observed that it w of the Lord Ordinary could be rested u reserved to the pursuer to bring a new ac for the damage subsequent to the 31st of

'the trustees, but in almost all the most important purposes of the trust, 'and that these blanks were filled up after the deed arrived in this 'country. The Lord Ordinary conceives that in such circumstances it 'is ineffectual, both at common law, and as struck at by the act 1696, 'c. 25.'

No. 325. May 22. 1829.

The trustees having reclaimed, the Court expressed an unanimous opinion that it was impossible the deed could be sustained, but sisted process for six months, 'in order to afford an opportunity to the de- 'fenders of bringing an action of proving the tenor of the alleged dupli- 'cate of the trust-deed in question.' Having failed to do so, the Court adhered.

J. Campbell, Jun. W. S.—C. C. Stewart, W. S.—Agents.

Hon. A. O. Murray and Others, Pursuers.—*Murray—A. Wood.*
Lord Elibank, Defender.—*Sol.-Gen. Hope—J. W. Dickson.*

No. 326.

Title to Pursue.—Held competent for an heir-substitute of entail to insist in a declarator to ascertain the power of the heir of entail in possession; but the question superseded as to whether he could insist on its being found that, on the supposition the heir did certain acts, his right to the estate would be forfeited.

May 22. 1829.

1st Division. Lord Meadowbank. H.

The pursuer, the Honourable Alexander Murray, eldest son of the defender Lord Elibank, and his commissioners, brought an action against his Lordship, founding on a deed of entail executed in 1776, under which Lord Elibank possessed the estates of Ballencrieff and Elibank, and to which his son the pursuer, as the next heir-substitute, had right. In the summons it was set forth, that "the said Alexander Lord Elibank, as the pursuers are informed, intends to disappoint him, and the other heirs substituted to him, of their succession to the lands and estate foresaid; and in violation of the conditions, provisions, restrictions, and limitations in the said deed of tailzie as above libelled, to sell and dispone the whole of the lands and estate of Ballencrieff and Elibank before described, or part thereof, and to appropriate the prices of the same to his own private uses and purposes; and at a meeting of his Lordship's creditors, held on the 12th day of December last, did, by his agent, openly propose to them to sell the said estate, or part thereof: Yet true it is, that, fettered as he is by the foresaid entail, he has no right or title whatever to sell, or dispone, or dilapidate, or put away the said lands and estate, or any part thereof; and the pursuer, as the nearest heir-substitute, has an undoubted right and interest to prevent such sale from taking effect;" and therefore concluding that it should be declared that "the said defender is, by the foresaid deed of entail, specially prohibited from selling the lands and others before mentioned, or any part thereof, and is legally debarred from selling the same, granting any deed or right whereby the same may be anywise evicted or carried off to the prejudice of the pursuer, or any of the other sub-

No. 324. May 22. 1829.

had previously executed arrestments, whic £5000; and the question now was, wheth the additional arrestments?

The Court, on the report of the Lord C loosing arrestments, being of opinion that titled to execute the arrestments, but that an equitable amount, ordered them to be lo found for £5000.

FOTHERINGHAM and LINDSAY, W. S.—D.

No. 325.

GEORGE PENTLAND, (GLASS'S TRUST DR. HARE and Others, (GLASS'S TRUS

Blank Writ.—A trust-deed, blank in the names of t executed by a party in India, and sent to this country, void.

May 22. 1829.

1ST DIVISION. Lord Newton. D.

DR. GLASS, who resided in India, had ri neighbourhood of Stirling, and to which was heir-apparent. Walter Stirling Gla Campbell and Arnott, W. S., on the emplc of the family, transmitted to Dr. Glass two of which the names of the trustees and the the other was left blank, in case he should the other copy. Both of the copies were re proved of the object of the deed, and, as both, and then sent them off by separate con bell and Arnott.

The blank copy was received by them in never arrived, and the blank one was accon Glass's approbation of the deed, Campbell same way in which, as they alleged, the oth died in August thereafter; and his son Wa the trust-deed was ineffectual) had right to a conveyance to Pentland for behoof of h brought of the trust-deed, on the ground, th had been inserted after it had been subscrit authority, and in his absence, and in that c was reducible, both under the statute 1696.

To this it was answered, that the statut cuted in trust, more especially when execut present one, and where the blanks had b instructions of the granter, and before d Lord Ordinary decerned in terms of the r served in a note, 'that it is admitted that th 'cuted and returned by the testator, was bl

'the trustees, but in almost all the most important purposes of the trust, 'and that these blanks were filled up after the deed arrived in this 'country. The Lord Ordinary conceives that in such circumstances it 'is ineffectual, both at common law, and as struck at by the act 1696, 'c. 25.'

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The trustees having reclaimed, the Court expressed an unanimous opinion that it was impossible the deed could be sustained, but sisted process for six months, 'in order to afford an opportunity to the de-'fenders of bringing an action of proving the tenor of the alleged dupli-'cate of the trust-deed in question.' Having failed to do so, the Court adhered.

J. Campbell, Jun. W. S.—C. C. Stewart, W. S.—Agents.

No. 326.

Hon. A. O. Murray and Others, Pursuers.—*Murray—A. Wood.*
Lord Elibank, Defender.—*Sol.-Gen. Hope—J. W. Dickson.*

Title to Pursue.—Held competent for an heir-substitute of entail to insist in a declarator to ascertain the power of the heir of entail in possession; but the question superseded as to whether he could insist on its being found that, on the supposition the heir did certain acts, his right to the estate would be forfeited.

May 22. 1829.

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No. 326. May 22. 1829.

stitutes of the said entail; and that any disposi veying away the said lands, or any part thereof, the defender for carrying off the same to the pr is and ought to be found void and null, and i said lands and others; and that by granting su right for affecting, evicting, or carrying off the s the pursuer, or any of the other substitutes in fender has already forfeited, or, upon granting s right for affecting, evicting, or carrying off the thereof, will forfeit, lose, or amit all right, tit said lands and estate; and that the same have, in cution of such deed, already devolved, or, upo will devolve on, fall, and accresce to the pursuer, appointed by the said entail, in the same manner had never existed, or had been deceased; and th such event, is and will be bound to denude theree heir of tailzie." There was also a further conclus found that Lord Elibank was entitled to sell the p to account for and re-invest the price.

In defence it was maintained as a preliminary was incompetent, because it was brought, not for r travention already committed, and declaring an i prospectively and hypothetically for annulling acts the defender might never commit, and for declar he might never incur, so that it rested upon a r tention.

The Lord Ordinary having repelled this defen claimed; but the Court, being satisfied that the ac tent, to the extent at least of having it declared possessed by his Lordship, and that it was unnece cide whether the other conclusions were incompeten adhered.

A. Rolland, W. S.—J. Young, S. S. C.—A

No. 327.

Earl of Mansfield, Pursuer.—*Murra* George Gray and Others, Defenders.

Superior and Vassal—Clause.—A piece of groud being feued to the purpose of carrying on an iron manufactory, under a prohibitio for payment to the superior of a duplicand of the feu-duty every 2 of the composition for entry of heirs, or the entry of singular s shares of any of the said parties in the said feu, while it remains w and for payment of £500 in case any of the parties or their heirs sl prohibition, sell the ground feued; and the original company havi company, who continued to carry on the same manufacture—Hel sidered a sale, not protected by the stipulation for a duplicand of t 25 years; that the lands were in non-entry; and that the purchase entry on payment of £500.

No. 327.

May 22. 1829.
2d Division.
Lord Newton.
F.

In the year 1794 a feu-contract was entered into between the commissioners of Lord Cathcart, then proprietor of the estate of Sauchie, and James Henry Casamayor and others, partners of the Devon Company, which sets forth,—that "whereas the said William Lord Cathcart has agreed to grant to the said Devon Company a feu of the lands after mentioned, for the purpose of erecting an iron foundery thereon, and other works relative to the manufacture of iron;" and proceeds, "therefore the said commissioners of the said William Lord Cathcart, in consideration of the yearly feu-duty and other prestations after mentioned, and with and under the exceptions, reservations, and conditions after mentioned, have sold, and by the tenor hereof sell, and in feu-farm dispone, to the said James Henry Casamayor, Archibald Montgomery Campbell, Edward and Charles Addison, and John Roebuck, partners under the name and description foresaid, their heirs and assignees, and the heirs or assignees of each of them, heritably and irredeemably, all and whole the farm of east side of Sauchie, &c.: Declaring that the said Devon Company and their foresaids shall be bound and obliged to make sufficient fences on each side of the roads above mentioned, and to maintain and uphold the same in a good and sufficient fencible condition in all time coming, &c.; reserving to the said William Lord Cathcart and his foresaids the whole coal, ironstone, iron ore, and other mines and minerals in the lands hereby feued, &c.; but declaring that the coal, ironstone, &c. shall not be wrought under the blast-furnaces, &c. to be erected on the lands hereby feued, &c.: And further declaring that the said James Henry Casamayor, &c. and their foresaids, shall not be entitled to use the lands hereby feued, for any other purpose than erecting an iron foundery, and other buildings thereon necessary for carrying on their works, nor to sell the same, or grant subfeus thereof, without consent of the said William Lord Cathcart, his heirs and successors." Then, after various other clauses, there comes an obligation to infeft the company 'and their foresaids' in the premises, to be holden of Lord Cathcart and his heirs for payment of a feu-duty of £98: 12: 5 yearly; and also "the said company and their foresaids paying to Lord Cathcart and his foresaids, at the term of Martinmas 1818 years, and every twenty-fifth year thereafter, the double of the foresaid feu-duty, in lieu and place of the composition for entry of heirs, or the entry of singular successors, in the share or shares of any of the said parties in the said feu, while it remains with the company as such; but in case, notwithstanding the declaration above written against selling, the saids James Henry Casamayor, Archibald Montgomery Campbell, Edward and Charles Addison, and John Roebuck, or their heirs, shall at any time hereafter sell or dispone the grounds hereby feued, then the singular successors paying a composition of £500 sterling to the said William Lord Cathcart and his foresaids for their entry to the said subjects in case of a total sale, and so proportionally for any lesser part or parts."

On this feu-contract infeftment was given to Mr. Casamayor, &c. as

No. 327. May 22. 1829.

partners of the Devon Company, and they the premises, and to carry on the stipulat 1796, Mr. Roebuck, one of the partners, r others, in proportion to their respective int pany, and in the feu-contracts, leases, &c 1799 Mr. Montgomery Campbell died, an Mr. Charles Campbell and others. In 18 pany, without obtaining the consent of Lor the works thereon, and the whole propert Longridge, for himself and such persons benefit of the agreement. The individuals ridge made this purchase were a Mr. Haw including Mr. Charles Addison, one of th the said Thomas Longridge, are to carr manufactory, and also the business of raisin the firm of the Devon Iron Company." In position was executed by the partners of t of Mr. Hawkes and these other persons, an the heirs and assignees of the last survivor, of all persons who might thereafter be part pany. The new company thereafter ente tinued the manufacture of iron as formerl years, by assignation and otherwise, the s into the hands of the present defenders G original purchasers of the feu from the fo carried on the business under the firm of Thereafter Lord Mansfield, who had acqui Lord Cathcart, raised this action of reducti tor of non-entry against Gray &c., the Company, concluding that, on obtaining bound to pay the duplicand of the feu-du and also the sum of £500 on account of th

The defenders, on the other hand, conten in the duplicand due in 1818, and at th years thereafter, so long as the property wa rying on the manufacture of iron.

The Lord Ordinary having sustained th "to the pursuer's demand for a present pay field reclaimed, and the Court thereupon cause.

Pleaded for the Pursuer.—The stipulatio duty every twenty-five years had reference ginal company continuing in possession of ation for the relief which would otherwise l mission of each individual partner's share to the £500 stipulated on a sale (which was

the proprietor) evidently had reference to an absolute sale from the original company, and was due under the terms of the contract, whether the purchasers continued to carry on the same manufacture or not. No. 327. May 22. 1829.

The Defenders, on the other hand, contended, that the object of the proprietor being (as set forth in the contract) to have a manufacture of iron on his property, the stipulation for a duplicand of the feu-duty must, on a fair construction of the contract, be held to apply to all transmissions, whether of single shares, or of the whole property, so long as the feu was continued to be used, by whatever company, for the purposes set forth in the contract; and that it was only in the event of a sale for some other purpose, whereby the object of the granter was to be defeated, that the £500 became due.

Lord Glenlee.—From the interlocutor and prayer of the note, I thought there was a demand, *ante omnia*, for £500, before it was settled whether the lands were in non-entry, which appeared an extraordinary state of the cause. By the Cases, however, all the matters are now before us. The defenders say there is no non-entry at all, as this is to be considered the same company with the original, only that they are new partners, and so are entitled to the benefit of the first clause stipulating for a duplicand every twenty-five years. This clause certainly excludes all claim for non-entry as long as the original company should last, though the partners might have entirely changed. But there is the widest difference in the world between a change of partners of the same company, and a total alienation by the company, as a company, to another set of people, whether they take one name or another. We have had nice questions as to the matter of identity; but I look on this in the same light as I would a vessel of which the planks were changed gradually till no plank of the old vessel remained; I would still consider it the same vessel; but if the ship sinks, and I build a new one, though I give it the same name, it is a different ship; and the feu-contract here makes a clear distinction between a change of partners and alienation. I am satisfied, therefore, that there are no grounds for saying the lands are not in non-entry, on the plea that the present company is to be considered in the same light as the old one. I do not think the prohibition to sell of any consequence. If the feu-contract had said nothing of singular successors at all, still, if the original company did sell, though not prohibited, I think the superior would have been entitled to the non-entry compensation, which would have been estimated by the rent of the ground and building; and whether it would have been £500 or not, I cannot say; but being taxed at that, I think it due.

Lord Pitmilly.—I am disposed to concur. I have no doubt on the first point, that the lands are in non-entry; and therefore there is only one question, what are these people to pay?—whether, under the clause regarding one set of singular successors, they are to pay double fen at the end of twenty-five years, or, under that regarding the other set, to pay £500? If each original partner had assigned separately, in terms of the first clause, till no one of the original partners remained, the first clause would certainly still have applied; and the singularity is, that it should make a difference that the whole have assigned at once. That was my difficulty, and I am still far from thinking it a clear case;

No. 327. May 22. 1829.

yet, when I consider that they did not get th that they made a total assignation, I cannot h Glenlee in holding that they must pay the £5

Lord Justice-Clerk.—Now that the cas produced, there is no difficulty at all in this, w struction; for I see nothing illegal in the contr here is, that there was a declared purpose t Devon Company as such; and though any on new partner, still the feu continuing with the the superior to demand a duplicand every twen at the clause in question in connexion with doubt but that, in the circumstances which h has a claim for £500, as it was a total sale by partners. The only difficulty I had is, that c the Addisons, who was a partner of the old was first to Longridge, and then to the othe alienation.

The Court recalled the Lord Ordinary' 'the subjects of the feu are in non-' 'liable to the pursuer for payment o 'ling libelled, in terms of the feu-' 'and the original Devon Company;' nary to proceed accordingly.

J. L. Mitchell, W. S.—J. Tait Ju

No. 328.

A. Paterson, Advocator.—
J. Thomson, Respondei

Process—Principal and Agent.—An action having b the proprietors of a newspaper for payment of an oblig and the Lord Ordinary having sisted procedure till the fender reclaimed, and contended that the action should him, reserving to the pursuer to bring a new action aga refused, but reserved to him all the objections to the co to be brought against the proprietors with that dependi

May 22. 1829. 2d Division. Lord Medwyn. R.

The respondent Thomson, cashier of th raised an action before the Magistrates of the advocator Paterson for payment of £20 granted by him:—"Sir, As the treasurer of proprietors of the Glasgow Free Press, I you, for behoof of the Royal Bank, Glasg a debt due to you by Mr. W. S. Northh "A. Paterson, Treasurer." The Mr. No editor of the Glasgow Free Press, (a newspa as to the origin and object of this obligation. in defence, inter alia, that the action was in

No. 328.
May 22. 1829.

him, and ought to have been brought against the proprietors of the newspaper, which was a solvent concern. The Magistrates, after some procedure, repelled this and the other defences; whereupon Paterson brought an advocation, in which he still maintained that the action as against him individually was incompetent. The record having been closed, the Lord Ordinary, on hearing parties, sisted process till the proprietors of the Free Press should be called by a supplementary summons. Thomson acquiesced in this interlocutor, which had not been asked for by him; but Paterson reclaimed.

Skene in support of the Reclaiming Note.—The obligation having been come under by Paterson expressly in his character of treasurer, the action as against him individually is incompetent, since he thereby only bound his constituents, who ought to have been called; and the record being now closed, this error in the summons cannot be rectified by a supplementary action; but, as was done in the case of King v. Shirra, Jan. 23. 1827, (ante, Vol. V. No. 138. p. 231,) the process should be dismissed, reserving to the defender to bring a new action.

More in answer.—The case of Shirra was no doubt well decided, because the action there was not competent against the agent at all; but here it was perfectly competent to bring a personal action against Paterson; and the Lord Ordinary has merely, ex proprio motu, sisted process till certain parties, whom his Lordship held to have an interest, are brought into the field.

Jeffrey in reply.—If our defence had been, that *all* the proper parties were not called, this interlocutor might have been very correct; but our defence is, that *none* of the proper parties, but a wrong party, has been called.

Lord Justice-Clerk.—Attending to the whole circumstances of the case, I am satisfied that no prejudice can be suffered, as every objection to the conjunction will be competent. Then, are your Lordships prepared to say that Paterson has incurred no personal responsibility? I am not going to decide that question at present; but I see nothing wrong in the Lord Ordinary's interlocutor, though, if desired, I would reserve objections to the competency.

Lord Glenlee.—It is absurd to call this an incompetent action. It may be ill founded, but it is not incompetent to allege that Paterson has personally bound himself; and unless it be incompetent, there can be no reason for dismissing it.

Lord Pitmilly.—The course taken by the Lord Ordinary does not, I suppose, arise from any decided opinion that the action is wrong against this party; but it arises from an objection taken in defence, that these parties should be called; and it is very reasonable for the Lord Ordinary to delay pronouncing any judgment till those whom the defender says are the proper parties are called, and no harm can be done by it.

The Court refused the reclaiming note, reserving all objections to the conjunction of the supplementary action to be brought against the proprietors, with the present process.

J. Cullen, W. S.—J. Dundas, W. S.—Agents.

No. 332. May 26. 1829.

yet a distinction existed between a proper process and an action; that an action was created by citation, and was productive of important consequences; and that it was quite competent to transfer an action, or, in other words an executed summons; that it was true that a wakening could not be brought, unless the summons had been called in Court, because, if not called for year and day, it fell altogether, and a new action was necessary; whereas, after it was called, and so brought into Court, it might fall asleep, which it could not previously do.

The Court, after taking time to consider, unanimously repelled the objection.

Lord Balgray observed, that the whole puzzle was created by the word process having been made use of in a loose way. Erskine (4. 1. 8.) says, that "the summons must be called by the clerk of the process within a year of the last diet, otherwise the *depending process* falls;" so that he here characterizes an executed summons as a depending process, or more properly a depending action. Thus Bankton also says, that "the *action* is intended by executing the summons, which has divers signal effects. It interrupts prescription; it likewise renders the thing in question litigious," &c.; and then he correctly draws the distinction between an action and process by saying, that "the summons being regularly called, it becomes a plea or depending suit." It is plain, therefore, that an executed summons is a depending action; and it is not and cannot be disputed that it is competent to transfer a depending action. Indeed it would be attended with most pernicious consequences, if, after a summons were executed, and diligence done upon it, and the defender die, it fell to the ground, and could not be transferred.

Lord President.—In another passage Erskine says, (3. 6. 3.) that "a summons, after it is executed, is considered as a begun action." The foundation, therefore, of the defender's objection, which is, that an executed summons is not a depending action, rests upon an entire mistake. Indeed there is no such correct legal phrase as 'process.' All the writers treat of the subject of 'actions;' and they all say that an action begins by the execution of the summons.

Lord Gillies.—The plea of the defender involves a manifest inconsistency. Arrestment at common law is undoubtedly competent upon an executed summons, in respect that it is a depending action; but the defender's plea is, that although this be competent in respect it is a depending action, still it is not a depending action to the effect of being transferred, which is absurd.

Lord Craigie concurred.

R. Roy, W. S.— Æ. Macbean, W. S.—Agents.

No. 333. Trustees of Arch. Campbell, W. S. Pursuers.—*Sol.-Gen. Hope—Cuninghame.*

James Thomson, W. S. Defender.—*Keay—Skene—Ivory.*

Partnership.—Held, in the absence of evidence to fix the extent of shares of partners, that the presumption of law is for equality, and their rights must be regulated accordingly.

A. LAWRIE, Raiser.—*A. M'Neill.*
J. GRANT, Claimant—*Shaw.*

No. 331.

Process—Multiplepoinding.—The common debtor in a multiplepoinding reponed against an order for consignation alleged to have been pronounced in absence of him.

May 23. 1829.
2D DIVISION.
Lord Medwyn.
F.

A process of multiplepoinding having been raised in name of Blackie by certain arresting creditors of Lawrie, and a condescendence of funds having been lodged, the Lord Ordinary pronounced an order for consignation. Against this interlocutor a reclaiming note was presented by Lawrie, who stated that he had not been cited; that he had objections to the competency of the multiplepoinding, on the ground that the fund in medio was not arrestable, and that the interlocutor complained of had passed in absence of him; and he prayed to be reponed. The Court remitted the note to the Lord Ordinary, with power to repone him, on payment of such expenses as his Lordship might consider reasonable.

G. MILL, S. S. C.—P. GRANT, W. S.—Agents.

LACHLAN M'INTOSH, Pursuer.—*Rutherfurd.*
JOHN MACANDREW, Defender.—*Cockburn.*

No. 332.

Process.—Held competent to transfer an executed summons which had not been called in Court.

May 26. 1829.
1ST DIVISION.
Ld. Corehouse.

M'INTOSH, on the 27th of December 1827, executed a summons against George Macandrew and John Macandrew, father and son, concluding for relief of a cash-bond granted by him and them, for behoof of John, to the Bank of Scotland, and on which he arrested. The citation was to appear on the 30th of January 1828. George, the father, died on the 3d of that month; and on the 24th M'Intosh raised a summons of transference against John, as the heir and representative of his father. Both the original action and the transference were called on the 22d of May 1828. In defence, Macandrew pleaded that the transference was incompetent, because there was no depending action against his father at the time when it was raised.

LORD COREHOUSE having verbally reported the question to the Court,

Cockburn, for Macandrew, maintained that it was laid down by all the authorities, that, in order either to transfer or waken a process, there must be a depending process in Court; that a summons which had merely been executed was not a process, and that it did not come into Court until it was called.

Rutherfurd, for M'Intosh, on the other hand contended, that although there was no precedent to regulate the decision one way or another, yet the objection rested upon an entire misapprehension; that although, in popular language, it was usually said that a 'process' could not be transferred, and that the word 'process' implied that the case was in Court,

No. 332. May 26. 1829.

yet a distinction existed between a proper p
tion was created by citation, and was produ
and that it was quite competent to transfe
an executed summons; that it was true
brought, unless the summons had been c
called for year and day, it fell altogether,
whereas, after it was called, and so brc
asleep, which it could not previously do.

The Court, after taking time to cons
objection.

Lord Balgray observed, that the whole
process having been made use of in a loose w
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Lord Craigie concurred.

R. Roy, W. S. — Æ. Macbean

No. 333. Trustees of Archd. Campbell, W. S. *Cuninghame*
James Thomson, W. S. Defender.

Partnership.—Held, in the absence of evidence to
the presumption of law is for equality, and their rights

No. 336.
May 26. 1829.
1st Division.
Lord Meadowbank.
D.

The late Archibald Campbell, writer to the Signet, after serving an apprenticeship of five years, entered, in 1798, into the office of the defender Mr. Thomson as a clerk. He remained in that situation till 1813, when he became a partner with Mr. Thomson. By the pursuers it was alleged that he was admitted as such in January, while Mr. Thomson stated that he was not so till April. Mr. Campbell did not contribute any capital; but it was alleged that he was possessed of superior qualifications as a man of business; that he was one of Mr. Thomson's nearest relations, and that that gentleman had arrived at an age when he had become desirous to be relieved from the fatigues of business. In admitting that Mr. Campbell had become a partner in April 1813, Mr. Thomson at the same time alleged that his share was limited to one third of the profits; but there was no written contract, and there was no evidence in the books or otherwise to show that such was the agreement or understanding of parties. Mr. Campbell died in 1823, having left a trust-deed in favour of the pursuers, who brought an action against Mr. Thomson, concluding against him, first, for payment of certain alleged arrears of salary due to Mr. Campbell, as a clerk, from 1798 to 1813; and, secondly, to account to them for one half of the profits from 1813 till the death of Mr. Campbell in 1823. Mr. Thomson denied that there were any such arrears, or that he was liable to account for more than one third of the profits. The main question, therefore, came to be, whether the pursuers were entitled to demand one half of the profits, or were only entitled to one third, agreeably to Mr. Thomson's admission?

On the part of Mr. Thomson it was contended, that there was no universal rule of law establishing a presumption of equality in partnership; that it was a question of circumstances to be decided by a Jury; and that although, no doubt, the institutional writers stated that equality was to be presumed, yet this dictum rested on the supposition that the contributions had been equal. Accordingly, in the case of Peacock against Peacock, a remit had been made to a Jury from the Court of Chancery in England, to ascertain the extent of a partner's share, where there had been no equality of contribution; and Lord Ellenborough told the Jury that they were to take into consideration all the circumstances, and say what was a just and fair proportion; and the Jury, on a view of the whole circumstances, had found a fourth. The same rule had also been acted on by the Second Division in the recent case of Russell against Anderson. In the present case, however, there had been no equality in contribution,—Mr. Thomson being possessed of a long established and valuable business—of skill and experience equal at least to that of Mr. Campbell; and although that gentleman, no doubt contributed professional skill and industry, yet he did not advance any capital, nor bring any addition to the business, and therefore it was impossible to presume equality; consequently the pursuers were not entitled to an accounting ing for more than one third.

No. 336.
May 26. 1829.

On the other hand, it was maintained b
sence of any written evidence to establish
the presumption by the law of Scotland w
appeared to be the law of England from
Eldon in the case of Peacock, when the
which occasion his Lordship had observe
appeared to him to be extraordinary, beca
ascertained by force of any express contra
they must, of necessity, be equal partners
the case of Russell had been decided on a
from the books that the parties had settl
sixth, and latterly of one third; but that
nised in the case of M'Whirter and Guthr
that Mr. Campbell advanced no capital, y
in question, he contributed, what was n
sional qualities, and relieved Mr. Thomso
business; and, besides, he had allowed hi
Mr. Thomson's hands, so that even in thi
as having contributed capital.

The Lord Ordinary at first remitted th
the Jury Court, (see ante, Vol. VII. No.
reclaimed, and the Court having some do
interlocutor, recalled it of consent, and r
consider whether the case should be remi
ported to them upon Cases. When the c
he reported it on Cases, 'deeming it of m
'ferent points of the cause should be dete

On the cause coming to be advised,

Lord Balgray observed, that if it were ne
were arrears of salary, and the amount of th
the Jury Court, but that he was disposed to th
were abandoned by Mr. Campbell when he w
question therefore came to be, seeing that the
what was the rule or the presumption of law
In mercantile companies, the extent of capital
may be of much importance in fixing the shar
gard to professions, where mental qualifications
importance. In this latter case it is natural t
accordance with the general rule of law. Mr
be held to have been one half.

Lord President.—If it had not been for th
of Lord Ellenborough, no difficulty would ha
according to the law of Scotland, the presumpti
that no capital was contributed, because a per
more valuable than capital.

Lord Craigie thought that it was impossibl
and therefore was for a remit to the Jury Court

No. 884.
May 26. 1829.

given to the trustee to take it for behoof of the creditors at the value put upon it by the holder. Now here, although no deduction was made at the time of ranking, in consequence of its being assumed that nothing could be recovered under the bond, it now falls to be regulated by the same principles on which the deduction would have been made, had it been done at the time of ranking, viz. that all which is to be deducted is the actual value of the security, and this is merely the amount recovered, minus the expense of making the security effectual; and, in this view, it makes no difference that, in a question with the competing creditor, the Court did not see fit to award the expenses of process.

2. Besides, M'Nair and Brunton, under the penalty in their bond, are entitled to be preferred on the price for the expense of making their security effectual, which is within the penalty; it having been found in Ramsay v. Goldie, June 22. 1826, (ante, Vol. V. No. 443. p. 73,) and other cases, that such expense, though incurred in a competition with a third party, falls under the penalty, even where not specially found due in the process.

Pleaded for the Trustee—

1. The true value of the security which falls to be deducted as in a question with the creditors, is just the amount which, in virtue of the security, is carried away by the holder of it from the general fund; and if the expenses of a competition with a third party were also allowed to be deducted, this would be, in substance, permitting the heritable creditor to rank on the personal estate for the expenses of such competition, which is nowhere sanctioned by the bankrupt statute, and would be unjust towards the general creditors, particularly when, as is the case here, these expenses have not been even awarded against the unsuccessful competitor.

2. The penalty is intended to cover merely the expense of overcoming obstacles thrown in the way of the creditor by the debtor himself, who is not bound to warrant against unsuccessful attempts to evict; but even in regard to litigations with the debtor himself, where no expenses have been awarded, the Court have refused in several cases, and particularly that of Smith v. M'Lean's trustee, June 3. 1800, (F. C.) to allow them to be claimed under the penalty. And here it is a mistake to say that the expenses were incurred in maintaining the preference of the creditor's security; for the object of the competition was to get the better of a prior security, which, but for the defect in it, would have been preferable, and could have carried off the whole subject from the claimants.

LORD GLENLEE.—I confess that if the case stood on the first plea stated by M'Nair and Brunton, I should have doubted much of the interlocutor; but, so far as it is put on the second plea, that they are entitled to rank for the penalty, to the effect of drawing the expense of making the bond available, I can have no doubt of the matter. The debtor is as much bound in law to pay the penalty as the principal sum; and it is equally secured over the lands. In equity we restrict it, but only to the necessary expense of maintaining the

No. 334. May 26. 1829.

with the usual penalty, over certain lands belonging
at the date of the sequestration, it was understood t
prior in date to their bond, were preferable to it, a
whole value of the property. In consequence of
personal creditors, and drew a dividend of 8s. in
amount of their claim, without deducting any thir
heritable security. It was subsequently discovered
security held by M'Nair of Balvie was liable to a
only a public holding, and not having been confi
The property had in the mean time been sold; an
hands of the trustee, he raised the present process
have the question of preference decided. A compe
place between M'Nair and Brunton, the claimants,
the holder of the prior security, in which the Cour
decided in favour of M'Nair and Brunton, but wi
titled to their expenses, (see ante, Vol. V. No. 2
balance of the fund in medio amounted to £230
Brunton claiming decree for this sum, Mein, the
he was entitled out of it to repetition of the divid
on the whole amount, as if that sum, as the value
had been deducted from the amount formerly ran
M'Nair and Brunton maintained, on the other ha
bound to repeat the dividend on this sum, minu
gation in which it was made good, this being the
able security.

The Lord Ordinary found 'that Messrs. E
'bound to repay or give allowance for the div
'upon the sum at which it has since appeared
'rity ought to have been valued, and which
'to have been deducted from their claim for
'said sum must be held to be the amount o
'secured, under deduction of the law expens
'maintaining the preference of the said heritab
interlocutor, in so far as it found that the sum
deducted, and the dividend on which was to be
of the money recovered in virtue of the herita
tion of the expenses, the trustee reclaimed.

The Court ordered Cases.

Pleaded for M'Nair and Brunton—

1. In deducting securities, under the 50
Statute, from the amount to be ranked up
creditor holding an heritable security, it is
rity which is required to be deducted, not th
ingly, if a creditor anticipates that his secur
puted, he will put a proportionally less valu
by the statute, in the event of his valuing

No. 385.
May 27. 1829.

and the subsequent term of Whitsunday 1825, he took decrees, and raised diligence; and he also obtained decree for an account due to him of £24. 12s. In virtue of the diligence for the interest at Martinmas 1824, Smith apprehended Elder on the 6th of July 1825; and a state of debt was then made up, including the amount of interest paid at Martinmas 1824 and Whitsunday 1825, and the business-account, with the expenses of the several diligences on the decrees, from which it appeared that a balance was due to Smith of £65. For this sum Elder granted his bill, payable at three months; and the state was docqueted and subscribed by the parties, bearing that it had been so settled, and the diligence was delivered up to Elder. He failed to pay this bill, which was retired by Smith, to whom Elder made a partial payment of £18. 10s. Elder afterwards employed Smith to negotiate a transfer of the loan of £500 to another party at lower interest, which Smith accomplished; and, in doing this, an account was incurred to him. Another state of debt was then made up on the 18th of January 1826, from which it appeared that, including the balance of the above bill, there was due to Smith £72, to account of which Smith granted his bill for £62, leaving a balance due to Smith of £10. Payment of this bill was recovered by Smith from Elder, in May 1827, by means of diligence. In June thereafter, Elder raised an action of reduction of the state of debt relative to the application of the £500 in March 1821—of the several decrees—of the two states of debts in July 1825 and January 1826—and of the bills—on the ground that the accounts were grossly overcharged, and had never been taxed, and that he had been induced to docquet the accounts, and grant the bills, under fear of ultimate diligence; and he further concluded for count and reckoning and damages. Smith satisfied the production as to the decrees by producing Elder's receipt for the precepts, and decree of reduction contra alia non producta was then pronounced.

In defence Smith maintained, that as he had been compelled to pay the interests on behalf of Elder, he was entitled to operate his relief by action and diligence; that it could not be disputed that he had paid these interests; that the expenses of obtaining the decrees had been regularly taxed; that no specific objection was stated as to those of this diligence; and that at all events, both in regard to this and the other matters, there were settled accounts which had not only been regularly docqueted, but bills granted, and payments made, without any objection; and therefore they could not now be opened up. No specific overcharge was condescended on by Elder; but he merely stated that he was prepared to point them out at the auditing, and that he would lodge a note of them.

The Lord Ordinary assoilzied Smith with expenses, and issued the subjoined note.*

* "The Lord Ordinary does not think that any sufficient ground for reduction has been made out. The decrees taken for the interests which the defender paid as cautioner, and

No. 334.
May 26. 1829.

right in competition with others. If, however, th than the penalty, the demand could not be listened penalty.

LORD PITMILLY.—I am of opinion that the clai grounds. The cases of Allardice and Ramsay go a gr and as to the other, I agree entirely with the argum Case for the claimants.

LORD JUSTICE-CLERK.—I agree in thinking th claimants are right. The true value of the securit after deducting the fair necessary expense of maki of no consequence that expenses were not awarded as and the claimants.

THE COURT accordingly refused the reclaimin penses since the date of the Lord Ordinary's

Raiser's Authorities.—(2.)—Allan v. Young, Dec. 23. 17 May 21. 1796, (10053); Gordon v. Maitland, Nov. 27. 176 Trustees, June 3. 1800, (F. C.)

Claimants' Authorities.—(2.)—1. Bell, 157; Allardic (10052); Duff v. Chapman, July 19. 1755, (10046); Ramsay Vol. V. No. 443. p. 737.)

H. GRAHAM, W. S.—GIBSON-CRAIGS and WARD

No. 335.

JOHN ELDER, Pursuer.—*Sol.-Gen. H*

DAVID SMITH, Defender.—

Settled Account—Agent and Client—Process.—1.—Circ between an agent and client were held to be settled, and n ation, or to entitle the client to enter into a count and reck which have been extracted are called for in a reduction, an up on receipt to the pursuer, it is sufficient to produce the

May 27. 1829.
1ST DIVISION.
Lord Newton.
S.

ELDER was possessed of a small property s borrowed £300 from the Kirk-session of Liff ployed the defender Mr. Smith, writer in D him of £500, with which to pay off the de other sums due by him. Smith accordingly Roberts,—applied about £335 of it to extin owing to the Kirk-session,—part of the residu extinction of an account due to himself, leavi due to Elder. Of this he rendered an ac by both, and which bore that "we have th ing state, and declare ourselves satisfied th have received from David Smith the above ling." Smith had become cautioner to Robert and Elder having failed to pay it, Smith w each term's interest he raised separate actior he obtained decrees in absence, with a sum of diligence on each of the decrees, he reco of the several terms preceding Martinmas 1

No. 385.
May 27. 1822.

and the subsequent term of Whitsunday 1825, he took decrees, and raised diligence; and he also obtained decree for an account due to him of £24. 12s. In virtue of the diligence for the interest at Martinmas 1824, Smith apprehended Elder on the 6th of July 1825; and a state of debt was then made up, including the amount of interest paid at Martinmas 1824 and Whitsunday 1825, and the business-account, with the expenses of the several diligences on the decrees, from which it appeared that a balance was due to Smith of £65. For this sum Elder granted his bill, payable at three months; and the state was docqueted and subscribed by the parties, bearing that it had been so settled, and the diligence was delivered up to Elder. He failed to pay this bill, which was retired by Smith, to whom Elder made a partial payment of £18. 10s. Elder afterwards employed Smith to negotiate a transfer of the loan of £500 to another party at lower interest, which Smith accomplished; and, in doing this, an account was incurred to him. Another state of debt was then made up on the 18th of January 1826, from which it appeared that, including the balance of the above bill, there was due to Smith £72, to account of which Smith granted his bill for £62, leaving a balance due to Smith of £10. Payment of this bill was recovered by Smith from Elder, in May 1827, by means of diligence. In June thereafter, Elder raised an action of reduction of the state of debt relative to the application of the £500 in March 1821—of the several decrees—of the two states of debts in July 1825 and January 1826—and of the bills—on the ground that the accounts were grossly overcharged, and had never been taxed, and that he had been induced to docquet the accounts, and grant the bills, under fear of ultimate diligence; and he further concluded for count and reckoning and damages. Smith satisfied the production as to the decrees by producing Elder's receipt for the precepts, and decree of reduction contra alia non producta was then pronounced.

In defence Smith maintained, that as he had been compelled to pay the interests on behalf of Elder, he was entitled to operate his relief by action and diligence; that it could not be disputed that he had paid these interests; that the expenses of obtaining the decrees had been regularly taxed; that no specific objection was stated as to those of this diligence; and that at all events, both in regard to this and the other matters, there were settled accounts which had not only been regularly docqueted, but bills granted, and payments made, without any objection; and therefore they could not now be opened up. No specific overcharge was condescended on by Elder; but he merely stated that he was prepared to point them out at the auditing, and that he would lodge a note of them.

The Lord Ordinary assoilzied Smith with expenses, and issued the subjoined note.*

* "The Lord Ordinary does not think that any sufficient ground for reduction has been made out. The decrees taken for the interests which the defender paid as cautioner, and

No. 385.

May 27. 1829.

Elder reclaimed; and

The Solicitor-General then maintained, that as been produced, and decree of reduction had b non producta, the whole case was laid open, and titled to go into the accounting; that although was no specification on the record of any overc averment to that effect, and it would have been i detail of all the objectionable items in the accoun

Skene, for Smith, answered, that when the de precepts and the diligence were delivered up t receipt for them, and he himself afterwards prod descendence;—that these precepts were truly th the objection (which, besides, was not stated in t ed; and that, as to the overcharges, although it sary to condescend on the different items, yet th to have been specified. But, independent of th foreclosed by the settlements and payments whi

The Solicitor-General admitted that Elder h and that they had been produced in process v but he contended that they were different f they had not been produced, the decerniture c effect.

Lord Balgray.—The precept is truly th tracted decree, combined with authority, to c diligence of poinding, &c. It is equivalent to cess; and the process itself, when delivered up, of the opposite party. There is nothing, there

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which compose the greater number of the writs called for been admitted by the pursuer, only craved to be opened penses. Indeed the Lord Ordinary can see no reason wh set aside. The defender may have been a sharp creditor, decree for the sums he was compelled to pay for the pu cured himself otherwise by obtaining an assignation pro but such assignation would have been more expensive th as to the fact, whether the expenses of the decrees were dently not random sums, and are apparently moderate, av extract, less than 20s. each, there seems no sufficient caus extent.

"In regard to the business accounts, the first was settle and has been long paid. It is objected generally that t loan for £500 amount to above £70. But, in looking very considerable part of the sum relates to business al and that the great bulk of the remainder consists of pay persons. The settlement of 6th July 1825 was no doub custody of a messenger; and had any specific objection b or the expense of diligence included in that settlement, circumstances, for still allowing these to be taxed. But a of extravagant charges, no specific objection has been accounts; and, in such circumstances, the Lord Ordinar

has now been made; and, on the merits, it is impossible to get over the repeated settlements. No. 335. May 27. 1829.

The other Judges having concurred in this opinion, the Court adhered.

C. F. Davidson, W. S.—J. Heriot, W. S.—Agents.

Alex. Mackenzie, Pursuer.—*Cuninghame—M'Dougal.*
Mackenzie's Trustees, Defenders.—*Anderson.*
James Scott and R. Roy, Defenders.—*Rutherfurd.*
Thomas Mackenzie, Defender.—*Ivory.* No. 336.

Process—Res Judicata—Trust.—A multiplepoinding having been raised in name of trustees, and a sum found to be in the hands of one of them who acted as their agent, and decree of preference pronounced against the trustees in favour of certain parties, reserving relief to the trustees inter se; and the one who acted as agent having brought an action at his own instance, concluding to have it found that his co-trustees were bound to relieve him of the decree to a certain extent, and that the parties in whose favour it had been pronounced should also free him of certain sums improperly awarded to them, and for which they were liable to him individually— Held that the decree was not res judicata in favour of these parties, so as to bar the action; and a remit made to ascertain whether any of the parties were personally bound to relieve the one who had acted as agent.

May 27. 1829.

1st Division. Lord Meadowbank. S.

George Mackenzie of Dundonnell died, leaving two sons, Kenneth and Thomas. He executed a trust-deed in favour of his widow, the pursuer Alexander Mackenzie, and certain other persons, by which he conveyed to them several heritable bonds, to be held for behoof of Kenneth. He also made a separate will, by which he bequeathed his moveable effects to Thomas. The pursuer, who was a writer in Inverness, acted as agent for the trustees; and after the trust had subsisted for several years, Kenneth raised a multiplepoinding in name of the trustees, in which the pursuer condescended upon £59 as being the amount of the trust-funds in his hands. Claims were lodged both by Kenneth and Thomas; and they having alleged that the pursuer had taken credit for certain sums of expenses, and intromitted with part of the ecutry, which ought to be put to his debit, and therefore that the ust-fund was larger than that condescended on, a remit was made an accountant to report as to the amount of the fund, and to the uditor of Court to tax the accounts of expenses. This having been ne, and the accountant having reported that certain sums for which dit had been taken, amounting to £335, ought to be deducted m the credit side, and put to the debit, and that, including the adted balance of £59, the fund in medio was £394, the Lord Ordinary roved of the report, and ordained the present pursuer to consign the ount, 'reserving all questions among the raisers of the multiplepoinding, and to each other their defences, as accords;' and to this interlocutor Court adhered, with this explanation, that the order for consignation uld be binding on all the trustees, 'reserving to them all questions at may occur between them in consequence of the said order.' Kenand Thomas then moved the Lord Ordinary for decree of prefer-

No. 836. May 27. 1829.

ence in regard to this sum, which he granted agains
' declaring that this decree shall be equally bindir
' donell's trustees as upon the said Alexander Macl
recalled this interlocutor, and, instead thereof, ' de
' trustees, conjointly and severally ; reserving to th
' such relief among themselves as may be compet
' them.' This decree was extracted. Kenneth d
trust-disposition in favour of Mr. Scott for payin
ing his estate upon Mr. Roy and a series of substi

The pursuer then brought an action against Scott and Roy as representing Kenneth, and agai cutor, in which, after reciting the proceedings i and particularly the decree, qualified with a re alleging that, by a settled account between him lance in his hands was ascertained to be only £ had been erroneously, and in his absence, appr ant to the heir and executor, (who, he afterwa ally liable to him for these sums,) he concluded be decerned, " conjunctly and severally, for interests, to free and relieve the pursuer of the ation, and to make payment accordingly, in res made by the pursuer as factor were ordered a stituents, the said trustees, by their minutes tioned;—and further, to free and relieve the disbursements as factor and agent, since the t and to make payment thereof to the pursuer, count here holden as repeated brevitatis causâ fixed and ascertained in the course of the proc separatim, the said James Scott and Robert the heir, and the said Thomas Mackenzie, t and should be decerned and ordained, by and severally, for their respective rights and the pursuer and the said trustees of the item adjudged to them severally out of the trust ant, as particularly specified in his report."

In defence, Scott and Roy (as represent stated that the pursuer had not only appe but had maintained a long litigation, and th ing the balance in his hands to be £394, sum, was res judicata; and consequently th enter on a discussion of the subject. By th that, under the circumstances, the allege amount of the balance in the hands of the them; and that they were entitled to a co only be responsible in relief pro rata.

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To these pleas it was answered by the pursuer—

1. That the decree founded on was pronounced as in a question with the trustees, and against them, and could not have the effect of res judicata, so as to prevent him, as an individual, from being relieved of the payment of any sums which he might be able to show were not exigible from him, and for which he had a claim against the heir and executor; and,

2. That the account between him and his co-trustees had been regularly settled and docqueted.

A record was then prepared and closed, without any objection being made to the form of the summons; but when the case came before the Lord Ordinary for debate, it appeared that Scott, Roy, and the executor Thomas, had objected that the conclusions against them were irregular, and the trustees that no personal decerniture could issue against them. The Lord Ordinary thereupon pronounced this interlocutor:—'The Lord Ordinary having heard the Counsel for the different parties in this cause; in respect it appears to the Lord Ordinary that the summons, as against James Scott, Robert Roy, and Thomas Mackenzie, executor under the will of the deceased George Mackenzie, Esq. his father, the defenders, is irregularly and incorrectly laid, in so far as regards the conclusions against them, therefore dismisses the action quoad the said defenders, and decerns; finds them entitled to their expenses, appoints an account thereof to be given, and remits to the Auditor of Court to tax the same when lodged, and to report; reserving to the pursuer such action as may be competent to him against the proper representatives of the deceased Captain Kenneth Mackenzie, the heir of the deceased George Mackenzie of Dundonnell, and against the said James Scott, and Thomas Mackenzie, the executor, and to them their defences thereagainst, as accords: And with regard to the whole other defenders concluded against, in respect of the process of multiplepoinding which was some years ago brought into this Court in the name of the trustees of the said George Mackenzie against all parties having interest in the trust-funds conveyed to them in the course of the proceedings, in which action the accounts of the pursuers, relative to the trust, were audited by an accountant, and also, so far as related to the law proceedings, by the Auditor of Court, and sundry final interlocutors exhausting the cause were pronounced therein; and in respect that the present action against the defenders, which is an action brought against them not personally, but in the character of trustees, is thus barred by res judicata, assoilzies the said defenders from the conclusions of the action against them, and decerns;' and found them entitled to expenses.

The pursuer having reclaimed, and the Court being satisfied that the objections made to the summons were too critical, and that, under the peculiar circumstances of the case, they were sufficient to enable justice to be done between the parties, and that the plea of res judicata was in-

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applicable, recalled the interlocutor, and 'remitt
'nary to inquire whether the trustees of George M
'donnell, or any of them, are liable to Alexande
'suer) in relief of the whole or any part of the s
'also whether any of the defenders are personally l
'of relief; and to proceed in the case as he shall se
question of expenses.

J. ANDERSON, W. S.—W. MACKENZIE, W. S.—T. MACKENZI
Agents.

No. 337.

THOMAS CARGILL, Pursuer.—*Murray*
JOHN BAXTER, Defender.—*Jameso*

Landlord and Tenant—Compensation.—A landlord having, of consent, in a process of sequestration against his tenant, s authorized by the warrant, and without the notification there been subjected in damages for the irregularities) that, in a cou plus proceeds, he was entitled to state his accounts as if the s in all respects; and in particular held,—1.—That he was enti on the whole proceeds, on the ground of the sales being ma as to the purchases made by others, and those made by himsel credit for a commission payable to the sequestrator, under r both on the amount authorized to be sold by warrant, and o he was entitled to set off against the claim for the surplus, pr decree, while the tenant was not entitled to recompensate by raised action, but had not obtained decree.

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2D DIVISION. Lord Glenlee. F.

THE pursuer Cargill, a tenant of Baxter th greatly in arrear of rent, the latter took out a against him, and, on the 12th November 1812, of Forfar a warrant of consent to sell as much "as will pay the rent of the last and curren expenses, intimation being made at certain par three days previous to the sale. The first Sun warrant fell on the 15th of November, and th day the 16th, the condition of three days no plied with. Instead of merely selling off suffic last and current year, Baxter sold off the w which yielded upwards of £300 more than t and he claimed retention of thesurplus of the self purchaser of a great part of the stock) in e

Thereupon Cargill raised an action of co mages against Baxter, in which, after conside conclusion for damages, a remit was made to following Issues were sent to trial:—'Wheth 'in conformity with the authority given by t 'lation thereof, to the loss, injury, and dam 'whether, at the said sale, the defender by

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'his behoof, or by his authority, illegally purchased part of the said pro-'perty, to the loss, injury, and damage of the pursuer?' A verdict having been returned for the pursuer, with £85 of damages, he now insisted in his conclusions for count and reckoning, which had been allowed to lie over pending the discussion of the question of damages.

On the other hand, Baxter raised a counter action before the Sheriff for his prior arrears, in which he obtained decree, but which was advocated by Cargill, and conjoined with the previous process in this Court.

With reference to the count and reckoning, a remit was made to an accountant, who reported a balance still due to the defender of £99. To the report of the accountant the pursuer gave in objections, including, inter alia, the following:—

1. That in debiting the defender with the proceeds of the roup-roll, discount had been allowed on the greater part as on a sale at three months credit, although there was no authority to sell on credit, and although a large proportion of the stock was purchased by the defender himself.

2. That credit was allowed for a charge of four per cent. commission to the agent appointed sequestrator by the Sheriff, for collection and insurance of the proceeds, but that this should not be allowed, the sale having been illegally conducted in violation of the Sheriff's warrant; and at all events that no such charge could be sustained in regard to the surplus over and above the amount authorized by the warrant to be sold, or in regard to the amount purchased by the defender himself, as to which there could be no charge for collection or insurance; and,

3. As to the defender's claims for prior arrears, that the surplus of the proceeds of the sale over the amount authorized to be sold having come into the defender's hands by an illegal act, he was not entitled to retain it in compensation of other claims, but must pay over that surplus, and recover any other claims as he best could; and Cargill further raised an action to constitute certain alleged counter claims against Baxter.

To these objections it was answered generally, that, if sustained, it would be subjecting the defender a second time in damages for the irregularity of the sale, and that all the injury thereby sustained having been repaired by the verdict of the Jury, he was entitled to have the accounting conducted as if the sale had been perfectly regular; and with regard to the particular objections themselves—

1. That the warrant contained no provision as to whether the sale should be on credit or for ready money, and that it was the universal practice to sell at three months credit, the sequestrator being bound to guarantee the bills taken, on getting a commission therefor, by express regulation of the Sheriff Court; and, consequently, that as the defender was debited in the accounts with the proceeds of the roup of a date prior to that when they fell due, he was entitled to a deduction of discount; and as to the purchases made by himself, he was entitled to the same credit with other purchasers.

2. That the charge of commission had been made against the defender

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by the agent who had been appointed sequestrator l authority of the regulations of the Sheriff Court, an to take credit for this charge which he had paid; a

3. That the pursuer's own summons concluded r the balance of the proceeds of the sale, "after ded as shall be found legally due to the proprietor;" a question had been decerned for by the Sheriff, and of compensation in the present process.

The Lord Ordinary having reported the cause t together with the supplementary action for coun ships repelled the objections to the accountant's rep action which had been brought by the landlord f for the balance brought out by the accountant, admitted sum, while they refused to conjoin the s the tenant for the constitution of alleged counter same to the Lord Ordinary.

R. URQUHART, S. S. C.—H. MURRAY, W. S

No. 338.

GEORGE RICHMOND, Advocator
EARL of KINNOULL, Respondent.—

Process—Advocation.—A landlord having raised an action tenant for payment of two years rent greatly exceeding £40 as a total defence that his farm had been rendered absolu tation committed by rabbits encouraged by the landlord; and of the tenant's allegations—Held competent for him to adv under the 40th section of the Judicature Act, as being a r without leave, or any declaration as to the value of the clai

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2D DIVISION.

Ld. Cringletie.

F.

THE advocator Richmond held a farm from rent of £50 in money, with twenty bolls of l oatmeal. In August 1827, Lord Kinnoull p Sheriff of Perthshire for payment of the rent and for sequestration of the stock and croppi averred that Lord Kinnoull had so much e rabbits in the neighbourhood of the farm, tha yielded sufficient to pay the seed and labou abandoned the possession as totally useless, a he was not bound to pay any part of the rent ing allowed a proof of these allegations, Rich under the 40th section of the Judicature Ac ter tried by a Jury.

To the competency of this advocation it w

1. That the question in dispute not being as to appear, ex facie of the proceedings, to £40, and the advocator not having appl Court, nor made the declaration as to the v

the Act of Sederunt July 11. 1828, § 5, in cases where it is not simply pecuniary, the advocation was incompetent; and, No. 338. May 27. 1829.

2. That the Act of Parliament could not be intended to apply to a case of this nature, because, as bills of advocation under it are allowed to be passed without caution, this would be staying a process of sequestration for rents on alleged counter claims of damages, without caution being found.

The Lord Ordinary, 'in respect the record in the Inferior Court proves 'the claim of the defender to be equal to the value of the pursuer's claim, 'which is above £40,' advocated the cause, found Richmond entitled to expenses, and remitted the cause to the Jury Court. The Court adhered, refusing to enter into any discussion of the question, whether the Sheriff was right in allowing a proof of the tenant's allegations.

GIBSON-CRAIGS and WARDLAW, W. S.—R. RUTHERFORD, W. S.—Agents.

WILLIAM M'KECHNIE, Advocator.—*Jameson—Russell.*
RICHARD GRIFFIN, Respondent.—*Sol.-Gen. Hope—A. M'Neill.* No. 339.

Process—Advocation—Final Judgment.—An advocation dismissed as incompetent, in respect of the conclusions of the libel not being exhausted.

THE advocator M'Kechnie, writer in Glasgow, was employed by one Potter as country agent in an action of damages for libel, in which a verdict for £40, and a decree for expenses of process, was obtained in Potter's favour. The £40 and the expenses were recovered by the Edinburgh agent, who remitted to M'Kechnie the balance, after deducting the amount of his own account. In the mean time Potter had executed a trust-deed in favour of the respondent Griffin, for behoof of his creditors; and after these remittances had been made to M'Kechnie, Griffin raised an action against him before the Bailies of Gorbals, concluding, 1. For count and reckoning as to the remittances, and payment of £120, more or less, as the balance due by him; and, 2. For relief of an action raised against Griffin, as Potter's trustee, by Boaz, an accountant, for payment of £14. 14s., being an account for giving evidence in the cause above mentioned. M'Kechnie pleaded in defence that he was entitled to pay, out of the sums remitted, his own accounts, which would more than exhaust them. After some procedure, the Bailies decerned against M'Kechnie for £79. 8s., as being the balance remitted by the Edinburgh agent after intimation to M'Kechnie of the execution of the trust-assignation to Griffin, reserving to M'Kechnie to claim for his business-accounts on Potter's estate. The judgment, however, did not assoilzie quoad ultra, nor did it contain any finding or decerniture as to the conclusion for relief of Boaz's action, which did not appear to have been adverted to in the pleadings. M'Kechnie having brought an advocation of the judgment of the Bailies, it was objected to its competency that the judgment was not final, and did not exhaust the cause, in so far as it merely decerned for a certain sum without assoilzieing quoad ultra, May 27. 1829. 2D DIVISION. Ld. Mackenzie. T.

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so that it was still open for him to instruct a further l the conclusion for relief undisposed of.

The Lord Ordinary repelled the objections to the Court, on a reclaiming note by Griffin, altered, and cation as incompetent, in respect of the conclusions in the Inferior Court.

Lord Glenlee.—It may be true that the Inferior more, but that must appear on the face of the interlo merely been a decerniture on a certain branch of the solvitor quoad ultra. The only decision is as to the m summons contains a further demand, which, whether th or not, ought to have been disposed of. Unless we kind, by the terms of the interlocutor, we would re whole process, to see if no more could be got. I think tion is incompetent.

Lord Pitmilly.—I concur.

Lord Justice-Clerk.—I am of the same opinion. to get over the objection that the special conclusion f posed of. It must appear from the interlocutor th hausted; for if we passed from that rule, we would r whole cause before we could say whether it was e could not be a stronger case on this point than that and it is clear we must alter. It is of no consequence intended to exhaust the cause or not.

C. Fisher,—Ritchie and Miller, S. S. C.

No. 340.

Mrs. Jolly and Husband, Pursuers.
Malcolm M'Neill, Defender.—*Sol.-Ge*

Bill of Exchange—Sexennial Prescription—Interest, Accu a question with a co-acceptor who had paid a bill for the acc was entitled to recover payment of the debt, notwithstanding accumulation of interest on interest in respect of a personal a competent.

May 28. 1829. 1st Division. Ld. Corehouse. D.

On the 3d of January 1793, the late Dr. M pursuer Mrs. Jolly) accepted a bill, along wit Iochilly, for £330 in favour of a Captain Dougl thereafter, in consideration of a commission gra ensign. This bill was retired by a Mr. Moir, M'Neill, and in whose possession the bill remai

In the mean while, a submission had been M'Neill and Gallochilly relative to certain ot they declared that it should not be affected by decree should be binding upon their heirs. Ga

* Ante, No. 136. p. 300.

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was succeeded by his eldest son Daniel. In February 1796, a decree-arbitral was pronounced against Gallochilly and his heirs for £242: 3s: in favour of Dr. M'Neill. Daniel died in 1801, and was succeeded by his younger brother Hector, who in 1804 paid to Dr. M'Neill £100; which, it was alleged by the pursuer, was to be applied in extinction of the above debts. In 1811 Hector obtained a discharge of all claims which the Doctor had against him, (including an heritable debt,) amounting altogether to nearly £3000, in consideration of granting a bill for £230, and a bond of annuity to the Doctor, (who was then upwards of 80,) at the rate of 7½ per cent. upon the debt. This transaction having been discovered, some of the friends of Dr. M'Neill obtained from him a trust-deed in 1814, and raised an action of reduction on the ground of fraud, facility, &c. Decree of reduction was pronounced by the Court of Session in July 1816, and the trustees then instituted the present action; (which was executed against Hector M'Neill on the 20th of February 1817,) concluding for payment of the £330 advanced on account of his father to Captain Douglas, with interest from Martinmas 1793, and the sum contained in the decreet-arbitral, with interest from its date, and also for several other smaller sums, under deduction of the £100 paid in 1804.

Hector then entered an appeal against the decree of reduction, and the Doctor soon thereafter died, leaving a trust-disposition for behoof of his natural daughter, Mrs. Jolly. Of this a reduction was brought by his heir at law, but she was assoilzied; and thereafter the appeal taken by Hector was discussed, and the judgment affirmed, on the 21st of May 1824.* Proceedings were then resumed in the present action, and Hector having died, it was transferred against his brother and successor Malcolm.

In defence he pleaded,

1. That the claim under the bill for £330 was prescribed.

2. That the decreet-arbitral, having been pronounced after the death of his father, was not valid; and,

3. That the other claims were unvouched.

In the mean while a separate action had been instituted against him for payment of an heritable debt, in which the Court had found that the interest was to be accumulated biennially;† and the pursuers contended that they were entitled in the present action to have the interest accumulated into a capital at the date of citation, and to have it also accumulated thereafter biennially.

The Lord Ordinary, after granting a diligence against havers, pronounced this interlocutor:—'Sustains the claim of Dr. M'Neill's representatives to the sum of £330 sterling contained in his joint acceptance with Daniel M'Neill of Gallochilly, dated 3d January 1793, and payable at Martinmas that year, with interest of the same from the said term

* II. Shaw's Appeal Cases, p. 206. † See ante, Vol. IV. No. 386. p. 620.

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'of payment, and during the not-payment: Su
'Dr. M'Neill's representatives to the sum of £24
'sum awarded by the extract decreet-arbitral
'mission between Dr. M'Neill and the said Dani
'of that sum from and since the 10th day of J
'of the decreet-arbitral, and in time coming d
'Finds that the sum of £100 paid by Frederic
'in the year 1804 is to be imputed pro tanto t
'above sums hereby found due: Finds that th
'cumulated with the principal as at the 20th
'being the date of citation to the present actio
'said interest the property tax, and deducting
'in striking the balance so accumulated; and
'accumulated balance falls to be accumulate
'end of every two years subsequent to the sa
'until payment, and that at the rate of five
'decerns accordingly; and, quoad ultra, allow
'minute of reference to the oath of the defend

The defender reclaimed; and, in support of

M'Neill contended,

1. That as the action was founded upon t the action was not executed till February 181 by the sexennial prescription, and therefore i either as a ground of debt, or in modum pr debt was unvouched, and could only be prov

2. That although interest had been accum tutors and pupils, trustees and trustors, and was the first instance in which it had been p debtor and creditor.

Lord Gillies.—It has only been done s

Lord President.—The defender should

Lord Balgray.—The interest then beca due upon that.

M'Neill.—But the Lord Ordinary has no est into a capital as at the date of citation, interest of that cumulo sum is thereafter t cipal at the end of every two years, and This is not supported by any precedent; an not conclude for any such accumulation.

Rutherfurd for the Pursuers—

1. The plea of prescription is inapplicabl on the bill, but on the averment that Dr. M defender's father, £330; and that such is documents recovered under the diligence. show that it was retired, and that the paym

2. In regard to the interest, the objecti

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founded, because, as the conclusion is for legal interest, it is broad enough to embrace whatever interest is legally due to the pursuers. It may be true that, in the general case, accumulation of interest is not allowed on personal debts. But this case is marked by this peculiarity, that in consequence of the discharge improperly obtained from Dr. M'Neill in 1811, and which was not finally set aside till 1824, neither he nor his representatives could take effectual measures to recover payment of the debts in question, and consequently the defender was retaining the money improperly, after a demand regularly made upon him. In the case of Mr. Tait, (ante, Vol. I. No. 486,) the Court found that he was not entitled to avail himself of a plea of retention of a debt due by him to the Executors of the Duke of Queensberry, without being liable in accumulated interest, because the presumption of law was, that on the interest he would make profit, and he was not entitled, under a plea of retention, to do so. If, therefore, the Court in that case found that a party, although retaining in his own right, was liable in accumulation, a fortiori the defender, who was retaining in his own wrong, ought to be subjected in accumulation.

The Solicitor-General, in reply on this latter point, stated that in Mr. Tait's case the Court would have ordered consignation of the debt which was heritable, had not Mr. Tait agreed to the accumulation of interest; and therefore it could not be founded on as a precedent, and that hitherto no instance had occurred in simple contract debts of accumulation,—all the cases which had occurred being those in which the parties stood, according to the expression of Lord Eldon, in an 'accountable' situation.

Lord Balgray.—The only difficulty in this case relates to the accumulation. The other points are quite clear, and as to them the interlocutor ought to be adhered to. Accumulations are allowed in heritable debts and adjudications, because the creditor is infeft, not only in security of the principal, but of one fifth part as penalty. In strict law he is entitled to the land, not only to the extent of the principal, but also of the penalty, if incurred; and the Court, upon equitable principles, do not allow him to insist for the full penalty, but find him entitled to accumulated interest; and it was on this principle that judgment was pronounced in the case of Gordon v. Lord Hopetoun.* But it is different as to ordinary contract debts. In regard to them, there is no penalty. The creditor may bring his action, and if interest has not been stipulated, he will get it from the date of citation; but no instance has occurred of accumulated interest being allowed where no diligence has been done. On this point, therefore, the interlocutor ought to be altered.

Lord Craigie concurred, and observed that a different rule would be attended with most injurious and alarming consequences; and he was not aware that it had been admitted in any country.

Lord Gillies was not prepared to say that in no case of a personal debt might accumulation to be allowed, and he was not aware that there was any

* His Lordship did not mention the date of this case.

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fixed general rule that it should not be so. In this c in 1817, but was not insisted in for many years t the pursuers had good reasons for not doing so; bu cient ground for placing so heavy a burden on the d the claim is not equitable that it is refused, but bound by law to award it; and the circumstances upon them in equity to do so.

THE COURT accordingly altered the interlocut was ordered to be accumulated every two y hered.

A. CLASON, W. S.—LOCKHART and SWAN,

No. 341.

A. SMITH, (TRUSTEE for STIRLING BANK,) T THO. MURDOCH and Others, (BUCHANAN'S *Forsyth—Sandford*

Bill of Exchange.—A bill having been accepted for the a to the drawer; and the drawer having discounted it with ing on the bill, indicating that it had been discounted; drawer when due, and thereafter transmitted by him to th it had been accepted, and by him indorsed in security to a was not entitled, in a question with the acceptor, to the holder.

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1ST DIVISION. Lord Meadowbank. H.

ON the 28th of October 1826, Mr. Macve upon Mr. Buchanan of Balfunning, which able three months after date. This bill, it by Mr. Buchanan for the accommodation o indebted to Mr. Napier. It was discounte British Linen Company, and a marking was these terms*:—When it fell due, it was re books of the Bank was thus expressed:—'I nan, £273.' Mr. Napier, however, on his e that it had been retired by him, and transm marking was on the bill, except the one a M'Kinlay was indebted in a sum exceeding Stirling Bank, in security of which, it was and delivered it to the Bank. At what tim pear; but it was admitted that it was poste had become due. The estates of the Stirli trated, Smith was appointed trustee; ar brought an action against his representati period when the bill would have been presc

*£273 269 11 3 J. F.

In defence it was stated,

1. That as no value had been paid for it indorsed to the Stirling Bank after it ha upon it, which must have shown to any

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been discounted, and was a retired document, the Stirling Bank was not entitled to the privileges of an onerous bonâ fide holder, and that all the objections pleadable against Napier and M'Kinlay were competent against the Bank; and as it was proved that no value had been paid by these parties to Buchanan, the Bank, as representing them, could not demand payment out of Mr. Buchanan's estate; and,

2. That as the presumption of law is, when a bill is retired, and no special receipt had been granted in favour of any of the indorsers, that it had been paid by the acceptor; and as this presumption was fortified by the entry in the books of the British Linen Company, it must be held that the bill had been retired by Buchanan, or at least by means of his friends; and therefore a second claim could not be made against him.

To this it was answered,

1. That a bill may be indorsed after the term of payment; and although it be so, the indorsee is entitled to all the privileges of an onerous bonâ fide holder, unless it appear on the face of the bill that it has been dishonoured; that in this case there was no such marking; and it was impossible for any one to infer from the jotting that it had been discounted, and still less that it had been dishonoured and protested; that, on the contrary, it appeared that it had been retired by the drawer Mr. Napier, who could competently transfer to another all the privileges of an onerous bonâ fide holder, which he had done; and that these privileges, by the indorsation of M'Kinlay, had been conferred on the Bank; and,

2. That the defenders themselves had proved by Mr. Napier that Buchanan had not paid the bill.

The Lord Ordinary having reported the case,

Lord Balgray observed, that the case was not attended with any difficulty. The bill was taken up after it was due; and although it was true that it might thereafter be indorsed, yet that was merely to the effect of transferring it. It had then run its course, and could not be again pushed into the circle, accompanied by its original privileges. Besides, the bill here bore a marking, which clearly showed that it had been discounted with a Bank; and, consequently, as there was no indorsation by the Bank, it was manifest that it must have been a retired document. It would be extremely dangerous, after a bill has been discounted and retired, to allow it again to be put into circulation, without subjecting the holder to all the exceptions pleadable against an ordinary assignee. It is indeed somewhat difficult to discover from the books of the British Linen Company by whom the bill was retired; if by Mr. Napier, the books ought to have borne so. The Stirling Bank may be an onerous holder, but cannot plead the privileges of a bonâ fide one; and therefore it is competent to go into the history of the bill; and as it clearly appears that no value was paid to Buchanan, the defenders should be assoilzied.

Lord Gillies concurred in opinion that the Stirling Bank was liable to all the exceptions pleadable against the party from whom the bill was acquired; and observed, that although the Bank may have been entitled to take the bill

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as a security, yet it was a different question whet made available against the acceptor.

LORDS PRESIDENT and CRAIGIE were understoc rule, and to be of opinion that the whole circun transaction were very suspicious.

THE COURT therefore assoilzied the defender

Pursuer's Authorities. — Thomson on Bills, 291. 293, an 1793, (1484); Craig, Dec. 15. 1809, (F. C.); Scott, Dec. 1 1821, (ante, Vol. I. No. 83.)

Defenders' Authorities.—Ferguson, Nov. 29. 1793, (1488 Thomson on Bills, p. 140.

DALLAS and INNES, W. S.—D. FISHER, S

No. 342.

MAGISTRATES of DUNBAR, Pursuers and *Marshall.*

JOHN SAWERS, Defender and Respondent.—

Servitude.—The proprietors of a piece of ground having ing proprietor to make a drain through their ground, with for the purpose of draining his property, but with a prol from conterminous land to be carried off by it; and a dr and continued in the same state for about fifty years—He nant tenement was not entititled to have the drain deepen effectually drain his property.

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2D DIVISION.
Ld. Cringletie.

ABOUT fifty years ago, Mr. Grieve Wilso of a few acres, part of a flat piece of ground Dunbar, which was parcelled out among se this ground and the shore was a stripe of belonging to the town of Dunbar; and wit (which, from the flatness of the ground, wa of water,) Mr. Wilson, in 1778, presented a trates, setting forth that he "intended to d said park, which stagnates thereon for wan ing begun his operations, has obtained libert to make a cut for a sunk drain through his of Dunbar, part of the unfeued property o property which lies between the petitioner's less he be allowed to make a cut through t his intention, and his work be frustrated;" to allow him "to carry his drain through t to keep the town free from all consequential after visiting the premises, "having resi Wilson's petition, "granted the prayer th should have liberty "to make a cut upo property mentioned in the petition, when of such a depth as they shall see necessar and his heirs shall not be at liberty to co

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grant to any other heritor, without consent of the Magistrates and Council for the time;" declaring "that the Magistrates and Council shall have liberty to make stoppages upon the petitioner's ground, to prevent the water of any other heritor from coming by the cut above mentioned." In consequence of this agreement, a covered drain of considerable depth was made by Mr. Wilson through the Kirkhill, and it subsists in perfectly good order to the present day. In 1825, the defender Sawers having acquired the park which belonged to Mr. Wilson, and also the rest of the flat piece of ground, of which it formed part, applied to the Magistrates for leave to deepen the Kirkhill drain, for the purpose, as stated in his letter to the Magistrates, of effectually draining the whole of this piece of ground. The Magistrates having refused to grant the permission desired, except on payment of £100, Sawers presented a petition to the Sheriff, praying him "to find that the petitioner is entitled to deepen the drain leading from his lands through the Kirkhill, and this either by opening the ground from the surface, or by means of a cut under the present drain, as shall be deemed most advisable, and to prohibit and discharge the Town Council and all others from interrupting his operations." After some procedure, in which the Magistrates objected to the competency of this petition before the Sheriff, as being in substance a declarator of heritable right, an interlocutor was pronounced, authorizing Sawers, 'in respect of the grant of 1778, to complete the drain of his 'lands in manner craved, but subject to the whole conditions of that 'grant,' and prohibiting the Magistrates from interrupting him therein.

On this the Magistrates brought an advocation, and at the same time raised a summons of declarator, concluding to have it found that Sawers had no right to cause the water collecting on his lands, other than the park which had belonged to Wilson, to be carried off by the drain through the Kirkhill; and that he had no right to enter on the lands of Kirkhill to alter or deepen the drain, for the purpose of taking off water which might accumulate on his lands, other than Wilson's park; but that his right was limited to the opening and clearing out the drain, when it should be so obstructed as to prevent the water from being carried off that park.

These processes having been conjoined, Sawers averred that he did not propose to deepen the drain, further than was necessary to drain effectually Wilson's park; that the original cut did not drain it completely; and that no benefit would accrue to the adjoining lands, "excepting such as may be the natural unavoidable consequence of the piece of ground which belonged to Grieve Wilson, in their vicinity, being well-drained land on the same or a lower level;" and he contended, that as there was no limitation in the original grant as to the depth to which the drain was to be cut, or as to the time within which it was to be done, he could not now be precluded from making it of such a depth as would effectually drain the park in question.

On the other hand, the Magistrates, besides contending in the advo-

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cation that the petition to the Sheriff was incompetent, maintained that the original grant was merely to execute a specific drain; and that having been made of a certain size, and continued so for such a long period, this must be held as the measure of the servitude, and that it could not now be made of a greater depth; and besides, that whatever the avowed intentions of Sawers might be, the necessary consequence of deepening the cut would be to drain the adjoining lands now belonging to him, the water from which, it was stipulated in the grant, should not be carried off by the drain in question.

The Lord Ordinary pronounced this interlocutor:—'Finds that the 'action before the Sheriff was not of a possessory nature for maintaining 'possession of the drain which Mr. Sawers and his authors had enjoyed 'forty or fifty years ago, but was for having it found that he was en- 'titled to have more than he possessed, namely, the right to deepen said 'drain: Finds, therefore, that the action was of a declaratory nature, 'and incompetent before the Sheriff; and therefore, not only on that 'account, but of the merits alluded to in the Lord Ordinary's note of 'the 18th day of November 1826,* advocates the cause, and assoilzies 'the defenders; and in the declarator finds and declares in terms of the 'libel, and decerns: Finds expenses due both in this Court and in the 'Sheriff's, and remits the accounts thereof to the Auditor to fix the same, 'and report.'

Sawers reclaimed; but the Court adhered.

Lord Glenlee.—I need say little as to whether the process before the Sheriff was declaratory or not, for the material process is the declarator by the Magistrates; and I see no reason to doubt the propriety of any of its conclusions. There is, however, a different question in the advocation; for though all these conclusions be decerned in, there is still a question open in the advocation, as Sawers avers that his proposed operation is merely fully to drain

* "The Lord Ordinary has advised this cause, and must express his surprise that there should arise any question of law out of the liberty given by the town of Dunbar to Mr. Grieve Wilson in 1778. That gentleman got leave to make a drain through Kirkhill for draining the ground then belonging to him, no matter what was its extent; but it was specially stipulated that no other heritor should have the benefit of that drain without the consent of the Magistrates; and they positively reserved a power to erect stoppages on Mr. Wilson's ground, to prevent the water from contiguous property being thrown on Mr. Wilson's, and carried off through the drain. The defender has acquired that contiguous ground, but surely he has not acquired any other right than belonged to it? And if he thinks proper to lead the water off it into that which in 1778 was Mr. Wilson's, it appears to the Lord Ordinary clear beyond a doubt that he cannot have even the shadow of a pretension to lead off that foreign water, as it may be called, by the drain permitted to be made in 1778, far less to open and deepen that drain to discharge that water by it. That he intends to do so, is proved by his own application to the Council of Dunbar, No. 5. of process in Inferior Court; and it is quite improper in him to pretend in this process that his object is merely to drain the ground which once belonged to Grieve Wilson. His object may be to drain it indeed; but it is of the water which he has thrown on it from his contiguous property, and which water the town of Dunbar is entitled to stop from reaching the drain in question. The Lord Ordinary repeats his surprise that there can be any dispute on a matter which is equally a right of the town, as that the defender's property belongs to him."

Wilson's park. But we see this drain was made fifty years ago, and was thought perfectly sufficient then, and no physical cause is assigned for more water coming on the ground than formerly. If that had been the case, as for instance by a burn changing its course, we might think there was something in the plea. But we cannot shut our eyes to this—that if there be more water, it must arise from his own fault in allowing water from his other lands to come on this ground; and then we see his plain avowal, in his letter to the Magistrates, that his object was to drain these other lands. On the whole, it rather appears to me, that after so long possession in a particular way, it will not do to go back and alter it. Suppose I grant a right of road, and it is laid out of a particular breadth, and so possessed for fifty years, and the party then acquires other lands, and says it is not broad enough, he would not be listened to.

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Lord Pitmilly.—I am clearly of opinion that the interlocutor is well founded.

Lord Justice-Clerk.—I am of the same opinion, and I go the length of thinking with the Lord Ordinary that the petition to the Sheriff was incompetent; and in the declarator I am clear that the Magistrates are right. A privilege having been granted to make a limited cut, it cannot be made greater without the consent of the Magistrates.

Gibson-Craigs and Wardlaw, W. S.—J. Gibson Jun. and A. Murray, W. S.—Agents.

John Pollock, Suspender.—*Sol.-Gen. Hope—Monteith.*
W. Mather and Others, Respondents.—*Jardine.*

Title to Pursue — Process.—A party not having the title set forth by him, process at his instance dismissed, without deciding whether the title actually possessed by him was sufficient.

The suspender Pollock is infeft jointly with Allan Gilmour and Arthur Pollock, partners in trade with him under the firm of Pollock, Gilmour, and Company, in the "mailing of Hairshaw," valued at £18 Scots, with the "mosses, muirs, and whole other privileges pertaining to the said lands," which were alleged to include a right in the common muir of Glenowther in the county of Ayr, the remaining interests in which (being to the extent of eleven-twelfths of the whole,) belonged to General Dunlop of Dunlop and Mr. Cunningham of Lainshaw. In February 1825, the respondent Gilmour obtained from General Dunlop a lease of his share of the muir, containing leave to shoot game thereon; and the respondent Mather, on the 11th of August of the same year, likewise obtained permission from Mr. Cunningham to shoot in the muir. On the evening of the 11th, however, they were served with an interdict, obtained on a bill of suspension presented by Pollock, prohibiting Mather and Gilmour, and a person named Craig, who, he averred, had threatened to shoot, and all others, from shooting on the muir without written permission from him, or one of the other proprietors. This bill of suspension was subsequently passed, and the letters expede, the title of the

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suspender being set forth as follows:—"That he is joint proprietor, along with General Dunlop of Dunlop and Mr. Cunningham of Lainshaw, of the commonty of Glenowther muir in the parish of Stewarton and county of Ayr."

To the title it was objected, that the suspender was not, as he set forth, "joint proprietor, with General Dunlop and Mr. Cunningham, of the commonty of Glenowther muir," but was merely joint proprietor, with his two partners, of the lands of Hairshaw and pertinents, including, as he alleged, a share in this muir; and, at any rate, that the titles of Hairshaw did not give a right of property in the muir, but merely a servitude; and that this was not sufficient to warrant an application for an interdict against shooting; but that, even if it were a right of property, a pro indiviso proprietor of a portion of a common muir had no title singly to apply for such interdict.

On the merits also it was pleaded by Mather and Gilmour that their lease from the other proprietors was sufficient to protect them; and by Craig that he never shot on the muir, or even threatened to shoot; and that the application for an interdict as to him was quite incompetent.

The Lord Ordinary pronounced this interlocutor:—'Having heard 'parties' procurators, and thereafter considered the closed record and 'whole process, finds that, in the circumstances of this case as appear-'ing on record, the suspender was not entitled to interdict the chargers 'William Mather and John Gilmour; and therefore, in respect to them, 'recalls the interdict, finds the letters orderly proceeded, and decerns: 'Finds the suspenders liable to these chargers in expenses, of which ap-'points an account to be given in, and when lodged, remits to the Au-'ditor to tax the same, and report; and in respect to the other charger 'William Craig, who admits that he has no right to kill game on the 'muir in question, but denies that he ever threatened to do so, as averred 'by the suspender, appoints the cause to be enrolled in the roll of mo-'tions, with a view to a remit to the Jury Court, or other trial of this 'disputed fact.'*

Both parties reclaimed.

Lord Glenlee.—It is not sufficient to say that the suspender has a good title. He must have the title which he sets forth in his suspension. Now, he

* His Lordship added the following note:—

"The suspender, who admits that he has right to only one third pro indiviso of a small portion of this muir, and yet claims the right of killing game upon it, seems to be in no condition to allege a settled or customary use of the muir, so strict as to exclude persons having right, such as he does not deny the two chargers have. It is not easy to see how a feu of a farm, with a right of commonty on this muir to a small extent, shall give right to kill game on it to three pro indiviso feuars at once, while a lease of a farm apparently larger, with its commonty on the muir, particularly including all right as respects game, should not give this right. As to Craig, the Lord Ordinary cannot admit the doctrine that an interdict may be obtained by a proprietor against any man at pleasure. The Lord Ordinary conceives that wrong must be done or threatened, or apparently intended to be done, to found ground for an application of interdict."

certainly has not the title he sets forth. It is only he and other two persons who are joint with General Dunlop and Mr. Cunninghame. He cannot be called a joint proprietor of the muir with these gentlemen. The only question is, whether he has the title set forth in the suspension? And whether his real title be sufficient or not, it will not do here. Indeed I cannot see what better title he can have than others having a lease from co-proprietors; and I would dismiss as to Craig also on the objection to the title.

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Lord Pitmilly.—I agree.

Lord Justice-Clerk.—The objection noticed by Lord Glenlee is invincible. The suspender sets forth a right as in himself, which is in Pollock, Gilmour, and Company, consisting of three partners. Even on the merits, when we see these parties have a lease from co-proprietors, I cannot hold one co-proprietor entitled to interdict persons having a lease from other co-proprietors. But the objection to the title is invincible; and we are not called on to decide whether this is a right of property or of servitude. As to Craig, it would be ludicrous to have a Jury trial on this matter, and the suspension must be dismissed as to him also.

The Court accordingly, while they refused Pollock's note, recalled the Lord Ordinary's interlocutor as to Craig, and dismissed the process with expenses.

J. Crawford, W. S.—W. Patrick, W. S.—Agents.

John Gibb, Advocator.—*Sol.-Gen. Hope—A. M'Neill.*
Thomas Winning, Respondent.—*Jameson—Whigham.*

No. 344.

Proof—Presumption—Landlord and Tenant.—Circumstances not sufficient to warrant a presumption in law that a landlord had agreed to an abatement of rent below that contained in a written contract of lease.

The advocator Gibb, in the year 1814, let to the respondent Winning, by a written tack, six acres of ground for 12 years, at a rent of £40. Winning paid £40 the first year; but having remonstrated that the rent was too high, he, for the nine succeeding years, paid only £35, and for the two last years of the lease only £30 each year, in consequence, as he alleged, of an agreement on the part of Gibb to restrict the rent to these sums; but no receipts had been granted for the rents, and there was no evidence of an agreement to abate. In 1826, shortly before this lease expired, Gibb granted a new lease of the same ground, with a house (worth £2 per annum) in addition, at the rent of £24; and thereafter Winning paid to him £19, which he alleged was in full of the first year's rent under the new lease, it having been agreed, as he averred, that the balance of £5 was to be expended in repairing the dikes surrounding the land. Gibb, however, alleging that he had never agreed to any restriction of the rent under the former lease, insisted on charging the full sum of £40 for each of the two last years of it, and maintained that he was entitled to impute the £19 in extinction pro tanto of the alleged arrears of £10 due for each of these years; and he accordingly raised an action

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before the Sheriff of Stirling, concluding for payment of the rent under the new lease.

In defence, Winning pleaded that the £19 was paid in full of the first year's rent, and contended that the circumstances afforded sufficient ground for presuming that Gibb had restricted the rent for the two last years of the old lease to £30, so that no arrears were due under that lease.

The Sheriff found that, under the circumstances, the allegation that Gibb had agreed to take £30 for the two last years was 'sufficiently instructed by his acceptance of these sums at the periods when the rents for these years successively became payable, and his entering into a new lease for the still smaller sum of £24 per annum, without any reservation of any arrear under the former one;' and therefore 'that the pursuer was not entitled to apply the £19 received by him from the defender, as the rent of the first year under the new lease, towards payment of any part of the rent exigible under the old one;' and he accordingly assoilzied Winning. Gibb then brought an advocation, in which he contended that there was no sufficient evidence of the alleged restriction. The Lord Ordinary pronounced this interlocutor:—'Finds that, during the preceding lease, which was for 12 years, it is not denied that, at the end of the first year, the respondent made a remonstrance that the rent was too high, and it is admitted that subsequently, for the nine following years, he paid only £35 of yearly rent, and the advocator claimed no higher sum for these years: Finds that in January 1826 the parties bargained for a new lease, which is now current, at £24 of yearly rent; and the advocator does not allege that at this time he stated that he was to revert again to the original rent for the last two years: Finds that it must be presumed the parties bargained on the understanding that for these two years the same rate of payment was to be taken as for the preceding years, unless the respondent proves by the oath of the advocator that he further restricted the rent for these two years to £0.'

Against this interlocutor both parties reclaimed,—Gibb in so far as it did not require Winning to prove the restriction even to £35 by his oath, and Winning in so far as it required him to prove in that way any part of the alleged restriction.

The Court refused Winning's note; and on that for Gibb recalled the Lord Ordinary's interlocutor, and found that the allegation of any deduction from the £40 stipulated by the lease must be proved by reference to oath.

Lord Justice-Clerk.—The rent, according to the written contract, is £40. It is clear this was egregiously high, and for several years the landlord abates £5, and he does not now attempt to go back on that. Then for the last two years he takes £30, and gives a new lease at £24. But still he might not have agreed to any abatement for these two years; and there being no evidence of abatement, I see no mode of proving it but by oath. The Lord Ordinary finds that the tenant must refer whether the restriction was so low as £30; but I think there is the same necessity for referring whether it was

£35, for I can see no presumption that because £35 was taken for so many years before, the landlord must have agreed to accept of that sum for the last two also. No. 344. May 28. 1829.

Lord Pitmilly.—I cannot concur with the finding of the Lord Ordinary. A deduction of £5 was given for eight years, and the question is, if the same is to be presumed as to the last two years? I cannot admit that to be the presumption of law. I think, no doubt, that there must have been a reasonable expectation on the part of the tenant that the same deduction would be given; but the presumption of law is, that the rent was that stipulated by the contract; and that can only be got the better of here, when there is no evidence of agreement to abate, by reference to oath.

Lord Glenlee.—I do not object to altering the interlocutor.

A. Nairne,—A. Bayne,—Agents.

William Sharp and Others, Pursuers.—*Rutherfurd.*
Duke of Hamilton, Defender.—*Jeffrey—Jardine.*

No. 345.

Title to Pursue — Servitude. — Question raised, but not decided, whether the character of 'inhabitant' merely of a burgh of barony was a sufficient title to pursue a declarator of servitude of a right to carry off sand and gravel from the bed of a river, and to draw water therefrom.

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This was an action raised by Sharp and others, as feuars or burgesses and inhabitants of a burgh of barony of Hamilton, to have it declared that they had a servitude right of carrying away sand and gravel from the bed and banks of the river Clyde for the use of their tenements within burgh, and of taking water from the river. The Duke of Hamilton, the defender, having objected to the title to pursue, the Lord Ordinary, while he sustained the objection as to one pursuer who was an honorary burgess merely, found that being 'a feuar or inhabitant' was sufficient, and sustained the title of four pursuers who were feuars, reserving the objections to others as to whom the facts were disputed. The Duke of Hamilton reclaimed against this interlocutor; but, at the advising, he only objected to it in so far as it seemed to sustain the title of an 'inhabitant' to insist in the action.

The Court, considering it unnecessary to decide this matter, sustained the title of the four feuars, and found it unnecessary to decide as to the others.

Scott, Finlay, and Balderston, W. S.—R. Rutherford, W. S.—Agents.

No. 346.

A. SHEPPERD, (FRASER'S TRUSTEE.)—*Skene—Buchanan.*
REV. T. MUNRO and Others.—*Rutherfurd.*

Res Judicata.—A bankrupt under sequestration having raised an action against certain defenders; and the trustee having declined to sist himself at that time, and intimated that if the creditors adopted any proceedings, it would be in a different shape; and the defenders having been assoilzied, in respect the bankrupt had failed to find caution for expenses—Held that this did not bar his trustee from afterwards bringing a multiplepoinding in name of the defenders in relation to the same question.

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1ST DIVISION. Lord Meadowbank. D.

THE estates of John Fraser were sequestrated in 1814, and Shepperd was appointed trustee. His daughter married Robert Munro, a native of Scotland, who, in 1822, went with her to Jamaica, where they both died, leaving a child, who also soon afterwards died. Fraser, conceiving that he had right to the succession of the child as its grandfather, agreeably to the law of England, obtained letters of administration, and thereafter brought an action against Munro and others, who had been appointed trustees by the father, to hold his property for behoof of the child. On the other hand, one of the trustees contended that he had right to the succession, because both the child and its parents must be held to have been domiciled natives of Scotland, and he was next of kin by the law of this country. But, as a preliminary defence, the trustees pleaded, that as Fraser was under sequestration, he must either sist the trustee, or find caution for expenses; and the Lord Ordinary appointed intimation to be made to Shepperd, the trustee. A meeting of the creditors was then called, who instructed Shepperd to take the opinion of counsel; but that they "did not deem it expedient for the trustee to become a party to that proceeding (Fraser's action) in the present state of matters; and they therefore declined authorizing him to sist himself a party to it." A minute was then lodged by Shepperd, reporting this resolution, but stating that he "did not mean to say that the creditors had abandoned, or meant to abandon, their claim to any share of Mr. Robert Munro's estate; but if they succeed in establishing any claim, it will be by a different mode of proceeding from that which the bankrupt has adopted."

Fraser was then ordered to find caution; but having failed to do so, the trustees were assoilzied. Thereafter Shepperd raised a multiplepoinding in name of the trustees, with the view of having the question of right decided, against which they lodged objections, founding on the above decree of absolvitor as a bar to the action; and the Lord Ordinary, 'in respect the decree founded on by the objectors is extracted, 'and affords a plea of res judicata, sisted further procedure till the third 'sederunt day in May next, that John Fraser and others, the real pur-'suers, may bring an action of reduction of said decree, if so advised.'

Shepperd having reclaimed, and the Court being satisfied that, under the circumstances, the absolvitor was no bar to the multiplepoinding, altered, and remitted to the Lord Ordinary to proceed accordingly.

H. MACQUEEN, W. S.—Æ. MACBEAN, W. S.—Agents.

WILLIAM BERRY, Advocator.—*Jameson.* No. 347.
ROBERT DALGLEISH, Respondent.—*Jardine.*

Cautioner.—A cautioner who had become bound for the rent due by a tenant whose effects were liable to sequestration, and of which the landlord was found not entitled to avail himself in respect of the cautioner—Held not liable in the expenses of a litigation between the landlord and tenant relative to the amount of the rent, and in which decree was pronounced against the tenant.

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1st DIVISION.
Ld. Corehouse.
D.

BERRY having threatened to sequestrate the effects of his tenant Gibb, who was about to remove from his farm to another possessed by Mr. Dalgleish, the latter gave a letter to Gibb, bearing, "Tell Mr. Berry that as far as that small sum is concerned, I will see it paid,"—the sum referred to being the rent. Being doubtful of the validity of this obligation, Berry applied to the Sheriff of Fifeshire for a sequestration, which was dismissed in respect of Mr. Dalgleish's obligation. Berry then raised an ordinary action against both Gibb and Mr. Dalgleish for payment of the rent, in which the latter stated that it was quite unnecessary as against him, because he "was ready to pay whatever sum was found due to him (Berry) by Gibb." A long litigation then took place between Berry and Gibb, and the Sheriff decerned for a certain sum less than that concluded for, but found none of the parties entitled to expenses. Mr. Dalgleish then consigned the sum found due; and Berry brought an *advocation* in regard to the merits against Gibb, and to have Mr. Dalgleish subjected in expenses.

The Lord Ordinary altered these judgments, and decerned against Gibb in terms of the libel, with expenses; but he affirmed them in regard to Mr. Dalgleish, found him entitled to expenses in this Court, and observed that 'Mr. Dalgleish's conduct was quite correct. His obligation implied 'that he should pay the rent due by the tenant Gibb, and he could not be 'called upon to pay it till the amount was ascertained. By consigning, 'till the issue of the process, the whole sum claimed by Mr. Berry, he did 'all that was incumbent upon him.'

Berry reclaimed, and contended that as, by virtue of his hypothec, he would have been entitled to recover both the rent, and the expenses of making it effectual, and as he had given it up in respect of the obligation by Mr. Dalgleish, he was entitled to recover from him the expenses; and this more especially, as it had now been found that the opposition by the tenant was improper.

The Court, however, being of opinion that Mr. Dalgleish's obligation could not be extended beyond the amount of the rent, and that he had done nothing to subject him in expenses, adhered.

G. HEGGIE, W. S.—J. HERIOT, W. S.—Agents.

No. 348. ALEX. SPROT and Others, Pursuers.—*Forsyth—Cockburn—Rutherfurd.*
GOVERNORS of HERIOT'S HOSPITAL and MAGISTRATES of EDINBURGH, Defenders.—*Sol.-Gen. Hope—L'Amy—More.*

Warrandice.—The Governors of Heriot's Hospital having feued lands then situated in the parish of St. Cuthberts, and beyond the royalty of Edinburgh, with an obligation to relieve the feuars "a solutione omnium stipendiorum ministris, et omnium salariorum ludi magistris, et omnium censuum aliorumque impositionum impositorum aut imponendorum dict. acris;" and the lands having, with consent of the feuars, been brought, by a subsequent statute, within the royalty, and disjoined from the parish of St. Cuthberts, and annexed to that of St. Giles, except as to payment of stipends and parochial burdens; and houses having been erected, in respect of which the inhabitants became liable to the Magistrates of Edinburgh in payment of annuity to the Ministers of Edinburgh, poor's rates, and impost money—Held that they had no claim of relief against the Governors for these payments.

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1st DIVISION.
Ld. Corehouse.
D.

THE Governors of Heriot's Hospital, on the 7th of December 1730, granted a feu-charter in favour of the Magistrates of Edinburgh of five acres of land which were then situated within the barony of Broughton, and parish of St. Cuthberts, in the county of Edinburgh, and which contained this clause:—"Et nos hanc nostram cartam præfatis præposito, ballivis, edilis, questori, consulibus et communitati dict. burgi eorumque antedict. a nostris propriis factis solummodo warrantisabimus, acquietabimus, et in perpetuum defendimus; præterea nos liberamus dict. præpositum, ballivos, consules, et communitatem eorumque antedict. a solutione omnium stipendiorum ministris, et omnium salariorum ludi magistris, et omnium censuum aliorumque impositionum impositorum aut imponendorum dict. acris, et subjecimus dict. hospitalem in solutionem eorundem." On the 30th of the same month the Magistrates, agreeably to an Act of Council, executed a feu-charter in favour of the Commissioners and Trustees of Fisheries and Manufactures of Scotland, in consideration of a certain price, by which they conveyed the lands to these trustees, and in which, after the obligation of absolute warrandice, there was introduced this clause:—"Præterea quod liberavimus dict. delegatos et fidei commissarios eorumque prædict. a solutione omnium stipendiorum ministris, et omnium salariorum ludi magistris, et omnium censuum aliorumque impositionum impositorum aut imponendorum dict. acris, et subjecimus nos nostriq. antedict. in solutionem eorundem." Upon each of these charters infeftment was taken. In 1767 the statute 7th Geo. III. c. 27, for extending the Royalty of the City of Edinburgh, was passed with the consent of the trustees, reserving their rights in the lands, and by which the lands were brought within the royalty. By that statute it was enacted that the Magistrates should have power to levy "the mails, duties, customs, and other taxations within these annexed grounds, in the same manner, and by such actions at law, as the said Magistrates and Town Council are entitled to use by any law, statute, or otherwise, within the present royalty;" and also to "levy from the proprietors and possessors of all such houses as are built, or shall hereafter be built, upon the foresaid ground hereby annexed, &c., an equal portion of the cess,

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annuity, poor's money, and watch money payable by the City of Edinburgh, in the same way and manner as the same are now levied within the present royalty." The lands were also disjoined from the parish of St. Cuthberts, and annexed to that of St. Giles; but declaring that the heritors should be liable to the payment of the minister's stipend, and other parochial burdens, as formerly. In 1800 the trustees conveyed the lands, (now known by the name of Picardy Lands,) to Mr. Burn and Mr. Forsyth, by whom they were feued out, and streets erected upon them. The Governors of George Heriot's Hospital had all along paid, and continued to pay, the cess, minister's stipend, school-master's salary, and other burdens affecting the lands; but Messrs. Sprot and others, who had purchased feus, and built or acquired houses, conceiving that, under the above clause, they were entitled to relief of the annuity, poor's rates, and a tax called impost money, (which had been imposed in 1785 by 25th Geo. III.,) brought an action of declarator, to have it found that the Governors and Magistrates were bound to relieve them "of and from payment of all teind, cess, ministers' stipends, school-masters' fees, annuity, poor's rates, and impost, and all other public burdens and taxations at present payable from, or which may hereafter be imposed upon the property, buildings, and subjects belonging to them aforesaid;" failing which, to pay a certain sum of money.

In defence it was stated, that the obligation of warrandice had reference merely to the *lands*, which were then a rural subject, and that the Governors had never disputed their liability to pay the taxes exigible from them; but that they were not liable to relieve the inhabitants of the taxes leviable in respect of the *houses* built upon them, or of those which were of a personal nature on the inhabitants; that these consisted of the annuity, poor's rates, and impost money; that the annuity was payable to the ministers under the statute 1661, which imposed it not upon the lands, but "upon the inhabitants, tenants, and occupiers of the several dwelling-houses" within the city, and that at a rate "effeirand to the mails of the houses occupied and inhabited by them;" that the poor's rates were exigible under the act 1579, c. 74, which laid them upon "the hail inhabitants within the parochin, according to the estimation of their substance;" that the impost money was leviable, not from the lands, but from the inhabitants; and that although the clause in the charters contained a warrandice "omnium censuum," these taxes could not have been in contemplation of the parties, because they were contracting with reference to a rural subject, and the lands had been brought within the burgh by a supervening statute; but that, at all events, the pursuers were barred from objecting to the payment of them, as the subjects had been brought within the city, and so exposed to these taxes by consent of their authors.

On the other hand, it was maintained by the pursuers, that as the clause of warrandice applied to all taxes imposed or to be imposed, and as there was a declaration in the statute that nothing thereby should affect the

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rights of their authors, the trustees, the case remained in the same position in regard to this question as if that statute had never existed.

The Lord Ordinary found 'that the clause of relief contained in the 'charter of the lands in question, dated the 7th day of December, 1730, 'by the Governors of Heriot's Hospital to the Magistrates and Council 'of Edinburgh, and in the charter, dated the 30th of the same month, 'by the Magistrates and Council of Edinburgh to the trustees for improving the manufactures and fisheries of Scotland, to the benefit of which 'the pursuers now claim right, imports relief, in fair construction, only 'from ministers' stipends, schoolmasters' salaries, and all taxes and other 'impositions imposed or to be imposed on the lands by virtue of laws then 'in existence, or at least applicable to the state in which the subjects then 'were, and that it does not extend to the annuity, or to the impost-money, 'which are burdens on the houses of the pursuers exigible by the act of 'George III. c. 27. extending the royalty over that district—an act 'which could not have been in contemplation of parties when the above-'mentioned charters were granted, and which was expressly consented to 'by the pursuers or their authors;—that the poor's rates levied from the 'pursuers by virtue of the statute 1579, c. 74, are not an imposition upon 'land, but a personal tax exigible in respect of inhabitancy; and therefore assoilzied the defenders from the conclusions of the action in so far 'as the annuity, impost, and poor's rates are concerned, being the only 'burdens now in dispute,' and found the pursuers liable in expenses.

The pursuers having reclaimed, the Court unanimously adhered.

Defenders' Authorities.—Lady Elliot, Dec. 2. 1824, (ante, Vol. III. No. 252); Watson. July 15. 1667, (16588); Lumsden, Jan. 6. 1682, (16606); 2. Ersk. 3. 29.

D. Fisher, S. S. C.—MacRitchies, Bayley, and Henderson, W.S.—Agents.

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Walker and Johnstone, Pursuers.—*Jeffrey—A. M'Neill.*
Sir Willian Forbes and Company, Defenders.—*Skene—Anderson.*

Bill of Exchange—Diligence, Legal.—One co-acceptor of a bill of exchange having paid the full amount after it had been protested and charged upon by the holder; and having thereupon received from the holder the bill and diligence, with a letter authorizing him to proceed with the diligence in name of the holder, but not having obtained a regular assignation; and he having proceeded therewith against the other acceptors, to the effect of operating his relief—Held that this mode of procedure was perfectly regular.

May 29. 1829. 2d Division. Ld. Mackenzie. T.

The pursuers Walker and Johnstone, wood-merchants in Perth, along with James Ainslie, shipbuilder there, accepted to Sir William Forbes and Company a bill for £76. 13s. being the price of wood purchased by them from Sir William Forbes and Company. Of this sum Sir William Forbes and Company alleged that £49. 12s. was the amount purchased by Walker and Johnstone, and the balance £27. 1s. the amount purchased by Ainslie, but this was denied. When the bill fell due, Ainslie paid the

£27. 1s.; but the balance not having been paid, Sir William Forbes and Company protested the bill for non-payment of the balance, and thereafter charged Ainslie and Walker and Johnstone. Ainslie paid up the balance, and received the bill and diligence from Sir William Forbes and Company, together with a letter from their agent, authorizing him to follow out the diligence in their names against Walker and Johnstone. Accordingly Ainslie proceeded with the diligence in name of Sir William Forbes and Company, and executed a poinding of certain goods belonging to Walker and Johnstone, which were ultimately sold by warrant of the Sheriff, it having been stated in the commencement of the proceedings that they were carried on for behoof of Ainslie, though in name of Sir William Forbes and Company. Walker and Johnstone now raised this action against Sir William Forbes and Company, concluding for reduction of the proceedings in the poinding, and repetition of the amount of goods sold, and for damages; and they contended, that although the bill and diligence might have been kept up by an assignation to Ainslie, in order to enable him to operate his relief; yet this not having been done, the bill was extinguished by payment to Sir William Forbes and Company, and that it was incompetent thereafter to do diligence in their names.

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To this it was answered, that one of several co-acceptors paying the full amount of a bill was always entitled to delivery of the bill and diligence, in order to follow out his relief; and that, for this purpose, an assignation was not in practice deemed necessary, nor could any prejudice have arisen to Walker and Johnstone, as they were certiorated from the beginning that the proceedings were for behoof of Ainslie.

The Lord Ordinary assoilzied the defenders with expenses,* and the Court adhered.

Lord Glenlee.—The interlocutor is right. The summons is libelled on the ground that although Sir William Forbes and Company were paid, yet they continued to charge on the bill, and the defence is, That is very true, but it was only paid by a party not primarily liable in the full amount, and on condition of his getting authority to carry on the diligence in their name; and the statement that the charge was made for behoof of Ainslie, was made early in the Sheriff Court, and not denied. Now Sir William Forbes and Company were bound to grant an assignation, and though not bound to grant authority to go on in their name, yet it was very reasonable and proper for them to do so. I grant it was necessary that it should be avowed from the beginning that the charge was

* His Lordship subjoined to his interlocutor the following note:—"The Lord Ordinary does not see why, if it was competent, as was admitted by the pursuers in argument, for the defenders to grant an assignation, and thereupon for diligence to proceed in their name, it would be incompetent to do what is averred to have been done in this case. The absolute extinction of the bill would have put an end to all procedure in any way. But there seems a sufficient allegation of that, or denial that the diligence actually went on by desire of Ainslie, and for his behoof,—he, though he paid the amount, not choosing to pay to the effect of extinguishing the bill, the payment not being received to that effect."

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made for behoof of Ainslie, that the other parties might plead claims competent to them; but that being done, I can see no objection to the regularity of the diligence.

LORD PITMILLY.—I have no doubt that the interlocutor is well founded. Ainslie, though a joint acceptor, was not to be called on to pay the whole bill so as to liberate the pursuers. It may not be established what their proportion of the debt was; but it is established by the bill that it was a joint obligation. Now Ainslie pays the bill; and as he could not mean to liberate them, he accordingly gets possession of it, that he might do diligence; and it must go on in the name in which it began. I can see nothing irregular in this proceeding, which is common in practice.

LORD JUSTICE-CLERK.—I agree. This was just a short way to save the expense of a formal assignation; and the pursuers are not at all injured by it, as it was set forth from the beginning that it was for Ainslie's behoof.

R. and A. KENNEDY, W. S.—CRANSTOUN and ANDERSON, W. S.—Agents.

No. 350.

NATHANIEL GRANT, S. S. C. Suspender.—*More—Alison.*
GIBSON-CRAIGS and WARDLAW, W. S. Chargers.—*Cockburn—Ivory.*

May 30. 1829.

2D DIVISION.
Bill-Chamber.
Ld. Fullerton.

Trustee.—Bill of suspension passed on caution, to try whether it was a good defence on the part of Grant against a charge for payment of certain expenses awarded against him qua trustee in the application for approval of composition and discharge mentioned ante, Vol. VI. No. 427. p. 1101, that he had no trust-funds in his hands.

J. YOUNG, S. S. C.—GIBSON-CRAIGS and WARDLAW, W. S.—Agents.

No. 351.

ARCHIBALD SCOT, Suspender.—*Robertson.*
JOHN IRVING, Charger.—*Jameson—Graham.*

May 30. 1829.

2D DIVISION.
Bill-Chamber.
Ld. Fullerton.

Process.—A third bill of suspension having been refused by the Lord Ordinary as incompetent, in respect the second had been refused during session, the Court adhered.

T. SMITH, W. S.—W. MARTIN, W. S.—Agents.

No. 352.

STEIN'S ASSIGNEES, Pursuers.—*Sol.-Gen. Hope—Forsyth—Sandford.*
J. GIBSON-CRAIG and WALTER BROWN, Esqrs., Defenders.—*Cockburn—Skene.*

Homologation.—Held (according to the opinion of English counsel) that it is competent for English assignees under a commission of bankruptcy to homologate a trust-deed executed by the bankrupts in relation to their effects in Scotland, which, it was alleged, fell under the commission; and that they had, by their deeds, homologated the trust.

June 2. 1829.

1ST DIVISION.
Ld. Corehouse.
H.

JOHN STEIN, Thomas Smith, Robert Stein, James Stein, and Robert Smith, were partners of a company which carried on business as bankers in Fenchurch street, London, under the firm of Stein, Smith, and Company; and in Edinburgh under that of Scott, Smith, Stein, and Com-

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pany. These firms were, in fact, one and the same company, being composed of the same partners.

John Stein, Robert Stein, and James Stein, at the same time, carried on business in partnership as distillers at Canonmills under the firm of John Stein; and at Kilbagie under that of Robert Stein and Company. On the 22d of July 1812, the London banking-house stopped payment, and four separate commissions of bankruptcy were, on the 23d, issued against Thomas and Robert Smith, and Robert and James Stein, who were then in London; but not against John Stein, who was then in Scotland. On the 25th, the Edinburgh house also stopped payment. In consequence of the stoppage of the banking establishment, the affairs of the distillery concern became embarrassed; and, on the 3d of August, a meeting of the distillery creditors was held at Edinburgh, when it appeared that there were sufficient funds to pay them; and it was resolved that a trust-deed should be executed in favour of the defenders, Mr. Gibson-Craig and Mr. Brown. In compliance with this resolution, John Stein, as the acting partner of the distillery concern, executed, on the 6th, a trust-disposition in favour of these gentlemen. On the following day he went to London, and on the 11th the separate commissions of bankruptcy were superseded, and a joint commission was taken out against all the partners, including John Stein. On the 22d, the provisional assignee, along with the partners under their several firms both of bankers and distillers, granted a power of attorney to Mr. Gibson-Craig to take possession of the whole estates and effects in Scotland; and on the appointment of Messrs. Cuthbert, Smith, and Duval as assignees, they executed, on the 1st of September, a similar power in his favour. In neither of these deeds was any notice taken of the trust. On the 16th, the partners, as bankers, executed in favour of the assignees a disposition and assignation of the effects in England and Scotland; and at the same time the partners in the distillery concern executed a similar deed, but in which it was declared that the execution of it should be without prejudice to the trust-disposition, of which the validity was to be determined at law.

In the mean while a meeting of the creditors in England had been called, "in order to assent to or dissent from the said assignees commencing, prosecuting, or defending any suit or suits at law or in equity, or any other proceedings in England or Scotland, for the recovery or defence of any part of the said bankrupts' estate and effects, or either of them, or the compounding, submitting to arbitration, or otherwise agreeing any matter, cause, or thing relating thereto also to the assignees; paying the salaries or wages of the clerks or servants of the said bankrupts, or either of them, in full, and other special affairs." A meeting was accordingly held on the 9th of September, when it was resolved to "authorize and empower the assignees of the said bankrupts' estate and effects to commence, prosecute, or defend any suit or suits at law or in equity, or any other proceedings in England or Scotland, for the recovery or defence

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of any part of the said bankrupts' estate and effects, or either of them, or to compound, submit to arbitration, or otherwise agree to any matter, cause, or thing relating thereto."

At this time there was a large quantity of spirits in the warehouses of the distillery in Scotland, prepared for the English market; and it appeared that, on the supposition that the banking and distillery concerns were separate, there would be sufficient funds to pay the distillery creditors, and leave a reversion, which would go to the liquidation of the debts due to the creditors of the banking establishment. It was proposed to send the spirits to London, and the assignees stated that they would dispose of the same, but that, as they conceived the two establishments were identified, they would hold the proceeds for behoof of the party having right to them. Messrs. Gibson-Craig and Brown, however, declined to ship on this footing; and Mr. Gibson-Craig proceeded to London to have the question settled. While there, an agreement was entered into, on the 24th September, between him (on behalf of himself and Mr. Brown as trustees) and the assignees, that the spirits should be shipped to the assignees for sale, without prejudice to their respective rights. He then left London; and, on the 26th, the assignees addressed to him and Mr. Brown this letter:—"Being satisfied that the distillery concerns at Canonmills and at Kilbagie were carried on by Messrs. John, Robert, and James Stein, distinct from the concern in Fenchurch street under the firm of Stein, Smith, and Company, and that the creditors of the distillery companies have a preference on the effects belonging thereto, we hereby authorize you to pay the distillery creditors the amount of their debts, taking care, in the first instance, to ascertain the exact amount of such debts. We beg leave to add, that the assignees of Messrs. Kennington and Company also approve of your making such payments."

The spirits were shipped to, and disposed of by the assignees; and on a representation from Mr. Gibson-Craig that some of the debtors to the distillery hesitated to pay their debts, in respect that they were vested in the assignees, they, to obviate this objection, granted to him a power of attorney to receive payment of and discharge the debts. On the faith of the above arrangement, Messrs. Gibson-Craig and Brown proceeded to execute the trust, and to pay a dividend to the distillery creditors. A dispute then arose between them and the assignees, who insisted that Mr. Gibson-Craig was acting merely as their attorney, and denied the validity of the trust. An arrangement was afterwards entered into between the assignees and the distillery creditors, by which the latter renounced their claims on the distillery effects, on being paid 15s. per pound; and the present pursuers having been appointed assignees in place of the former, they brought an action of reduction of the trust-deed on various grounds against Messrs. Gibson-Craig and Brown, and concluded that they should be ordained to count and reckon with them for their intromissions. On the other hand, Messrs. Gibson-Craig and Brown brought an action of multiplepoinding and exoneration; and these processes having been con

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joined, and having come before Lord Alloway, he directed the opinion of English counsel to be taken upon the subjoined queries.*

The case was afterwards remitted to Lord Corehouse, who, conceiving that the opinion did not exhaust the questions between the parties, and particularly one as to the effect of homologation, urged by Messrs. Gibson-Craig and Brown—a plea which the assignees alleged was not maintainable by the law of England, he directed the opinion of English counsel to be taken—"Whether, on the supposition that the letter from Messrs. Cuthbert, Smith, and Duval to the defenders, dated 26th September 1812, is held to import an authority to the defenders to settle with the distillery creditors in the capacity of trustees, and of consequence to be a homologation of the trust-deed to that effect, such authority is by the law of England binding on the creditors of Scott, Smith, Stein, and Company, and on the present assignees, the pursuers of this action, reference being had to all the circumstances of the case, and in particular

* "1. Whether the separate commissions issued on the 22d of July against Robert Stein and James Stein had the effect of dissolving the partnership which existed between John, Robert, and James Stein, under the firms of 'John Stein' and 'Robert Stein' and Company,' and thereby vesting in the commissioners, or afterwards in the assignees, the interest which those individuals possessed in the distillery concern carried on under the firm of 'John Stein' and 'Robert Stein and Company,' and of which they were partners?

"2. Whether the issuing of these separate commissions had the effect of preventing John Stein from making an effectual alienation of the whole property of the said companies of 'John Stein' and 'Robert Stein and Company,' so as to interfere with the rights of the assignees?

"3. Whether the superseding of the separate commissions had the effect of validating the disposition of the partnership property made by John Stein, which disposition was dated prior to the granting of the joint commission, but subsequent to the issuing of the separate commissions against Robert Stein and James Stein?

"Lastly, Whether, as the joint commission issued on the 11th August, proceeded so far as related to Robert Stein and James Stein, upon the same act of bankruptcy as that on which the separate commissions against those two persons had issued, its effect did not draw back to the date of the acts of bankruptcy committed by Robert Stein and James Stein, and vest in the persons of the assignees, not merely the individual property of Robert Stein and James Stein, but also their shares and interests in the property and effects of the companies of 'John Stein' and 'Robert Stein and Company' from the date of the acts of bankruptcy committed by them?

To these queries Mr. Basil Montague returned this answer:—"1. When the separate commissions issued, the partnership of John, Robert, and James Stein was dissolved, and the interest of the bankrupt partners vested in the assignees, with whom John was interested as tenant in common. Harvey v. Crickett, 5. Maule and Selwyn, 336; Smith v. Stokes, 1. East. 363.

"2. The issuing of the separate commission had not, I am of opinion, the effect of preventing John Stein from making an effectual alienation of the whole property, provided it was such alienation as one partner might make of the partnership property, and not in fraud of the bankrupt laws; but the alienation in this case does appear to me to be in fraud of the bankrupt laws, and a fraudulent preference. Pulling v. Tucker, 4. Barn. and Ald. 382.

"3. The superseding the separate, and the issuing the joint commission, does not, in my opinion, vary the right.

"4. The separate property of Robert Stein and James Stein, and their shares and interests in the property and effects of the companies of John Stein, and Robert Stein and Company, vested in the assignees, I am of opinion, from the date of the acts of bankruptcy committed by them."

utes of the meeting of creditors held upon the 9th of
The record, together with the Cases for the parties, ha
laid before Mr. Rose, he delivered the subjoined opinion.
ming consideration of the case, the Lord Ordinary pronou
ocutor:—'Finds it proved, that by the law of Englan
as assignees of Stein, Smith, and Company, acting for
d the creditors of the company, had power to homolog
d executed by John Stein in favour of the defenders
he creditors of the distillery companies: Finds it proved by
nents produced, and facts admitted in process, that the pursuers
ologate that trust-deed to the effect of authorizing the defenders
e and distribute the funds of the distillery companies
pose to ascertain the claims against the companies, a
creditors; that the defenders are bound to account
their actings and intromissions only in the charac

supposition that the letter from Messrs. Cuthbert, Smith, and
ted the 26th September 1812, is held to import an authority to the defenders to
e distillery creditors in the capacity of trustees, and of consequence to be a ho-
f the trust-deed to that effect, I am of opinion that such auth
inding on the creditors of Scott, Smith, Stein, and Company, a
e pursuers in the action, reference being had to all the circum
ular to the minutes of the meeting of creditors held upon the
gard to the obligation of this transaction upon the assignee
signees, and individually as creditors, there could not be a question either in law

gard to the creditors generally, the question involves a conclusion rather of fact

es under a commission of bankrupt have the complete legal authority and title,
a trust or duty to use them beneficially for the purposes of the commission.
imâ facie fully competent to bind the creditors at their (the assignees) own dis-
without any previous or express sanction, either of commissioners or of credi-
in those particular instances in which such sanction is required by statute 6th
6, § 88, viz. compounding with a debtor, giving time, taking security, submit-
tration, and commencing suits in equity; any other act relating to the property
claimed by them, which an absolute owner or claimant may do, they may do effec-
nclusively, provided it be for the benefit, or rather not to the detriment, of the
emselves at all events they bind, and if no creditor or creditors come forward to
e act done is good to all intents and purposes both in law and in equity.
uestion were agitated in this country it would stand thus:—Creditors, one or
, would complain either in a court of equity, or to the equitable jurisdiction of
or in bankruptcy, that the assignees had abused their legal dominion to the pre-
e interests of such creditor or creditors. The primâ facie legal validity of the
would be recognised; the question would be, is it detrimental or not to those on
the assignees have thus been acting? Upon this question, as upon a matter of
urt would direct a reference either to the Commissioners or to a Master in Chan-
on their returning yea or nay to such inquiry, would make its final adjudication.
ion were referred to me, or if in this case I am to be taken as exercising a similar
hould, under all the circumstances of the case, without hesitation affirm that the
d creditors were bound,—holding, 1. The assignees to be legally competent to
s attending such exercise, any incident upon which the creditors were entitled to

'the privilege of trustees under the said trust-deed; and therefore as- No. 852.
'soilzies the defenders from the reductive conclusions of the libel, and June 2. 1829.
'decerns; and in the multiplepoinding appoints parties to debate; re-
'serving consideration as to expenses until parties be heard in the mul-
'tiplepoinding.'

Against this judgment the pursuers reclaimed; but the Court unanimously adhered.

Lord Balgray.—It is quite clear that the distillery company was a separate concern from the banking establishment; and it is not alleged that it was bankrupt. On the contrary, it appears that it had sufficient funds to pay the debts. The question of law, therefore, as to the effect of the English commission, is superseded. John Stein acted properly in granting the trust-deed; and the question is, supposing that the assignees had a right to dispute the execution of such a deed, whether they have not passed from it, and homologated the deed? By the resolution of the English creditors, full power was given to the assignees to agree to any matter relating to the estate; and then, after an interview with Mr. Gibson-Craig, they write the letter of the 26th of September, which is conclusive. Again, on a representation that the debtors of the distillery declined to pay, on the ground that the debts were vested in the assignees, they granted a power of attorney to obviate that objection. It is impossible, therefore, that they can now be permitted to set aside the trust-deed.

Lord Craigie.—Besides, the distillery creditors have been settled with, and the object here is to saddle these gentlemen with a heavy accounting.

Lord Gillies.—The Lord Ordinary has put the case on its proper grounds, and his judgment is quite right.

Lord President.—The only difficulty which could ever exist was, whether, by the law of England, the assignees could homologate the trust-deed; and that is removed by the opinion of English counsel.

Pursuers' Authority.—Cullen Bank. Law, p. 264.

Defenders' Authority.—Stein's Assignees against Earl of Mar, Nov. 13. 1827, (ante, Vol. VI. No. 1. p. 1.)*

D. Fisher, S. S. C.—Gibson-Craigs and Wardlaw, W. S.—Agents.

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* The pursuers in their Case stated, that in regard "to a decision given in a case between them and the Earl of Mar, as reported by Messrs. Shaw and Dunlop, the pursuers are forced to observe that the report given by these gentlemen is most erroneous." The pursuers did not state in what respect the report was erroneous; but the Reporter has again looked into the case and his notes, and is satisfied that the report is correct. The question there was, whether Stein's assignees having taken from Mr. Gibson-Craig a bill granted to that gentleman by the Earl of Mar as the balance of a settlement of accounts with Mr. Gibson-Craig acting for Stein's assignees, and having afterwards taken a renewal of that bill from his Lordship, were not bound by the settlement. The Court held they were bound, and the report bears that such was the nature of the case.

No. 353. REMINGTON, CRAWFORD, and COMPANY, and Others, Pursuers.—*Paterson.*

MRS. and MISS BRUCE, Defenders.—*Bell—Skene—H. Bruce.*
SIR MICHAEL BRUCE and Others, Compearers.—*A. Wood.*

Process—Title to Appear.—Held incompetent, without the consent of a defender, to sist a third party as a pursuer along with the original pursuer, or to repeat an action at the instance of that party against the defender.

June 2. 1829.
1ST DIVISION.
Lord Meadowbank.
H.

REMINGTON, CRAWFORD, and COMPANY, and others, as creditors of the late Patrick Crawford Bruce of Glenelg, brought an action of reduction of certain provisions in favour of his wife and daughter, the defenders, on the ground that he had been insolvent when they were made; and that, at all events, they could not compete with onerous creditors. The pursuers, however, afterwards admitted that he had died solvent; and after the record was closed, the Lord Ordinary appointed Cases, which were prepared, and the cause was enrolled by the pursuers for avizandum. At this enrolment appearance was made for Sir Michael Bruce and others, also creditors of Mr. Bruce, who stated that they had raised a separate action of reduction against the defenders on the ground of insolvency, and moved that further proceedings should be sisted till their action should be brought into Court.

The Lord Ordinary thereupon 'allowed the process brought at the 'instance of Sir Michael Bruce against the defenders Mrs. and Miss 'Maria Bruce to be held as repeated in this action, and appointed Sir 'Michael Bruce to prepare and lodge a Case within ten days.' Against this interlocutor Mrs. and Miss Bruce reclaimed.

Skene, in support of the reclaiming note, contended that although it might be competent to sist a party who had an interest as a defender, and although it was usual to allow an action to be repeated at the instance of one or other of the parties where it became necessary in point of form, yet it was incompetent to sist a third party as a pursuer without the consent of the defender, or to allow an action at the instance of a separate party to be repeated.

Wood, for Sir Michael Bruce and others, stated that they had not moved that their action should be repeated, but only that proceedings should be sisted in the mean while, and that the suggestion to repeat the action in the present process had been made by the Lord Ordinary, to which they did not object; but that it was plain that, as creditors, they had an interest to prevent any judgment hostile to their pleas being pronounced before they were heard.

LORD PRESIDENT.—The two actions rest on entirely different grounds The allegation of insolvency has been departed from in the present one, and the question put on the footing of solvency; the other is rested on insolvency so that it is manifest they cannot go on together.

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Lord Balgray.—No third party is entitled to push himself into a cause as a pursuer without consent of the defender, and still less can he do so where, as in this case, the parties have arranged to try the question on the assumption of certain facts which this third party wishes to dispute.

Lord Gillies.—A defender may appear in any process in which he can show an interest; but a third party cannot appear as a pursuer without the consent of the defender; and still less can he get a separate action at his instance repeated.

Lord Craigie.—The defenders are right in point of form, but it is not very apparent what benefit they will derive from this objection.

The Court accordingly altered the interlocutor, found Sir Michael Bruce and others liable in expenses, and remitted to the Lord Ordinary to proceed accordingly.

A. Pearson, W. S.—Bowie and Campbell, W. S.—A. Swinton, W. S.—Agents.

Walter Laing, Advocator.—*Skene—Rutherfurd.*
David Laing, Respondent.—*Jameson.*

No. 354.

Bona Fides.—A father having, by his deed of settlement, conveyed all his property to his eldest son, under an obligation to pay £100 to a younger son, or, at the option of the latter, to make over to him one half of a certain tenement on his paying £50 to the eldest; and a family arrangement having led the eldest son to believe that the younger son had renounced his claim on the half of the heritage—Held to have been in bona fide to possess the heritage, and reap the whole fruits, without being accountable therefor, until the younger son duly intimated his election of the heritage; and the rents, prior to intimation, found not imputable to extinguish the £50 payable by the younger son on choosing the heritage.

June 2. 1829.
2d Division.
Lord Medwyn.
F.

The late John Laing, father of the advocator and respondent, by his deed of settlement conveyed his whole property to his eldest son, the respondent, under the burden of his paying to the advocator, a younger son, £100, or, in the option of the advocator, making over to him one half of a certain tenement, on his paying to the respondent £50. After the father's death in 1817, an agreement was entered into among his children, on the narrative that the funds of the deceased were inadequate to pay his debts and provisions in full, to discharge respectively their provisions under the settlement, on receiving from the respondent £50 each on the death of their mother. This agreement was signed by most of the family, and among others by the advocator, who subsequently, however, denied the truth of the narrative on which it proceeded; but it was not signed by all the family, and the testing clause was never filled up. In the mean time the respondent entered into possession of the property conveyed to him under the settlement, drawing the rents, and otherwise acting as proprietor; and it did not appear in evidence that the advocator had made any intimation that he meant to repudiate the above agreement, or exercise the option left him under his father's settlement, by claiming the half of the tenement therein described, until November 1821, when he made an in-

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timation to that effect to the respondent. In 1826 he brought an action against the respondent before the Bailies of Hawick, concluding for the sum of £132: 5: 10, on the assumption that he was entitled to one half of all the rents drawn from the tenement in question since his father's death; that he could still repudiate the informal agreement; and that the £50 payable by him on claiming that heritage did not become due till the respondent had executed the conveyance in his favour; or at least that it was more than paid by the intromissions of the respondent with the rents. The respondent admitted that he was accountable for the rents subsequent to November 1821, but contended that those prior to that period were bonâ fide percepti et consumpti, and that the £50 payable to him by the advocator on making his option should be deducted wholly out of the rents subsequent to that period. The Magistrates gave effect to the respondent's plea of bonâ fide possession, and also decided on some smaller claims of accounting between the parties, to which it is unnecessary to advert. The cause, having been advocated, came before Lord Medwyn, who pronounced the following interlocutor:—'Finds that John 'Laing, by his deed of settlement, conveyed his whole property to the 'respondent, including the tenement of houses in question, under an ob- 'ligation to pay £100 to the advocator, or, at the advocator's option, to 'make over the half of the property opposite the Pant Well of Hawick, 'upon making payment to the respondent of £50;—that the deed of 'agreement in 1817, though not duly executed, and therefore not now 'binding on the parties, affords sufficient evidence, in addition to the ad- 'mitted fact of the respondent remaining in possession without any pay- 'ment to the advocator, that the advocator did not insist for fulfilment 'of the provision in his favour, nor declare his option to take the tene- 'ment in question;—finds no evidence that the advocator meant to de- 'part from the agreement subscribed by him in 1817, till the letter of 'November 1821; and hence that, during the intermediate period, the 'respondent was warranted in believing that the said tenement was not 'to be claimed by the advocator, but that he was to be contented with 'the restricted provision of £50 payable at their mother's death; and 'therefore that the respondent's possession was a bonâ fide possession, 'and his consumption of the rents was bonâ fide. On these grounds, re- 'pels the reasons of advocation, remits the cause simpliciter, and finds no 'expenses due.'

The advocator reclaimed, and contended, not only that the respondent could not justly plead bonâ fide possession, but that even if he could do so, still, upon the authority of the two cases quoted below, it was clear that he attempted to stretch that plea too far. That by these it was established that where a bonâ fide possessor happened also to be the creditor of him with the fruits of whose property he intromitted, he never could plead his bona fides to the effect of preventing these intromissions from being imputed in extinction of the debt in the first place; although, where he had had superintromissions beyond the amount of his debt, it might pro-

tect him from accounting for these; and that in this case, therefore, even if the respondent were a bonâ fide possessor down to 1821, still he must impute the previous rents in extinction of the claim of £50 against the advocator, arising from the advocator's claiming one half of the tenement.

The respondent, on the other hand, besides contending that, unless the £50 were imputed only to the rents subsequent to 1821, his plea of bonâ fide perception would be indirectly frustrated, also urged that the family agreement might, under all the circumstances, have warranted him, had he not been otherwise advised in the Inferior Court, to plead a higher title than that of a bonâ fide possessor to the rents of the tenement, and that he was protected from all accounting, at least prior to 1821.

Lord Glenlee.—The precise nature of the title which gives rise to the possession of the respondent in this case should be attended to. It was a direct and absolute conveyance by his father to the respondent, but defeasible as to one half, upon the advocator making intimation to him that he chose to take that half, and pay the sum of £50, at the same time giving up his other alternative provision in the settlement. Until such intimation was given to the respondent, he was entitled to look upon himself as the absolute proprietor of the subject. Then the agreement in its nature contains a waiver by the advocator of his right of election, and could not fail to confirm the respondent in the belief that he was the absolute proprietor of the subject, at least until the advocator intimated, as he did in 1821, that he meant not to abide by that agreement, but to exercise the option under the settlement. Up to that date at least, the respondent might justly plead bonâ fide possession, and was entitled to the fruits previously reaped, without being accountable for them. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lords Justice-Clerk and Pitmilly concurred.

The Court accordingly adhered, with expenses since the date of the Lord Ordinary's interlocutor.

Advocator's Authorities.—Seymour v. Doig, Feb. 22. 1751, (1773); Spreul v. Spreul Crawfurd, Jan. 5. 1748, (Elchies Bona and Mala Fides, 5.)

P. Crooks, W. S.—W. Dickson Jun. W. S.—Agents.

Robert Herries and Others, Pursuers.—*Jameson.* N

Mrs. Margaret Morrison or Lamont, her Husband and Children, —Defenders.—*Cockburn—Brown.*

Expenses—Debtor and Creditor.—There being considerable doubt how far parties in right of a redeemable security could grant a valid discharge, the debtor held entitled to bring a declarator of redemption; and the creditors having made up a record, with a view to the question whether they should not be allowed the expenses of their appearance, found liable in expenses to the debtor.

The pursuer Herries, in consideration of a certain sum of borrowed money, granted to the late William Morrison a redeemable bond and disposition over his lands of Hopehead. By his deed of settlement Morrison conveyed this disposition, along with his other property, to his daughter Mrs. Lamont, for her life-rent use allenarly; and, after her decease, to all her lawful children equally, with power to Mrs. Lamont, with the advice

No. 355. June 2. 1829.

of certain persons specially named, or any two of them, to uplift and discharge his debts. Herries and the other pursuers (his interdictors,) being now desirous to redeem his lands, tendered payment of the money; but one of the only two survivors of the persons named in the settlement having refused to concur in the discharge, they declined to accept a discharge by Mrs. Lamont, with concurrence of her husband, and brought a process of declarator of redemption. In this process appearance was made for Mrs. Lamont, her husband and children, who made no objection to decree of redemption being pronounced, but contended that they were entitled to the expenses incurred by them in consequence of being called in an action which they alleged was unnecessary; and on this matter parties made up a record by condescendence and answers. The Lord Ordinary, while he decerned in the declarator, found 'that the 'pursuers were fully warranted in instituting the present process, in re- 'spect of the doubt as to the power of Mrs. Lamont singly, or in concur- 'rence with her husband, to grant a valid discharge of the debt over the 'estate of Hopehead; and that the pursuers were entitled to have the said 'lands disburdened upon payment, so as to have the full power over the 'said estate, without any reasonable ground of challenge on account of 'the said heritable debt;' and found them entitled to expenses 'under 'the penalty in the bond.'

The Court adhered, recalling, however, these words, 'under the 'penalty in the bond.'

DONALDSON and RAMSAY, W. S.—RITCHIE and MILLER, S. S. C.—Agents.

No. 356.

ROBERT BLAIR and Others, Suspenders.
HENRY GORDON, Charger.—*Speirs.*

June 2. 1829.

2D DIVISION. Lord Medwyn. F.

Reclaiming note for Blair refused, in respect of no appearance in support.

J. NAIRN, S. S. C.—P. DUDGEON, W. S.—Agents.

No. 357.

JOHN M'NEILL, Raiser.—*Sol.-Gen. Hope—J. Miller.*
ISAAC and THOMAS LITTLEDALE, Claimants.—*Baird—Jeffrey.*

Heritable Debt—Discharge—Multiplepoinding.—Circumstances in which decree in a multiplepoinding as to the amount of an heritable bond, containing declaratory conclusions of the nullity of certain adjudications of the bond, and that the lands should be disencumbered held a sufficient discharge, all parties having interest being called.

June 3. 1829.

2D DIVISION. Lord Medwyn. F.

IN 1804, the raiser Mr. M'Neill purchased the estate of Colonsay, with an obligation to clear it of encumbrances, for which purpose he retained part of the price in his hands. One of these encumbrances was a bond for £2000 in favour of the late Joseph Littledale, brother of the claimants, on which infeftment had been taken. In the year 1808, Joseph Littledale being then dead, one Broderick, alleging that he was a creditor of Joseph's to the extent of £2273, charged Isaac Littledale to enter heir to his brother, and thereupon raised an action of constitution of his debt in which he obtained decree in absence. In virtue of this decree, he led an adjudication of the bond; and having obtained decree, likewise in absence, he took from the raiser, as superior, a charter of adjudication

on which he was infeft,—the raiser having, however, in the charter reserved to himself right to challenge the grounds and vouchers of the debt on which the decree of adjudication had proceeded.

Broderick then raised an action against M'Neill for payment of the bond, and, having obtained decree in absence, he charged him thereon; but M'Neill having suspended, on the ground that the debt on which Broderick had adjudged the bond was unvouched, the latter, after some procedure in the suspension, abandoned his claim, and paid the expenses of process.

In 1813, similar proceedings were instituted by the same person Broderick, along with two others, Ross and Hooper, as assignees of Turnbull, Forbes, and Company, alleging themselves to be creditors of Joseph Littledale to the extent of £55,000, with interest. They in like manner obtained, in absence, decrees of constitution of their alleged debt and adjudication of the bond, and were also infeft on a charter of adjudication granted by M'Neill, under a similar reservation of his right to challenge the grounds and vouchers of their debt. These persons took no steps to enforce their adjudication; and in 1826 a discharge and renunciation was executed by Ross and Hooper, the latter of whom was executor of Broderick, who had in the mean time died.

In the course of the same year, the claimant Isaac Littledale, who had not interfered in any of the proceedings above mentioned, expede a special service as heir to his brother Joseph in the heritable bond, and obtained a precept of clare constat from M'Neill as superior. He then raised, in name of M'Neill, a summons of multiplepoinding as to the amount of the bond and interest thereon, concluding likewise to have it declared that the above-mentioned adjudications and infeftments were null and void, and that the lands of Colonsay were freed and disencumbered. To this action there were called as parties (besides the claimants, Isaac and Thomas Littledale, the heir and executor of Joseph,) the sisters of Broderick, Hooper as the executor named by his will, the surviving assignees of Turnbull, Forbes, and Company, and the heir and trustees of the former proprietor of Colonsay, by whom the bond in question had been granted. No appearance was made except for Isaac and Thomas Littledale; the former of whom, as heir of Joseph, claimed the principal of the bond, with interest since his brother's death; and the latter, as his executor, claimed a year's interest fallen due before Joseph's death. M'Neill, however, objected that Isaac Littledale had not a sufficient title to discharge the heritable bond, in consequence of the adjudications and infeftments in favour of Broderick, and of the assignees of Turnbull, Forbes, and Company; and that a decree in a multiplepoinding, though a sufficient protection in regard to a moveable debt, could not effectually disencumber his estate against parties claiming right at a future period to the adjudications.

The Lord Ordinary, in respect that the heirs of Broderick were not called eo nomine, sisted process till that should be done; and the sisters of Broderick having accordingly been again called by a supplementary

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summons, specially in the character of heirs-portioners, his Lordship decerned in terms of the declaratory conclusions of the summons, and preferred Isaac and Thomas Littledale according to their respective claims.

M'Neill reclaimed; but the Court adhered.

R. M'Kenzie, W. S.—R. Fleming, W. S.—Agents.

No. 358.

James Finlayson, Advocator.—*A. Wood.*

C. Russell, (Ross's Trustee,) Respondent.—*Cockburn—Anderson.*

Compensation.—A party who alleged that he had a claim against another, having purchased articles at a roup with the view to found a plea of compensation, the Court refused to sustain it.

June 4. 1829. 1st Division. Lord Meadowbank. D.

Finlayson, the tenant of a farm on the estate of Shandwick, belonging to Mr. Cockburn Ross, and on which Mr. Claud Russell was trustee and judicial factor, having incurred large arrears of rent, renounced his lease in 1823, and assigned the effects to Mr. Russell. After deducting the arrears from the value of these effects, Finlayson alleged that there was a balance in his favour of upwards of £1400, to constitute which, he brought an action in 1824, which was still in dependence. In August 1826, Mr. Russell exposed the effects to sale by articles of roup, in which it was stipulated that the purchasers should settle by cash or bills before receiving the articles. Finlayson attended the sale, made purchases to the extent of £80, and (as was alleged by Mr. Russell) clandestinely carried off the articles. Mr. Russell then brought an action against him before the Sheriff of Ross-shire, in defence against which Finlayson, founding on the above claim, pleaded compensation. The Sheriff having repelled this plea, and decerned in terms of the libel, Finlayson brought an advocation, and stated on the record "that he went to the sale, and made the purchases, with the intention of compensating the price with the sum due to himself;" and again maintained his right to set off the claim made against him in extinction pro tanto of that which he had against Mr. Russell.

To this Mr. Russell answered, that no debt was due to Finlayson; and that at all events, as his claim was illiquid, and as that sued for was liquidated both by the roup-roll and Finlayson's admission, the plea of compensation was irrelevant.

The Lord Ordinary remitted simpliciter; and the Court, without hearing the counsel for Mr. Russell, unanimously adhered.

Lord Balgray.—Independent of the circumstance that Finlayson's claim is illiquid, his plea of compensation is rested upon a fraudulent act. He himself says that he went to the sale, and made the purchases, with the view to found a plea of compensation. This was highly improper, and was truly a fraud. It is clear, therefore, that compensation cannot be admitted.

Lord Craigie.—It would be most inexpedient to sanction such an attempt to found a plea of compensation.

The other Judges concurred.

J. Macdonell, W. S.—H. Cowan, W. S.—Agents.

JAMES CARRUTHERS and Others, Pursuers.—*Henderson.* No. 359.
JOHN DICKSON and Others, Defenders.—*Sol.-Gen. Hope—Gillies.*

Process—A. S. July 11. 1828.—Held that when cases are ordered by the Lord Ordinary with the view of reporting to the Court, they must be lodged with the Outer House Clerk before avizandum can be made with them to the Court, and be ordered to be boxed.

June 4. 1829.
1ST DIVISION.
Lord Newton.

IN an action at the instance of Carruthers and others against Dickson and others, the Lord Ordinary, on the 15th of January 1829, ordered Cases "with the view of being reported to the Court;" and, on the 14th of May, he granted a prorogation for ten days to Dickson and others for lodging their revised Case,—made avizandum with the Cases to the Court, "and appointed the same to be printed and boxed within the foresaid period.' Carruthers and others lodged and boxed their Case in proper time, and Dickson and others also lodged theirs in due time; but they did not box it till two days thereafter. Both parties lodged their Cases with the Inner House Clerk. Carruthers and others then moved the Court to enforce the rule enacted by the 62d section of the Act of Sederunt July 11. 1828, by decerning in terms of the libel.

On the other hand, Dickson and others contended that, by lodging their Case within the proper time, they had complied with the rule of the Act of Sederunt; but that, at all events, the interlocutor was incompetent, because where Cases are ordered with the view of being reported to the Court, the 64th section enacts that they shall first be lodged, and that "when both Cases so prepared are put into process, he (the Lord Ordinary) shall make avizandum with the Case to the Court, order the Cases to be immediately boxed, and grant warrant to enrol in the Inner House rolls;" but that, in the present case, the Lord Ordinary had ordered the Cases to be boxed before they were lodged, and therefore the sanction of the 62d section could not be applied.

The Court, being of opinion that the interlocutor was irregular, refused the motion.

Their Lordships held, 1. That the Lord Ordinary should not have made avizandum, and ordered the Cases to be boxed till after they were lodged;—and, 2. That the rule of the 62d section had reference to the lodging in the Outer House; and that the papers should be lodged with the Outer House Clerk, and not with the Inner House Clerk.

T. RANKEN, S. S. C.—W. JOHNSTONE, S. S. C.—Agents.

BENJAMIN MACKAY, Pursuer.—*Jeffrey—G. Napier.* No. 360.
WILLIAM AMBROSE, Defender.—*Skene—Macallan.*

Trust—1696, *c.* 25.—Circumstances which were held not sufficient to elide the necessity of referring a trust to the oath of the defender.

June 4. 1829.
2D DIVISION.
Ld. Cringletie.
F.

THE pursuer Mackay was proprietor of great part of a tenement in Gabriel's road, Edinburgh, including a tavern in the lower flat occupied by the defender Ambrose, as his tenant, under a lease which expired in 1826. The flat immediately over the tavern belonged to

No. 360. June 4. 1829.

one Mercer, and being exposed for sale at a public roup on the 20t June 1820, it was purchased in name of Ambrose; and in J 1821 the titles were made up likewise in his name, and he was infe the property, having paid the price to the seller. The present was a declarator of trust, at the instance of Mackay, to have it that this flat was bought for his behoof, and to have Ambrose o to execute conveyances in his favour.

It was averred by Mackay that he had frequently mentioned brose his intention of purchasing this flat, with the view of its b as a dwelling-house for the tenant in the tavern; and that, "in on the evening immediately preceding the day of sale, it was and finally agreed to between the pursuer and defender, that suer's engagements at his school would prevent him from at sonally at the commencement of the sale, the defender was t the pursuer, and purchase the property for the pursuer's that the defender should be allowed to occupy it at a cert terest on the price during the currency of his lease of the of which about six years were then to run; or, if he chose purchase-money, he was to possess it rent free until the e and should then deliver it up to the pursuer, if they upon a renewal of the lease;" and further, that he acce defender a mandate to purchase the property for him.

On the other hand, Ambrose, while he admitte posals had been made regarding the purchase of the any agreement had been come to by the parties on t he had received any mandate from Mackay.

It appeared that Ambrose attended at the sale bid for the property. Mackay's uncle was then the sale was concluded, Mackay himself came heard Ambrose announced to be the purchaser, p minute of sale; but he averred that immediately retired to another room, where Mackay was ac real purchaser, and gave a treat to those pr This, however, was denied by Ambrose. In day, both parties signed the following letter, allan, the agent of Mr. Mercer, the seller: — Mr. Mercer's agent, we have such an opinic integrity, that we have agreed to let you p the house in Gabriel's road, and to take care o tion to be in name of Mr. Benjamin Mackay, whom, in reality, the house was purchased, a visal." This letter, which was neither p Ambrose, (who, however, did not deny his Mackay, who averred that he had immedi but it never was delivered to him, and session till produced in the present proc

No. 360.
June 4. 1829.

ing thereafter taken place between the parties as to this purchase, Ambrose wrote to Mackay, on the 16th of August 1820, a letter, containing, inter alia, the following statement and offer:—"In the meetings which we had previous to the day of sale, various proposals were made by you, and amongst others this one,—that in the event of my becoming the purchaser of the house, I should, at the expiry of my present lease of the premises below, convey it to you at the price which I might pay for it, provided we could not agree upon terms for a renewal of my lease. But, on the other hand, so long as I was willing to continue tenant of the premises below on reasonable terms, I was to hold the flat above as proprietor, in the same way as I would do during the currency of my present lease; and it was only in the event of my giving up possession of the tavern as tenant that I was to convey the house to you. It is unnecessary to advert further to the nature of our meetings before the sale, because, though many arrangements were talked of, nothing was definitely agreed upon or bargained for. I am now ready, however, to enter into a regular agreement with you on the terms I have specified above, which I hope you will accede to, as it was originally your own proposal; and that there may be no misunderstanding as to what may be considered reasonable terms for a lease of the tavern, I would suggest that, in case of difference, the terms be fixed by two persons to be mutually chosen. I beg to hear from you in answer, and remain," &c.

No answer was returned to this letter; and, in April 1821, Ambrose, having paid the price, obtained a disposition to the house, took infeftment thereon, and entered into and continued in possession, without challenge on the part of Mackay, till the expiry of his lease of the tavern in 1826. Not having been able to agree on a new lease, Mackay raised the present action of declarator of trust; in defence against which Ambrose pleaded the act 1696, c. 25, requiring trusts to be proved by writ or oath of the party.

The Lord Ordinary reported the cause on Cases.

Pleaded for the Pursuer—

1. In regard to all matters which may be competently proved by reference to oath, the acknowledgment of a party's signature to an improbative writing is sufficient to make it effective. The joint letter, therefore, of 20th June, the signature to which is acknowledged by the defender, must be considered as if it were probative; and it imports an acknowledgment that the purchase of the house was for behoof of the pursuer.

2. Trust has been found proveable by facts and circumstances, without the writ or oath of the party, Ramsay, July 30. 1748, (12757); and the facts and circumstances here are sufficient to establish the allegation of trust.

3. Although, when titles to a property are taken to a third party, with consent of the true owner, the trust can only be proved by writ or oath; yet where the third party has obtained the titles in his own name,

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without the consent and contrary to the intentions of the true owner, as was averred here, this is a case of fraud, which it is competent to establish prout de jure.

Pleaded for the Defender—

1. An improbative writing is incapable of affecting heritage, whether the signature be acknowledged or not; but, at any rate, the letter of 20th June 1820 merely shows that it was intended at one time that the pursuer should have the house; but this letter was not addressed to the pursuer, so as to create an obligation towards him, and it never was acted upon, but, on the contrary, was departed from by the pursuer, who, without challenge, allowed the defender to pay the price, and make up titles in his own name; and so, even if the letter imported any obligation on the part of the pursuer to the defender, it was resiled from by the latter, which it was in his power to do, the letter being improbative, and there having been no rei interventus.

2. The case of Ramsay does not warrant the doctrine that trust may be proved by facts and circumstances; and, at any rate, those in the present case show nothing more than that some arrangement was proposed, but not carried into effect.

3. A declarator of trust always implies an allegation of fraud on the part of the trustee; and if this were sufficient to elide the necessity of proving by writ or oath, the act 1696 would be inoperative; but the averment here is, that the defender purchased the property with the consent, and on the mandate of the pursuer, and for his behoof; so that this is just an ordinary case of trust falling under the act 1696.

Lord Glenlee.—When it is agreed that rights have been taken as the parties intended, but it is averred that this was done in trust, the act applies. But when it is alleged that the defender was employed to buy for one party, and took titles in the name of another, that is totally a different case, and no doubt proof prout de jure might be allowed. In an unreported case, Burns v. Morrison, that species facti actually occurred. Here, however, the very terms of the pursuer's condescendence exclude all possibility of this, as he states that he was present at the roup, and agreed that the act of roup should be signed by the defender on a certain promise or understanding, so that he signed as was agreed on. The thing of most importance is the joint letter on the evening of the sale; but I do not think it is of much moment whether it is probative or not, as the case occurs. The pursuer talks of it as an unilateral deed by the defender in favour of the pursuer; but it is not so—it is a mutual mandate of which the material part implied is, that the pursuer should go and pay the price; and there could be no mutual interests, if this were a unilateral conveyance by the defender to the pursuer. It was a mutual agreement, which required to be acted upon; and if the pursuer did not fulfil his part of the implied conditions on which the mutual mandate was granted, the other party was not bound. Probably the pursuer had not the money, and kept back the letter, though he may have shown it to Macallan. Then the defender wrote the letter of 16th August, which seems to admit the

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fact that the purchase was for the pursuer's behoof, if he chose to pay the price, and comply with certain other conditions. But no answer was returned to this letter; and as matters then stood, Macallan could not hold the pursuer liable for the price, but was entitled to demand it from the defender. No doubt, the purchase was made for the pursuer on certain terms, but of these terms we are ignorant; and, through this person's misconduct, the titles were taken to the defender, and there has been no definitive bargain as to the terms of the lease, &c. Then how can we, after the pursuer has waived taking the benefit of the mutual arrangement, when he might have carried it into effect, allow him to turn it into an unilateral obligation in his favour, which was never intended?

Lord Pitmilly.—This appears to me a very short and clear case. I cannot view the summons in any other light than that of a declarator of trust. The act 1696 applies to it, and it is regulated by the decision in the case of Duggan v. Wight. In all the material features, this case is similar; and we should be going in the face of that case, were we to pronounce a different decision. As to the alleged mandates prior to the sale, they are out of the question, there being no evidence that they were ever delivered. As to the letter of 16th August 1820, it is in favour of the defender; and the only letter of importance is the joint one to Macallan. It is unnecessary, when we attend to its history, to go into the question whether this be probative or improbative. It appears doubtful to me whether it ever was exhibited to Macallan; and in May 1821 he made out titles in favour of the defender; and it is not alleged that the pursuer complied with the terms of the letter by paying the price. He keeps the letter, and does not pay the price; but allows the defender to get the titles, and keep possession of the house for a number of years. It is impossible to hold this to be evidence of a trust; and unless we lay aside the act 1696, reference must be made to this party's oath.

Lord Justice-Clerk.—From the way in which the case is argued by the pursuer, an impression is given that he suffers hardship; but, on considering the summons &c., I concur in the views taken by the Lord Ordinary and your Lordships. If I can read this summons, it is clearly a declarator of trust. Then what evidence is there of trust? It is impossible to hold the written documents here to be evidence of an admission that the defender held this property in trust; and if so, can we allow a rambling proof in the face of the statute? It is not enough to say there are imputations of fraud; for there must always be imputations of fraud in every declarator of trust. We must just turn back to the case of Duggan, which was affirmed in the House of Lords; and if we were to go contrary to the principle there established, we should throw every thing loose on this subject. The consequences have been Mackay's own fault, and he can now only refer to oath.

The Court accordingly, 'in respect the pursuer has failed to prove, or to 'undertake to prove, his allegations relative to the alleged trust by com-'petent evidence,' assoilzied the defender, and found him entitled to expenses.

No. 365.

June 5. 1829.
2D DIVISION.
Lord Newton.
F.

ACTION of reduction and declarator at the
quhoun, only daughter of the deceased Patri
pose of setting aside a deed of settlement exe
the ground that it must be held to have be
to take effect only si sine liberis decesserit.
of the island of Islay, and, after marrying in
West Indies, where he remained for nearly
small fortune. His wife had joined him sh
but he had no family by her, and, immediate
to this country. He took up his residence w
mother of the defender Campbell, and rema
till he took a lease of a farm in the islan
second wife, who was then thirty-three years

In December 1814, there being at this ti
by his wife, he executed a general settleme
to have been written by Mr. Crawford, chan
set out with the narrative that the testator h
affairs, " and to prevent all possible dispute
after my death, do now resolve to make th
accordingly conveyed to his wife the lease of
heritable property, together with the stock
the remainder of his effects. The other h
own relations, including his nephew, the def
certain specified sums to each; but declarin
be equal to bestow a larger distribution, suc
in proportion to the legacies of each."

In January 1818, three years after the d
suer was born. Mr. Colquhoun had been i
about twelve days in the month of October
or at any subsequent period before his de
two and three months after the birth of hi
settlement, or revoke the one above menti
that, a few weeks before the birth of his da
message requesting the attendance of Mr. (
settlement; but there was no evidence as to
so; and though another person in the islan
writer, was recommended by Mr. Crawford
the deceased,) he did not require that indiv
his settlement. It was averred by the purs
was in ill health, and suffering much pain
alleged, that although, shortly after his r
seized with a violent fit of gout, this so
capable of applying, and did apply to bus

Some time after Mr. Colquhoun's dea
declarator was instituted against all the
ment. No appearance was made by an

No. 362.
June 5. 1829.

endure for seven years. Several of the parties thereafter withdrew; but Fisher and Geddes commenced running the coach on the 1st of March. As Geddes resided at Inverness, where tickets were sold, and Fisher at Dunkeld, the former drew a larger portion of money than the latter; and when a balance was struck on the 12th of April, it was found that Geddes was indebted to Fisher in £80. As there was an opposition coach on the road, the speculation did not turn out successful; and after giving intimation to Geddes, Fisher, in the month of May, entered into an arrangement with the opposition coach proprietors, took a share, and withdrew from that in which he was concerned with Geddes. At this time an additional balance of £98 was due to Fisher by Geddes. These sums Geddes ought to have paid to Fisher, as his share of the proceeds; but he refused to do so, alleging that Fisher had been guilty of a breach of contract, and that he was liable to him in a much larger sum of damages. Fisher having brought an action for the money due to him, Geddes pleaded retention and compensation in respect of his claim of damages. On the other hand, Fisher maintained that as his claim was liquid, while that of Geddes was illiquid, and as it was his duty to have paid over the money as soon as the balance was ascertained, he was not entitled to plead compensation; and that, under the circumstances, no claim of damages lay against him.

The Lord Ordinary decerned in terms of the libel, reserving to Geddes to insist in an action of damages, if he should be so advised, and issued the subjoined note.*

Geddes reclaimed.

Jameson.—By the agreement, the parties were "strictly bound to have no concern, directly or indirectly, with any coach or coaches that a majority of them shall think prejudicial to the interests of the present concern." But it is admitted that Fisher united with the opposition coach, thereby committing a violation of the contract, and that he entirely abandoned it before the expiration of the stipulated period. He was therefore clearly liable in damages; and as the claims of both parties arise out of one and the same contract, it is competent to set the one gainst the other.

Lord President.—The case stands just where the Lord Ordinary as put it. Geddes admits that if he has no counter claim, he is bound o pay the money. But his claim is quite illiquid. Besides, he was

* "The coach fares or emoluments of the joint concern ought, in the first instance, to be vided among the partners according to their interests, or in proportion to that part of the ad for which each provided horses. It appears as inconsistent with strict legal principle with equity that the defender should have a right of retention over part of the common nd of the concern, of which he has accidentally become custodier, and to which the pursuer s a liquid claim, for the purpose of meeting an illiquid claim of damages at his own inance against the pursuer. Further, it is thought that the averments in his pleadings do not ke out a prima facie case of damages, reference being had to the circumstances as admit, and to the correspondence produced."

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June 5. 1829.

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cumstances, it is not necessary to move the Cc against the defendant in custody, in order to pre titled to his discharge for want of a declaration, to be made for that purpose. See Tidd's Prac.

In consequence of not being able to apprel found he could not proceed against Ogle, and the In 1817, Johnstone, having been informed th resided in Dumfries-shire) had received paymer upon him for the amount, which he indorsed to of the circumstances. Carruthers having re founding on the bill, brought an action against Dumfries-shire, concluding for payment of the

In defence, Carruthers denied that he had debt, or that he had done anything to subject l and pleaded that Johnstone had incurred a la penses, on which he was entitled to found a ple

The Sheriff ordained Carruthers to produc debt and expenses, which he failed to do; and, nounced this interlocutor:—'In respect of the l 'to the defender of 17th March 1808, finds t 'tifiable in accepting of Wilson as surety for 'to Mr. Johnstone; but in respect he has fa 'upon him of 12th May last, by producing t 'and Wilson for said debt and expenses, de 'of the libel;' and found him liable in expens

Carruthers then brought an advocation, in had advocated the cause) he contended,

1. That as the claim made against him resc the action was not competent in the form in w ing that it was founded upon a bill, as if for session.

2. That Little had no title to pursue such

3. That he had not subjected himself in a law of England, and that he was ready to p English counsel.

Lord Alloway, on the 21st of January 18 cutor:—'Finds that the title of the pursuer 'him to insist in the present action;—that 'ruthers was entitled, in consequence of the 'to relieve Mr. Ogle from jail, upon obtainin 'and for the expenses due to him (Carruth 'satisfactory to them, yet he was not entitled 'and at the same time to take a new securit

'never yet been indorsed by Johnstone, nor is it alleged that it ever was 'presented to him for indorsation; and it appears, from the opinion of 'English counsel (Mr. Grisdale) produced by Mr. Carruthers, that no 'declaration or suit, according to the law of England, could take place 'upon it; therefore decerns in terms of the libel.' No. 366. June 6. 1829.

Against this judgment Carruthers offered a representation, which Lord Alloway, on the 21st of June, refused, 'in respect that when the 'representer and Mr. Bainbridge, as acting under his authority, took 'the security from Mr. Ogle for payment of the debt in question, and 'also for their own expenses, they took a bill drawn by Ogle, and ac-'cepted by Wilson, for the expenses, and which, being in point of form 'unexceptionable, was regularly paid; but that they took a joint and 'several acceptance by Ogle and Wilson for payment of the principal 'sum, in consequence of which a legal difficulty occurred by the law of 'England, as no suit could be maintained until both Wilson and Ogle 'were apprehended, and no suit has been brought, although this joint 'acceptance was granted in 1808;' and he added the following note:— 'The Lord Ordinary would have directed a case to be prepared, and 'the opinion of English counsel to be taken, had not the representer 'himself produced the opinion of his own counsel, which he considers is 'satisfactory upon the subject; and in a case where the sum in dispute 'was but trifling, he was unwilling to put the parties to further expense.'

Carruthers having reclaimed, the Court, in respect of certain new productions, remitted the case to Lord Corehouse; and thereafter Carruthers having died, and his representatives having sisted themselves in his place, Lord Corehouse found 'that the productions made by the defend-'ers during the period the cause depended in the Inner House do not 'affect the pleas of the pursuer,—adhered to the findings contained in 'Lord Alloway's interlocutors of 21st January and 21st June 1823,— 'repelled the defender's claim of compensation, and decerned in terms 'of the libel, with expenses.'

Carruthers reclaimed; but the Court, on the grounds expressed in Lord Alloway's interlocutors, adhered.

JOHNSTONE and LITTLE,—W. MARTIN,—Agents.

NEIL MALCOLM, Pursuer.—*Greenshields.*
MISS STEWART and Others, Defenders.—*Cuninghame.* No. 367.

Process.—Question raised, whether it be competent for a Lord Ordinary (even of consent of both parties) to grant a commission, in initio litis, for the examination of witnesses residing abroad, and not alleged to be in danger of life, to lie in retentis.

MALCOLM raised an action against the defenders, which involved a question whether the late Mr. Stewart of Ascog had executed a deed on deathbed; and both parties being anxious to examine certain witnesses residing on the Continent, and to have their depositions sealed June 6. 1829. 1st DIVISION. Ld. Corehouse.

No. 367.
June 6. 1829.

up to lie in retentis, but who were not alleged t
moved his Lordship, on the summons and def
record was closed, for a commission to that effect.
some doubts whether it was competent for a Lord
a motion, reported it verbally to the Court; and
out deciding the point, granted the motion in resp
both parties.

DICKSON and STEWART, W. S.—GIBSON-CRAIGS and WARI

No. 368.

MRS. JANET MILLS, Pursuer.—
JAMES HAMILTON, W. S. Defender.—S

Process—48th Geo. III. c. 151.—(1.)—An interlocutor having
of a reclaiming note being refused as incompetent, (the summons,
not having been appended,) held to be an interlocutor become fi
ency, against which the party was entitled to be reponed under t
(2.)—A petition for this purpose, without leave of the Ordinary,

June 6. 1829.
2D DIVISION.
Lord Medwyn.
T.

THE Lord Ordinary having decerned against th
in an action against him at the instance of Mrs. Jan
a reclaiming note, which fell to be lodged at the firs
vacation. Trusting, as he said, to being furnished
copies of the summons to append to the note, he dic
having been disappointed in that expectation, he wa
from counsel &c. as many of the six copies origina
sible. In the hurry, however, it was omitted to ap
the process copy, and the note was accordingly re
(see ante, No. 298. p. 601.) He then, but without
Ordinary for leave, as required by the 48th Geo. II
petition to the Court, praying them to repone him, a
the roll. This petition the Court refused to write u
incompetent; and he then enrolled the cause before
to obtain leave to apply to be reponed under the abov
on payment of previous expenses, as against an inter
through mistake or inadvertency. The Lord Ordin
this application with reference to the question whet
could be held as one allowed to become final throug
vertency within the meaning of the statute, the Court
it must be so considered, instructed his Lordship to
tion.

D. TURNBULL, W. S.—A. HAMILTON, W. S.—A

No. 369.

MRS. E. FINLAYSON or MUIR, Suspender.—*A. Wood.*
ALEX. M'KENZIE, Charger.—*Macdougal.*

Process—Master and Servant.—1.—A party having neglected to lead a proof allowed in the Inferior Court, notwithstanding repeated renewals; and the term being circumduced, the Court, in a suspension, refused to allow her to prove, even on payment of previous expenses. —2.—A grieve or farm-overseer held to be hired for a year, and a year's wages accordingly allowed on his being improperly discharged.

June 6. 1829.

2D DIVISION. Bill-Chamber. Ld. Fullerton. F.

THE charger M'Kenzie had been in the service of the late Mr. Muir, husband of the suspender, for fifteen years, in the capacity of grieve or farm-overseer. Mr. Muir died shortly before Whitsunday 1827, and his widow (the suspender) having discharged M'Kenzie at that term without warning, he raised an action against her before the Sheriff of Ross and Cromarty, concluding for wages and board-wages for a year. In defence, Mrs. Muir made various statements, to which it is unnecessary to advert. The Sheriff allowed her a proof at large of her allegations; and after renewing the diligence for this purpose three times, he circumduced the term; and thereafter, 'in respect the defender has 'allowed the term for proving to be circumduced,' decerned against her in terms of the libel. Against this interlocutor she reclaimed, but did not offer to lead a proof; and on her petition being refused, she presented a bill of suspension, setting forth the same averments in defence, and likewise contending that, at all events, the charger was entitled only to wages for half a year.

The Lord Ordinary, in respect the Sheriff had 'allowed the suspender 'a proof at large of her condescendence, which condescendence contains 'in substance the whole averments now made by the suspender, and 'that, after repeated prorogations, the suspender allowed the term to be 'circumduced without offering such proof,' refused the bill.

She now reclaimed, and offered, if allowed to lead her proof, to pay the previous expenses; but the Court adhered.

LORD JUSTICE-CLERK.—It would be a grievous hardship to pass this bill. The suspender was allowed a full proof—diligence was renewed three times—the term was then circumduced—and in her reclaiming petition she does not ask to prove, and she cannot be allowed to do so now. As the charger's situation was that of grieve, he must of course be held to have been hired for a year, and wages must be due for that period.

The other Judges concurred.

J. MACDONELL, W. S.—G. MONRO, S. S. C.—Agents.

No. 370. W. CHALMERS and Others, Pursuers.—*Sol.-Ge*
MAGISTRATES of PAISLEY, Defenders.—*D. of*
—Keay—Jameson.

Superior and Vassal—Booking.—Held,—1.—That parties booking from the Magistrates of Paisley are entitled to entrie investitures, and on payment of the casualties paid from time Magistrates cannot convert the title by booking into one by c sent of the vassals;—and,—3.—That in regard to lands held and sasine, they are entitled, on the vassals demanding an en may be fixed by them, provided they do not exceed the usual

June 9. 1829.
1ST DIVISION.
Lord Eldin.

THE lands on which the town of Paisley is neighbourhood, originally belonged to the Mo August 1488, James IV., from his devotion to S to the Abbot, granted a charter by which he ere into a burgh of barony with all the usual rights a cularly as fully as those enjoyed by Dunfermline brothock. On the 2d of June 1490, the Abbo favour of the Magistrates of Paisley, proceeding charter granted by James IV., and by which h disse concessisse assedasse et ad feodifirmam de carta nostra confirmasse necnon dare concedere as dimittere et hac presenti carta nostra confirmare balliuis burgensibus et communitati burgi nostri grum dictum nostrum burgum in baronia cum pe regalitate nostra de Pasleto et infra vicecomitatum et limites infrascriptas," &c; and after a specifica the burgh and its pertinents, the object of the gr tenementis mansionibus et ortis dictis preposito bal munitati edificandis et construendis prout singulis nostrum conuentum per cartas nostras in feodifirr seu in futurum assignabitur vna cum certis acris d infra limites et bondas predictas iacentibus cuilibe orto assignatis seu assignandis iuxta tenorem dictar desuper factarum seu conficiendarum." Full pc Magistrates to hold Courts, elect their successors, " omnium et singularum terrarum acrarum et ten burgum jacentium et saisinas vt moris est in burgo tibus seu veris heredibus eorundem conferre et de alie persone saisinam dent neque resignationem re sensu et assensu desuper petitis et obtentis." The to be held of the Abbey " in feodifirma hereditar the reddendo was thus expressed:—" Reddendo an balliui burgenses et communitas dictj burgj eorum sores nobis et successoribus nostris de dictis tenem et acris terrarum infra bondas et limites burgj pre

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et seruitia curiarum debita et consueta cum annuis redditibus inde debitis secundum tenorem nostri rentalis et registri et prout plenius continetur in cartis nostris predictis super assedatione feodifirme dictorum tenementorum mansionum ortorum et acrarum desuper confectis seu conficiendis."

This charter had reference to lands on which houses were to be built, and to others of the nature of a commonty, called the Burgh Acres. A distinction between these lands was preserved in the chartulary of the Monastery commencing in 1489, and ending in 1547. The titles of the lands situated within the burgh were entered under the head "Carta terre burgalis," and the latter under "Carta terre campestris." In the charters relative to the former, it was declared that they were to be held of the Abbot "in libero burgagio, ac in feodifirma hereditarie;" while the latter were to be held "in feodifirma hereditarie."

In 1553, John Hamilton, Bishop of Dunkeld, (who then held the Abbacy,) with consent of the Queen, resigned the temporalities to Lord Claud Hamilton, in whose favour they were erected into a lordship, which was specially excepted from the act 1587, annexing kirk lands to the Crown. By the statute 1633, c. 14, "anent superiorities of kirk lands," it was enacted, that his Majesty should "have good and undoubted right to the superiorities of all and sundry lands, baronies, &c. pertaining to whatsoever abbacies &c., and whatsoever other benefices of whatsoever estate &c., erected in temporal lordships, baronies, or livings, before or after the general annexation of kirk lands made in the month of July 1587;" and also the whole feu-duties, under a reservation to the Lords of Erection, who had subscribed the general surrender of their feu-duties until payment of a certain sum of redemption money. No exception as to the Abbacy of Paisley was made. This statute was ratified by another in 1649. In consequence, the Magistrates, on the 12th of April of the same year, issued an act of Council, in which they stated, that finding 'be 'the foresaid act that the town of Paslaye being burgh of baronye or 'regalitie, and haill pertinents yairof within the bounds and limittes of 'the same, is now holden and to be holden in all tym cuming of our 'soveraigne lord the King's Majestie, and his Hienes successors immediately; theirfore the said baillies and counsell have fund it expedient 'that the foresaid act be made notour to all the vassals of tenements and lands within the said burgh, that they are the King's Majestie's immediate vassalls of their said tenements and lands, and are to be entred, receaved, and infeft be the baillies of this burgh in tym cuming, in manner above written, that they pretend no ignorance yairof, nor enter with their former superior upon their perill;' and they ordained certain sums to be paid to the town-clerk for infeftments.

In the mean while the lordship of Paisley had descended to Lord Angus, who, in 1653, conveyed it to Lord Cochrane. An attempt having been made by Lord Cochrane to include in his Crown charter the superiority of the burgh, a dispute took place between him and

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the Magistrates, which was ultimately terminat
cuted in August 1658. By this contract Lord C
son, in consideration, inter alia, of certain sums
by the Magistrates, declared that they have " r
overgiven, and heirbye renunce, dimit, and ove
saids William Lord Cochrane, and Williame N
sonne, their eairis, successours, and assignayes,
oritie of the saide burghe of Paislaye, within t
mentionat, to the effecte and intent the foresai
friedome, liberties, and privileges of the sammen
maye be holden of his hienes the Lord Protector
Ingland, Scotland, and Ireland, and dominions ye
his Hienes' successouris, superiouris yerofe;" and
" to and in favouris of the saids baillies, counsell, co
and inhabitants of the said burghe of Paislaye an
richte of propriete and magistracie of the said b
election of the baillies, counsell, clerke, burgess
membris yerof, in all tyme comeinge; and of th
vtheris within the samen; to the effecte thaye the
and communitie of the said burghe, and yeir suc
enjoye, and possess the samen conforme to theire r
and maye be in the capacitie and power to elec
continewe their owne magistrats, baillies, counsell,
gesses, officers, and all vther members necessarie
said burgh." They likewise conveyed the feu-du
and bound themselves to execute a procuratory of
ing in the hands of the Lord Protector, " ad pe
to the effect the said superiority may conform to t
this nation, be consolidate in the person and favou
and his successors for ever;"—as also to resign th
&c., for new infeftment to be given to the Magi
them in free blench of Lord Cochrane. A pro
was accordingly subjoined, but never executed.
1649 was rescinded; and Lord Cochrane, conceiv
effect of invalidating the contract which had been r
ence, endeavoured to assert those rights of which h
In this he appears not to have insisted; and, or
1665, a procuratory of resignation in favorem was
that of his son, executed by the Magistrates, by
the hands of his Majesty " all and hail the said bu
ley, with the burgal acres" &c., and all and sund
all other rights and privileges,—" and that for
samyne to be made and granted under his Majesty
favours of us the said present Bailies," &c., and th

In consequence of this resignation, a Crown d
the 8th of December 1665, by which Charles II. d

trates and community of Paisley "totum et integrum burgum et villam de Pasleto, cum acris burgalibus" &c., with the feu-duties, rights, privileges, &c.; and which subjects were stated to have belonged to Lord Cochrane, and to have been conveyed by him and his son to the Magistrates by the contract which was thereby ratified and confirmed. The tenendas clause declared that the subjects were to be held of his Majesty and his successors, "tanquam principibus et senescallis Scotiæ, in libera albafirma et hæreditate;" and the reddendo was declared to be "summam septem librarum monete hujus regni nostri Scotiæ annuatim ad festum Pentecostes tanquam proportionalem partem albefirme divoriarum dominij de Paisley pro omni alio onere exactione questione demanda seu servitio seculari que de predicto burgo feudifirme divoriis privilegiis aliisque particulariter supra express. per quoscunque juste exigi poterit quomodolibet vel requiri." But it was declared, "hanc nostram cartam concessam esse sine prejudicio juris superioritatis aliorumque ad nos pertinen. per actum annexationis factum in anno millesimo sexcentesimo trigesimo tertio."

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In virtue of this charter, infeftment was taken by the Magistrates, who, on the 10th of September 1666, issued an act of Council, declaring "that ilk persone that held of the Lords of Erectioun of before, their singular successours sall pay of compositioun for their entrie the eight part of one yeiris rent; provyding that this act sall not be extendit to tenements that formerlie held properlie of the town, nor to the entrie of airs as formerlie, and yat ilk air sall pay the double of their few-dewtie the first yeir of their entrie."

Under these titles the Magistrates claimed right to vote for a member of Parliament, which right was sustained by the Scottish Parliament; but having attempted to exercise it by a delegate, the Court of Session found this illegal; and they also found that widows had right to terce of subjects within the burgh. The titles to the subjects formerly distinguished as 'terræ burgales,' were made up by charters granted by the Magistrates, and sasine taken upon them. These charters in some instances declared the holding to be in 'libero burgagio,' but in general, in feu-farm and heritage of the Magistrates, for payment of feu-duties and services to the burgh, conform to use and wont, one of which was watching and warding. On the 7th of May 1756, they made certain regulations "as to the compositions to be paid by the Town's vassals at their entry with the Town's superiors, to be observed in time coming," and by which it was declared that an heir should pay for a house double feu-duty—a singular successor the eighth part of the rent—an heir for an acre of land a merk—and a singular successor a merk per rood, &c. In 1805 they made new regulations, by which they enlarged the entry-money as to singular successors, in respect that the Magistrates were by law entitled to a year's rent, and declared that heirs entering by a disposition should be regarded as singular successors; and they reserved power to make new regulations.

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The titles to the burgh acres, originally call
tres," were completed in a peculiar form called
fined to persons possessed of property within the
this practice did not very clearly appear; but
period when the lands were possessed by the
consisted of an entry in the books of the burgh,
was booked as having right to a particular lot.
tract was delivered to the party. On assigning
the assignee exhibited his title, and was thereupon
disponer. So likewise, when the party died, his h
of Court, and then booked. Numerous regulati
subject from 1603 downwards, fixing the rates of
by heirs and singular successors at their respective

On the 17th of June 1816, the Magistrates m
bearing, that having "taken into consideration th
lands within burgh by booking is a singular and a
pleting titles thereto, disadvantageous to the supe
stances inconvenient and injurious to the vassals,
the ground of consuetude or long-continued usage,
hitherto been employed when houses and tenemen
kind, have been erected on such lands; and being
such a mode of tenure, and to introduce the mo
form by charter and sasine, they, after due delib
and guided by the opinion of learned counsel cons
enacted, and hereby enact, that from and after th
as superiors of ground within the burgh, discontinu
of entry by booking, and instead thereof substitut
usual and regular form by charter and sasine; a
any of their vassals insisting on being received by
they will nevertheless require and exact such com
try from heirs and singular successors as are, by l
burgh, exigible in cases where the investiture h
charters of resignation and confirmation; and th
hereof to be given to all concerned, by printed ad
through the burgh in the usual manner." In c
those who applied for titles in this form having o
troduced into the charters, prohibiting subinfeuda
on the 23d of May 1823, passed another act, dec
one was intended for the benefit of the vassals, an
rights of the burgh; and they resolved "1st, Th
dation of the vassals in lands held by booking, the
sideration of each particular case, and if no good
contrary, renew the investiture in the form of ch
but these charters shall contain the strictest prohib
dation; and every other means shall be taken to
and privileges of the burgh may be noways imp

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such change of the form of investiture. 2dly, In all cases in which investitures shall continue to be renewed in the form of booking, the Council reserve their right to exact the casualty of a year's rent for the entry of singular successors, in the same way as is competent to them in subjects held by charter; and it is hereby declared, that in any cases which have occurred, or which may occur, in which this right has not been or may not be exercised, the abstaining from having done so, or the abstaining from doing so hereafter, is and shall be held to be merely a matter of grace and indulgence in each particular case; and that it shall not be pled as founding any title on the part of the receivers, or others in the like situation, to the continuance of such grace and indulgence. 3dly, It is hereby declared, that nothing herein contained shall be construed as operating against the rights and interests of the burgh, or as vesting any title in the Town's vassals to insist on charters of booked lands being granted; and that this act shall be held to be of the nature of a private resolution for the conduct of the affairs of the burgh as superiors, which the Council may or may not act on, as they see fit for the advantage of the community."

In consequence of these acts, Chalmers and others, describing themselves as "burgesses and feuars, and proprietors of houses, yards, and lands within the burgh of Paisley, and also owners of burgal acres and common lands held by the tenure of booking within the territory of the said burgh," brought an action against the Magistrates to have it found,

1. That the pursuers, their heirs and singular successors, were entitled to entries to the lands on which houses and buildings were erected, and held by charter and sasine, on payment of the sums specified by the act of Council of the 7th of May 1756.

2. That they were entitled to be entered by booking, agreeably to ancient usage, and on payment of the casualties established by that usage, which they stated were these mentioned in the above act of of Council; and,

3. That if they made the option to abandon the title of booking, the Magistrates should be bound to grant them charters without any restricting clauses, and on payment of the original duties.

In defence, the Magistrates maintained,

1. That, being superiors of the lands, they were entitled to exact a full year's rent from singular successors; that they could not be tied down to any smaller sum by having taken payment of a smaller sum for any length of time, unless a special bargain could be shown with the feuars; and,

2. That if the pursuers were desirous to have their titles converted from booking to charter and sasine, (which they had no right to do,) they could only get them on the terms prescribed by the Magistrates.

Lord Eldin having reported the cause upon Cases, the pursuers, in answer to the first plea of the Magistrates, maintained that they were not superiors of the lands, but that they were merely Commissioners of the

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King, in whom the superiority had been vested b
who had reserved his right by the charter of 1665;
in the same position in relation to the vassals as
and that the services or duties which were exigi
of royal burghs,) be regulated by use and wont
proposition that they were the vassals of the C
that as the lands had been originally church la
sidered as church vassals, and that as such they
the Crown, and get an entry.

On the other hand, the Magistrates contende
with Lord Cochrane, and the resignation and ch
come into the place of the Abbot and the Lords
of the lands; that as such the vassals had, from
from the Magistrates; and if they demanded an
could only do so on the same footing as a vassal
any other superior; and that the plea of the pur
sals was incompetent under the summons, and wa

The Court, after a hearing in presence, ord
chiefly in relation to the plea that the pursuers w

When the case came to be advised, and af
Counsel,

The Lord President observed—Suppose the
the Crown, the feu-duty must still be paid to
Here the voluntary minute of the Magistrates is
which the pursuers found their claim; and if th
should have been adopted at one time, is that a r
held as a discharge of the superior's right to the
think not.

Stewart (in absence of the Solicitor-General.)—
show the feudal state of the burgh at that time.
of Annexation was to leave the duties in the Lord

Lord President.—It only permitted the vass
to the Crown, if they chose.

Stewart.—Under the act 1649, they might ha
and be entered by the Magistrates as the Crown's
present is not the ordinary case of church vassals,
from the case of Lords of Erection.

Lord President.—Not in the least.

Stewart.—What was annexed to the Crown
conveyed by the charter 1655, but is specially re

Lord President.—In short, I understand
your right of going to the Crown is, that the M
sioners of the Crown, and bound to give you an
while the feu-duties belong to them as Lords of E

Stewart.—That is not the case. In the Acts
duties are given to the Lords of Erection; the

the Crown. What is annexed by the act 1663, was clearly the feudal superiority and casualties. No. 370. June 9. 1829.

Lord Balgray.—The argument proceeds upon a wrong interpretation of the charter 1665. It is a conveyance of the burgh. If the conveyance had been made under a qualification—if the Magistrates had been directed to enter the vassals on any modification of the rates, I could have understood the effect of the argument. But we must take the charter as it stands. It is a conveyance of the ground out and out. The holding is a blench holding, and all right of superiority was conveyed. How can there be such a reservation as that which the pursuers state? If the Crown can show a right of superiority, let the Crown Officers make it effectual. But, under the charter, the conveyance was one out and out, and consequently did not reserve the superiority. It seems to have been a joint concern, for the purpose of obtaining an entry-feu, as in the case of all feudal superiors. All discussion previous to that date is out of the question; we must bottom and begin the argument at the charter 1665. Supposing the superiority reserved, which I do not believe it was, it may follow that the vassals are entitled to go to the Crown; but if they come to the ordinary superior for an entry, he is entitled to say to them, Why, you come to me for your own accommodation, and I, as ordinary feudal superior, will exact the usual casualties. Immediately after 1665, the Magistrates gave entry on modified terms; but that circumstance can never have the effect of permanently depriving them of the right to exact the ordinary casualties. Why, over all Scotland, and even in my time, it was the custom to enter vassals on moderate terms, and Mr. Hugh Warrender was the first to introduce a stricter rule. Upon the Buccleuch estates, and also on those of Hamilton, the usual composition was one fourth. The same custom was I believe, followed, by the Annandale and Hopetoun families; but would you say, that because these families had, from a favour to their vassals at the time, voluntarily modified their rates of entry, that all their vassals in time coming were entitled to be entered for one fourth. This is not consistent with either principle or practice; and I see nothing whatever to prevent the Magistrates of Paisley from insisting for payment of the usual casualties.

Lord Gillies.—It is impossible to reconcile the demand of these pursuers with their own conduct, or that of the Magistrates. Immediately after the charter, the Magistrates asserted their right to a composition. They limited the right to one eighth of a year's rent; and if they were entitled to an eighth, they were entitled to the whole. My only doubt in the case was, whether they were now entitled to increase the rate; but, on the whole, I concur with Lord Balgray.

Lord Craigie.—I never had any doubt on the subject.

The Court accordingly pronounced this interlocutor:—'The Lords 'having heard parties' procurators, find and declare, that in the case of 'lands held by the tenure of booking, the pursuers and their heirs and

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'singular successors are entitled to be entered b
'in terms of their investitures, on payment of the
'paid for time immemorial; and that the Magis
'without consent of the vassals, to convert book
'sasines, or to introduce any alteration or innova
'tering them by booking;—further, that when
'ply to the Magistrates for entries in land held
'the latter are entitled to exact such casualty a
'regulations of the burgh, providing the same d
'feudal casualties; and that the said casualties a
'eighth of a year's rent; and decern.'

Pursuer's Authorities.—1. Craig, 11. 24; Duke of Hamil
Heriot's Hospital, June 9. 1714, (7986, Rob. Ap. Ca. 123);
1730, (1. Dict. 531); Duke of Gordon, March 4. 1773, (15096.)

Defenders' Authorities.—Magistrates of Inverness, Feb. 2. 17
6. 1794, (2054); M'Lauchlan, May 14. 1823, (ante, Vol. II. No.

W. Patrick, W. S.—A. Naisne,—Agen

No. 371.

James Connal, Pursuer.—*Murray*-
Robert Coldstream, Defender.—*Sol.-Gen.*

Property—Servitude—Submission.—Two conterminous propri
leaving a small space of ground between their respective gable
divided by a wall which each claimed as his property; and one of
Dean of Guild to have certain beams of wood removed from it wh
neighbour, and to have the vacant space shut up as a nuisance; a
referred to an arbiter, who granted the prayer—Held,—1.—That
to the decree that the arbiter, by ordering the beams to be remov
of property, and so gone ultra vires;—and,—2.—That the party
have the vacant space shut up.

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1st Division.
Lord Newton.

Connal and Coldstream were conterminou
pieces of ground in Constitution street, Leith.
ing to Coldstream lay to the north, and was divide
to Connal by a wall which extended along the whc
west, with the exception of about fifteen feet on the
the property. At this part a dwelling-house pos
had been erected, and immediately to the south Cor
tenement, so that the space on which the wall hac
left vacant between the two gables to the extent of
in breadth. At the east end of this vacancy Conna
which rested on the gable of Coldstream's house;
access from the street, and rubbish was thrown into
frequented by rats, Coldstream complained of it to
and insisted on having the necessary removed, an
shutting up the vacant space. This Connal refused t
also got into a dispute as to the right to the boundar
ing that it was his property. On the footing that it bel

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rested beams of wood and stones on it in connexion with a warehouse which he had built on his back ground. Coldstream then presented a petition to the Dean of Guild, in which he prayed him, 1. "To ordain the said James Connal to remove the said stones and beams of wood which rest upon the said boundary wall, and prohibit and discharge him from making any erection thereon in time coming without the petitioner's consent. 2. To grant warrant to, and authorize the petitioner, at the mutual expense of parties, to clear out the vacant space between his and Mr. Connal's houses; to remove the stones and rubbish collected therein, and to fill up and stop the rat-holes; and, in order to prevent them harbouring there in future, and to prevent water collecting in the said space, to authorize the same to be paved with flag-stones, and the opening of the said space, in front and behind, to be built up with stone and lime to such height and in such manner as your Lordship and Council may direct; the top of such building to be covered and defended with iron pikes, to prevent access thereto from the street; and such alterations and improvements to be kept in repair at the joint expense of the parties. 3. To ordain the said necessary-house to be removed from the petitioner's gable wall, and the said boundary wall to be continued towards the west on the line on which it is at present built, along the petitioner's gable, until it comes on a line with the back wall of Mr. Connal's house, so as to defend the petitioner's gable in future from any dunghill or erection Mr. Connal may place adjoining to it; and also to ordain the said boundary wall to be covered or defended with iron pikes or glass, in order that the same may be made a complete fence on both sides; the whole operations, as well as the expense of this application and procedure, to be at the joint expense of the parties; and in the event of the said James Connal making any unnecessary or unreasonable opposition to the present application, to find him liable in the whole expenses."

The Dean of Guild having granted the prayer of the petition, and Connal having brought an advocation, a submission was entered into to Sir John Connell, by which they referred to his decision "the said action or process, with all that has followed or might have followed thereon." Sir John pronounced a decree in these terms:—"I decern and ordain the said James Connal to remove the stones and beams of wood which rest upon the boundary wall between the property of the said Robert Coldstream and James Connal, and prohibit and discharge the said James Connal or his successors from making any erection thereon in time coming without the consent of the said Robert Coldstream or his successors; and failing the said James Connal obeying this order within fourteen days from the date hereof, I authorize and empower the said Robert Coldstream to carry the work into execution, and I find the said James Connal liable in the expense thereof, which I decern him to pay to the said Robert Coldstream. 2. I authorize and empower the said Robert Coldstream, at the mutual expense of him

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and the said James Connal, to clear out the va
two front houses of the parties, and to remov
rubbish collected thereon, to cause the same
stones, and the opening in front and behind to
and lime to the height of ten feet, the top of w
proper coping, and defended with iron pikes;
mutual benefit of the parties, shall in future be
mutual expense. 3. I decern and ordain the s
move the box or necessary-house complained of
the said Robert Coldstream; and failing his d
days from this date, I authorize the said Rober
the work, and I find the said James Connal liable
which I decern him to pay to the said Robert C
ther ordain the whole of the operations before s
at the sight and to the satisfaction of Mr. Wil
Edinburgh;"—and found Connal liable in full
brought an action of declarator to have it found t
space of ground were his property—a reduction o
the allegation that Sir John had gone ultra vires
and stones to be removed from the wall, wherel
question of property, which had not been submitt
pension of a charge for the expenses awarded by t
defence, Coldstream maintained that the wall an
longed to him; but that at all events he had such
as to prevent Connal from making any other us
boundary; that Connal was not entitled to place
stood, nor to prevent measures being taken to ab
by the space of ground being left open; that by th
of Guild process had been referred to the decis
had pronounced his decree precisely in terms of th
it was unchallengeable.

The Lord Ordinary in the declarator found 'th
'produced sufficient evidence to instruct that he w
'of the piece of ground in dispute, being that occ
'wall betwixt the properties,' and therefore asso
the reduction, found 'that no relevant objection h
'decreet-arbitral,' and therefore sustained the de
pension found the letters orderly proceeded, and C
penses. His Lordship at the same time issued the

* "The question in the declarator appears to the Lord Ordina
terial, in respect to value, which perhaps ever came before the
dispute being the foundation of a wall which originally separated
ties, and which, if the exclusive property of either is burdened h
servitude, such that it can be used in no other way than to carry
cannot be raised or applied to any other purpose without the co

Connal having reclaimed, the Court, for the reasons assigned by the Lord Ordinary, unanimously adhered. No. 371. June 9. 1829.

Pursuer's Authorities.—Steele, June 22. 1809, (F. C.); Reid, Dec. 15. 1826, (ante, Vol. V. No. 90. p. 140.)

D. Christie, S. S. C.—A. Snody, S. S. C.—Agents.

Peter Dudgeon, Advocator.—*Skene—Innes.* George Reid, Respondent.—*Sol.-Gen. Hope—Buchanan.* No. 372.

Process—Delegation.—A party under an obligation to another not entitled to delegate that to a third party without consent of the creditor; and an interlocutor in regard to the obligation not being reclaimed against by the proper debtor, incompetent for the third party to reclaim against it.

June 9. 1829. 2d Division. Ld. Mackenzie. F.

The advocator Dudgeon held a lease of the farm of Myreton, belonging to Lord Elibank, for twenty-three years from Martinmas 1821. In 1824 he left the farm, it being disputed whether his renunciation had been accepted by Lord Elibank's trustees or not. They, however, let it to the respondent Reid, who came under an obligation to relieve them of all claims on the part of Dudgeon; while, on the other hand, they gave to him all right to exact performance of the obligations incumbent upon Dudgeon. The latter had various claims against Lord Elibank's trustees, and one in particular for the value of the dung and straw left by him, which, it was stipulated by the lease, should be paid for by the landlord at the expiry of the tack; and for constitution of these claims he raised an action against the trustees before the Sheriff of Haddington. Answers were given in for the trustees, stating that Reid was bound to relieve them of all claims by Dudgeon, and leaving the discussion to him; while answers on the merits were given in by Reid, who produced a missive from the factor for the trustees, authorizing him "to exact performance

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ment. But, in such circumstances, the right of property seems no way better than that of servitude, the dominant and servient tenements having the very same interest in and benefit from the subject. His Lordship then entered into a detail of the titles, after which he observed:—"Even had the pursuer established his exclusive right of property, the Lord Ordinary would have been disposed to sustain the decreet-arbitral. It does not go beyond the conclusions of the action in the Dean of Guild Court, nor does it decide any thing expressly as to the right of property on which the defender might not have acted, supposing him to have only a servitude over the ground in dispute. Indeed it seems to be doubtful whether, independently of a servitude, a person who, in building, leaves a narrow space of eighteen inches unoccupied betwixt his house and his neighbour's, may not be called upon, as a matter of police, to build up the entrance to it, in order to prevent the nuisance it might otherwise occasion. But, in virtue of the servitude, the defender was entitled to insist that the space in dispute should be occupied exclusively by a boundary wall; and if it was unnecessary to replace this in the interval betwixt the two houses, which does not exceed the breadth of such a wall, he had at least a right to demand that the wall should be continued till it reached the houses, which must have shut up the space between them at both ends. But this is just what the pursuer complains of as an implied decision as to the right of property. The other findings in the decree seem all to be competent, either on the ground of nuisance, or on the right of servitude, which it must at least be admitted the defender possessed."

No. 372.
June 9. 1829.

of every obligation incumbent on Mr. Peter Dudg
ant, for making your entry more advantageous, yo
lieve the proprietor of all obligations, of which Mr
his tack, is entitled to exact performance." Reid al
for implement of certain alleged obligations on the
for penalties of non-implement. These petitions
Dudgeon refused to have any thing to do with I
claims against the trustees. The Sheriff, however,
to inspectors to report on his claims before answer,
an interlocutor sustaining certain claims by Dudg
of other counter claims, but refusing to allow him
and straw, on the ground that this was only stipulat
event of its natural termination, and not in the eve
ing the farm during the currency of the tack. Du
advocated, and Lord Elibank's trustees appeared a
vocation. The Lord Ordinary having advocated t
the Sheriff's interlocutor so far as it refused to allo
of the dung and straw, adhering quoad ultra in reg
by Reid, which it is unnecessary to advert to, the t
reclaiming note. Reid, however, having reclaimed,
although the trustees could assign to him a claim
against Dudgeon, they could not, without Dudgeon
him in their place with reference to Dudgeon's claim
consequently, that they having acquiesced in the i
not be reclaimed against by Reid, but was final.

The Court, in respect the action by Dudgeon was d
Lord Elibank's trustees, and that the interlocutor o
was not reclaimed against by them, refused the note
regarded Dudgeon's advocation, and also adhered
nary's interlocutor quoad ultra.

DALLAS and INNES, W. S.—A. C. HOWDEN, W. S.-

No. 373.

ALEXANDER THOMSON, Advocator.—*Jeffr*
JAMES PURVES, Respondent.—*Sol.-Gen. Hop*

Reparation—Fence.—One of two neighbouring tenants under the
down part of a thorn hedge between the same farms, but not in a
be prejudicial, or unnecessary for the ultimate improvement of the h
to put up a temporary fence at mutual expense, and the other tenant
that the latter was not entitled to reparation for damage suffered in c
a fence.

June 9. 1829.
2D DIVISION.
Ld. Cringletie.
F.

THE advocator Thomson was tenant of the farm of
respondent Purves of that of Lennelhill, both belongi
lord. It appeared that a considerable time ago a thc
erected between the two farms, but on the ground o
the joint expense of the then tenant of Oxenrigg an
further appeared that the tenant of Oxenrigg had alw
cut the hedge when that was necessary for thickenin

away the cuttings. In 1819, Thomson cut a part of the hedge; and on this being complained of by Purves, he offered to put up a temporary fence at their joint expense; but this Purves declined. He again cut down another part of the hedge in 1821, and no temporary fence having been put up, Purves's cattle trespassed on Thomson's farm; and the latter having, on one occasion, poinded some of them, Purves wrote to Thomson, insisting that he, as tenant of Oxenrigg, was bound to keep the fence in repair. In answer, Thomson repeated his willingness to make the fence good, whenever Purves would declare it to be mutual. This Purves still declined to do; and on Thomson cutting down another part of it in 1822, Purves presented a petition to the Sheriff of Berwickshire to have Thomson ordained to put up a sufficient fence where it had been laid open by the cutting down of the hedge, or to authorize him to do so at Thomson's expense; and also to have Thomson found liable in damages; but he did not aver that the cutting of the hedge was an improper or hurtful operation in the condition in which it was, while Thomson alleged that it was necessary to make it a good fence, as the hedge had become thin and scraggy from age.

No. 373.
June 9. 1829.

The Sheriff, after a proof, and a report as to the damage sustained by Purves from want of a sufficient fence, found Thomson liable in damages, and ordained the fence to be repaired. Thomson thereupon brought an advocation, in which the Lord Ordinary advocated the cause, and, with certain findings, assoilzied him.

Purves having now reclaimed against his Lordship's interlocutor, the Court found that, in the circumstances, the claim for damages was not well founded; that the fence was mutual, and must be mutually supported by the tenants during the subsistence of their leases; and so far adhered to the Lord Ordinary's interlocutor, remitting to his Lordship to determine expenses.

Lord Glenlee.—I can see no reason to alter this interlocutor. As to the origin of the fence, it is not material, as it is plain it ought to be a mutual fence, and both parties are willing to hold it so. But Purves says it is a mutual fence, which Thomson is bound to support at his own expense. Thomson states (and the presumption is in his favour) that the operation was for the benefit of the hedge; and that is not denied. Then Purves says, You should keep it up; and Thomson says, I am perfectly willing, if done at mutual expense, as it is a mutual fence. Therefore I think the interlocutor right.

Lord Pitmilly.—I am of the same opinion. The result of the interlocutor is right. This tenant was in the habit of cutting down the hedge, and there is nothing injurious in what was done. I think that Thomson made a reasonable offer, and therefore I would adhere.

Lord Justice-Clerk.—The question is, whether the damage did not arise from this man's own conduct in refusing Thomson's offer? When it was cut for the benefit of the hedge, a temporary fence must be put up at mutual expense; and as this offer on the part of Thomson was refused by Purves, I think the result of the interlocutor correct.

J. Grieg, W. S.—G. Hogarth, W. S.—Agents.

No. 374. JOHNSTONE and BUCHANAN, Advocators. MRS. AITKEN, Respondent.—

Servitude.—A proof allowed, before answer, as to a clai

June 10. 1829. 1ST DIVISION. Lord Newton.

THIS was a question as to a servitude of light over the grounds of Johnstone and Buchanan. Tl ed her a proof of certain facts in support of her and Buchanan having reclaimed, on the ground t ten title, the proof was incompetent, the Court, i stances of the case, adhered; but declared tha answer.

A. BATHGATE, S. S. C.—J. SOMERVILLE Jun. S.

No. 375. D. G. FORBES and TRUSTEE, Pursuers.— W. A. WELSH, Defender.—*Sol.-Gen. H*

Cautioner.—A party having become bound that a factor sh sions, but stipulated that discharges should be granted at least done—Held that he was liberated from the obligation.

June 10. 1829. 1ST DIVISION. Ld. Corehouse. D.

ON the 2d of July 1810, Mr. Crawfurd Tait, Culloden, appointed Dr. Forbes factor on the e time William Welsh (the father of the defender) to Mr. Tait:—" I hereby become bound to the pounds sterling that Dr. George Forbes shall re just account of the rents uplifted by him from C this from a certainty of the Doctor's honesty ness; but I make a point of it that mutual shall take place at least once every year, that n from long accounts." From that period till 1815 removed from the office, his accounts were neit discharges granted; but in that year an action o was brought against him, in which it was found December he was owing £1978, of which about £ that year. In the mean while the obligation h Welsh having died, an action for proving the teno the defender, his son, in which decree was pro March 1827, (see ante, Vol. V. p. 497.) An act founding on the obligation; in defence against w 1. That as it was an essential condition that mu take place at least once every year, and as no sett made, the obligation was no longer binding; and, of the pursuers, independent of the stipulated con Dr. Forbes to regular periodical settlements; and to do so, they had lost recourse against the defend

To this it was answered, 1. That the obligation see that Dr. Forbes accounted regularly; and that

so, notwithstanding he had been repeatedly applied to, the failure was on his part, and therefore the pursuers could not be deprived of the benefit of the obligation; and, 2. That, at all events, it was effectual in relation to the arrears of 1815, when the action of count and reckoning was raised. No. 375. June 10. 1829.

The Lord Ordinary found 'that the cautionary obligation granted by 'William Welsh to Mr. Tait imports that if a settlement did not take 'place at least once a year between Dr. Forbes and the trustees, the cau-'tioner should not be bound;—that it is admitted that no such settle-'ment took place; on the contrary, that there was a culpable negligence 'on the part of the trustees in not calling the factor to account;'—therefore assoilzied the defender, and found him entitled to expenses. The pursuers reclaimed, and referred to the cases of Hamilton against Calder, June 18. 1706 (2091), and Wallace against Lauders, Feb. 20. 1707, (2096); but the Court, without hearing the counsel for the defender, unanimously adhered.

Lord Balgray.—It seems to be a prevailing notion, that when a person becomes cautioner that a certain duty shall be performed by another, the principal is entitled to sit with his hands across, and allow the party to conduct himself as he thinks fit. This is an entire mistake. It is the duty of the principal to superintend and watch over the conduct of the party in a proper and rational manner. But, independent of the general rule, there is here a special condition that mutual discharges shall take place at least once a year, which it is admitted was not done. It is said, no doubt, that Dr. Forbes evaded the applications made to him; but if so, the pursuers ought to have warned the cautioner, and compelled Dr. Forbes to account by an action at law. With regard to the claim for the arrears of 1815, the obligation was at an end long before they were incurred. The interlocutor, therefore, is quite correct.

Lord Gillies.—The terms of the obligation are clear and explicit. Mr. Welsh no doubt says that he has confidence in the honesty and integrity of Dr. Forbes; but he stipulates, at the same time, for a check by means of annual settlements.

Lord President.—The stipulation is not merely that there shall be an annual accounting, but that there shall be a clearance and discharge every year. This confessedly was not attended to, and therefore the obligation was not binding even for the second year. The cases referred to have been superseded by more recent decisions, and particularly those relative to bank agents.

Lord Craigie concurred.

Tait and Young, W. S.—J. Stuart, S. S. C.—Agents.

David Clyne, S. S. C., Pursuer.—*More—Boswell.*
G. Campbell, Defender.—*Skene.* No. 376.

Reference to Oath.—This was an action for an alleged balance of an account of £5 odds, rested on the averment that the pursuer had been employed by the defender as a law agent through the medium of his son. His having been denied, and a reference made to oath, the Lord Ordinary found it negative, and the Court adhered. June 10. 1829. 1st Division. Ld. Corehouse. H.

D. Clyne, S. S. C.—T. Syme, W. S.—Agents.

No. 377. LIEUT.-COLONEL W. SMITH and Others.—JOHN DONALDSON, W. S.—*Jameson*—Competing.

Clause—Testament.—A testator having, in his trust-deed of tees to pay one half of the free proceeds of his moveable estat codicil, as an additional provision, directed to be paid to her, all such free money as he might leave behind him at his de have no right to the principal in virtue of this bequest—Held, revoke the gift in the settlement of one half of the moveable was entitled to the fee of one half, and to interest of the other h term 'free money' were to be included all the testator's mo cash in bank, subject to the deduction of debts, but not of lega

June 10. 1829.
2D DIVISION.
Ld. Mackenzie.
T.

THE late Colonel Robert Wright, by his trust- veyed all his property (including heritage, yieldi to trustees, for the purpose, inter alia, of paying t or Wright, his wife, a free annuity of £300 a yea payment to her "of one half of the clear proceeds sonal property, after payment of my debts and appointed certain other annuities and legacies directed the trustees to make payment of the resid niece Miss Robina Burnside in liferent for her lif to the heirs of her body—whom failing, to Lie and two others in fee. Shortly before Colonel W a year after the date of this settlement, he sold his and lodged the proceeds (£4398. 15s.) in the Co subsequently added a codicil to his settlement in t Robert Wright, &c. in addition to the legacies co deeds of settlement already executed by me, and w to the said deed or deeds, but in corroboration th and bequeath, and direct to be duly paid to m Wright, as the same periodically falls d from all such free money as I may leave behind decease, for her liferent use; declaring that she the principal of that money, nor any right or co virtue of this bequest; and, after the death of my by legate and bequeath," &c.—being legacies to t

Disputes having arisen under this settlement, th tiplepoinding, in which a claim was given in for curator bonis on the estate of Mrs. Wright no 1. Under the original settlement, the fee of one half moveable funds remaining after deduction of his d of the codicil, the interest of the other half. On t Smith &c., the residuary legatees, (Miss Robina unmarried,) claimed the whole proceeds of Colonel paying debts and legacies, together with the inter

fallen due during Mrs. Wright's life; and they contended, that under the codicil and settlement taken together, Mrs. Wright was to have no claim whatever to any part of the principal, and that her liferent was to be limited to the interest of cash lodged in the bank after payment of expenses, debts, and legacies, which alone they contended was included under the phrase in the codicil 'free money.' No. 377. June 10. 1829.

The Lord Ordinary found 'the claimant John Donaldson, the curator 'bonis on the estate of the late Mrs. Isabella Mabane or Wright, entitled 'to the fee or principal of the half of the free proceeds of the moveable 'estate left by the late Colonel Wright, after payment of his debts and 'obligations, not including legacies left by him, but not constituted by 'form of obligation upon himself, and also to the interest of the other half 'of the said free proceeds,' and preferred him to the fund in medio accordingly, adding the following note:—'The Lord Ordinary sees no improbability in supposing that Colonel Wright, when he sold his commission, 'gave his wife, in lieu of what she lost by that sale, the interest of the 'other half of the proceeds of his moveable estate, having previously given 'her the principal of the half of that estate; and the words express this 'well enough. She is to have all the interest, but no principal, *in virtue 'of that bequest*, without prejudice to former deeds, i. e. to the deed which 'had previously given her the half of the principal. The conjecture as 'to free money, meaning money in bank, seems too loose, and this meaning could not be without prejudice to the former deed.'

Colonel Smith &c. reclaimed, but the Court adhered.

A. Macbean, W. S.—J. Donaldson, W. S.—Agents.

James, Janet, and Mary Burnside.—*Cuninghame—A. Dunlop.* **Colonel Smith and Others, and J. Donaldson.**—*Cockburn—More—Jameson—J. W. Dickson.* No. 378.

Competing.

Legacy.—Trustees being appointed in a trust-deed of settlement, "in the event of their considering it proper," to pay to the testator's niece a legacy of £1000 "at such times and in such payments as they in their discretion may think expedient;" and the niece having survived the testator, but having died before the trustees paid the money, or made any entry in their minutes binding themselves to pay—Held that the legacy had lapsed, and did not pass to the executors of the niece, although, prior to her death, the trustees had entered in their sederunt-book a view of the trust-affairs, where they deducted this legacy from the free proceeds along with debts and absolute legacies, and although, subsequent thereto, they acknowledged that they had resolved and agreed to pay the legacy, but were prevented by her death.

June 10. 1829. 2d Division. Ld. Mackenzie. T.

This was another competition arising out of the deed, and in the process of multiplepoinding, mentioned in the preceding case. The late Colonel Wright had, as there stated, conveyed all his property to trustees, with directions to pay the residue of his estate "to and in favour of my niece Robina Burnside, now residing with me, in liferent, for her liferent use allenarly, and exclusive of the jus mariti of her husband in case of

No. 878.
June 10. 1829.

her marriage, and to the heirs of her body — Colonel Smith and two others in fee. The deed " But I appoint my said trustees, in the event proper, to pay to the said Miss Robina Burnside, for her own behoof absolutely, the sum of £100 and in such payments as they in their discretion

Colonel Wright died in October 1823, being s side. The trustees thereupon entered into posse inserted in their sederunt-book a " view of Cc succession, and the application of it under his set was set down, as a deduction from the free proc Burnside, along with the debts, funeral expenses which was directed in the deed to be paid three tator's decease. Thereafter, in September 182 without any resolution of the trustees to pay her having been entered in their sederunt-book, but had meetings, the minutes of which, relative t follows:—" The attention of the trustees bei legacy of £1000 bequeathed to Miss Burnside derstood to have been set apart for her, had ne the trustees are of opinion that, in the circumst occurred, it would not be proper for them eithe the nearest of kin of Miss Burnside, or to hol lapsed in consequence of her death before rec out having this point determined by a Court o cordingly directed a process of multiplepoinding purpose. Such a process was accordingly raised, and condescendence of funds the trustees set forth of the powers committed to them by the said tr had likewise agreed and resolved to pay over the the said Robina Burnside, over and above the contained in the said trust-disposition and deed c they were prevented from carrying their intentio quence of her death. A claim having been given the brother and sisters of Miss Burnside as her opposed by Colonel Smith &c., the residuary leg son, the curator bonis on the estate of Mrs. Wr contended, that the trust-deed merely gave a po pay to Miss Burnside £1000 in addition to the li and that as they had not exercised that power du whatever had vested in her, and the trustees could tors, the direction in the deed being merely to pay *to*

On the other hand, it was pleaded for Miss B that the legacy was duly constituted by the deed only to the condition of the trustees thinking it condition being purified, the legacy became absolu

Burnside, so as to pass to her representatives, (although, in the time and manner of paying it, the trustees had a further discretion in virtue of the latter part of the bequest); and therefore that it did not require the granting of any obligation by the trustees to make it binding on them, as the obligation lay on them by the will, provided the condition of their thinking it proper was fulfilled prior to her death; and, consequently, all that was requisite was evidence of the condition being fulfilled, which it was competent to prove, like any other condition, prout de jure; that the entry in the state of funds in the sederunt-book, however, prior to Miss Burnside's death, together with the subsequent acknowledgment of the trustees, was sufficient evidence that, before her death, they had thought it proper to pay the legacy, and indeed had resolved to do so; but that at any rate this might yet be established by the oaths of the trustees.

No. 378. June 10. 1829.

The Lord Ordinary, as to this matter, found, 'that the trustees of 'the said Colonel Wright were appointed by his settlement, in the event 'of their considering it proper, to pay to Miss Robina Burnside £1000 'at such times and in such payments as they in their discretion may 'think expedient; that the trustees never did make such payment to 'her, nor even grant her any right to demand such payment from them; 'that she is now dead, so that no payment can be made to her; and 'that the trustees are not appointed to make such payment to her exe-'cutors.'* His Lordship therefore repelled the claim of Miss Burnside's executors, and the Court adhered.

Lord Glenlee.—The executors can only claim the legacy as in bonis of Miss Burnside, and I am not satisfied it was in bonis of her. It is very true that in the vidimus of the trust-funds the trustees inserted this as a claim; but they might still have said, we did not come to any positive resolution to pay it. They did not deposit it in a bank, nor intimate to her or her agent that they were to pay it; and though they thought it right to state it in a vidimus, they might still say they were not bound; so that she could have compelled them to pay. On the whole, therefore, I think the legacy never was in bonis of her.

Lord Pitmilly.—I am of the same opinion. The construction of the Lord Ordinary may be strict, but I do not see any other construction that we, as a Court of Law, can give. The only question is, whether the trustees have exercised the powers conferred on them by the trust-deed, or not? Have they put it in such a shape that Miss Burnside could have compelled them to pay

* His Lordship added the following note:—"As to Miss Robina Burnside, the Lord Ordinary cannot see that she ever had in her any vested right to exact payment of the £1000 from the trustees; and if not, he does not see how her executors can have any. Put the case that she had survived the testator only one hour; can it be said that the trustees would thereby have been compelled immediately to pay the £1000 to her executors? Whereas, if she had lived fifty years, they could, during all that time, have been called upon to do nothing unless they pleased. The private views or intentions entertained by any or all of the trustees inter se, but never communicated to Robina Burnside, nor even during her life put into any form of instrument, do not seem relevant."

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if she were alive, or could her creditors do so? I th so. They have not done what the deed authorized being dead, and there being no bequest to executor compel payment.

LORD JUSTICE-CLERK.—I feel inclined, if I coul the executors; but I cannot arrive at any other your Lordships. The trustees might have done s they entered a regular minute, ordering the sum to Miss Burnside's behoof, I could have had no difficul she made the demand or not, this would have ves that we see is an intention stated by them, and the I can come to no other conclusion than that Miss Bu pelled payment, if alive, in virtue of the entry only i now it cannot be compelled by her executors.

TWEEDIE and GRAHAM, W. S.—Æ. MACBEAN, W. S.—J. D

No. 379.

ALEX. ROSS, (CHARLES'S TRUSTEE,) Pursuer.
SOUTHERN DISTRICTS MARKET COMPANY, De
Brown.

Sale—Mora.—A party having purchased a piece of ground pulation that the seller was to give him entry and a valid title a dispute having arisen as to whether the purchaser was not e gain, which became the subject of a submission, wherein decre not pronounced till April 1825—Held that the purchaser was bargain, though a title was not offered till November thereafter.

June 10. 1829.
2D DIVISION.
Ld. Mackenzie.
T.

THE defenders, who had established a market of the city of Edinburgh, being desirous of havin in the vicinity, purchased from Charles, proprieto property, certain premises suitable for that purpo made on the 4th of February 1824 by an improba which bore as follows:—"1. Mr. Charles agrees for the purpose of a slaughtering-house, or any piece of his ground at the Sciennes adjacent to Brotherstone," &c. "2. Mr. Charles to warrant above use of them, against all burdens, encumbr except a right of way specially mentioned. "3. T premises to be £850 sterling, and payable at W the entry of the purchaser commences, and when the whole premises open and ready for the occup without obstacle or hinderance from any one;" Charles shall, at his own expense, grant a valid mises to the Company, accompanied with a searc the date of entry, and shall hand his rights to th good time for having the conveyance ready by being further stated, that "the Company's agent

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portunity of seeing Mr. Charles's own titles, he assures them in the meantime that they are valid and complete in all respects."

So soon as the object for which the purchase was made by the Company became known, several of the neighbours threatened to adopt legal proceedings for the prevention of what they considered would be a nuisance. On this the Company applied to Charles, either to protect them in their proposed use of the premises, which they contended was covered by his warrandice, or to relieve them of the bargain, which they further considered as liable to be resiled from, the written agreement not being probative. Charles having insisted on their abiding by the agreement, which had been rendered binding rei interventu, he having, on the faith of it, warned away his tenants in the property, and also contending that he was not bound to warrant to the Company the use of the property as a slaughter-house against the complaints of the neighbourhood, they entered into a submission, on the 5th of November 1824, to Mr. Irving, advocate, (the present Lord Newton,) who, on the 7th of April 1825, pronounced a decreet-arbitral, whereby he found that the agreement was obligatory, in consequence of the rei interventus which had taken place; and that the second article of the agreement "does not import an obligation on the pursuer to warrant the subject, and the use of it as a slaughter-house against all objections on the ground of nuisance, but only against all burdens, encumbrances, and servitudes, not specially excepted, which may affect the subject;" and he also ordained the parties to acquiesce in and implement the decreet-arbitral in all respects to each other.

On the 11th of April, (four days after the date of the decreet-arbitral,) the Company's agent wrote to Charles's agent, stating that they were ready to pay the price on receiving a clear title, supported by certificates of search; and further, "that the Company will be great losers if any delay in giving them a complete title be allowed to take place, and that Mr. Charles shall be responsible for all the consequences arising from any such delay." On the 29th Charles's agent sent to the agent for the Company certain title-deeds and certificates of search, showing a variety of inhibitions and encumbrances affecting the property, greatly beyond its value. These were returned next day by the Company's agent, who pointed out certain defects in the progress, and omissions in the searches, and required discharges to be produced of the inhibitions and encumbrances standing on the record. In answer, Charles's agent stated that the debts and encumbrances had, as to some, been already paid; and as to the remainder, that they would be paid. The Company's agent in return, by letter of 6th May, required regular renunciations on the record before paying the price; and, on the 27th, no unencumbered title having been offered them, they served Charles with a protest, setting forth the previous delay, and that he was not able to give them a title with complete searches; and intimating that they would no longer hold themselves bound by the agreement. No answer was returned to this

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protest; and, on the 15th of July, the Compan
of Charles, repeating the intimation formerly
this letter an answer was returned by Charles's
and stating, inter alia, "As to encumbrances,
that so far from the property sold being encu
Mr. Charles had made arrangements to clea
with the exception of one or two inhibitions, u
you, for debts not amounting to one half of
Company; and had the Company shown mo
stead of throwing every possible obstacle in t
and annoying nature, the transaction would
ago. As it is, we are getting discharges of
which will be handed over to you at a settlem

On the 16th of September, Charles's agents
agent in these terms:—"We expect to be i
exhibit discharges of the inhibitions against
getting the Market Company's price, or askin
it, which by law we think you are bound tc
practice;" to which the Company's agent ret
considered the transaction was at an end sinc
the 28th of September, however, the Compar
ground in question, to be binding on the offere
sequence of which they on the same day se
second protest, wherein, without departing fi
stated that for the purpose of avoiding liti
Charles, they were still willing, in consideratio
made, to pay the price, on condition of a
searches, discharges, and renunciations, ente
livered to them by twelve o'clock of Saturday
day to which the offer made them was to be bi
to do this, the Company were obliged to ref
the party making it subsequently purchased
to Charles, for the purposes for which he h

On the 22d of November, Charles's agents
the title-deeds of the property, with a view
the disposition, stating, at the same time, t
cumbrances were now upon record, and t
would have certain searches, which the Con
demanded, made before the final settlemen
clined to receive the titles, or accept a dis
for implement was raised against them at
on the estate of Charles, who was now seq

In defence, the Company pleaded,

1. That, after the long delay, they wer
clear and valid title.

2. That the pursuer was not yet able t

portunity of seeing Mr. Charles's own titles, he assures them in the mean time that they are valid and complete in all respects." No. 379. June 10. 1829.

So soon as the object for which the purchase was made by the Company became known, several of the neighbours threatened to adopt legal proceedings for the prevention of what they considered would be a nuisance. On this the Company applied to Charles, either to protect them in their proposed use of the premises, which they contended was covered by his warrandice, or to relieve them of the bargain, which they further considered as liable to be resiled from, the written agreement not being probative. Charles having insisted on their abiding by the agreement, which had been rendered binding rei interventu, he having, on the faith of it, warned away his tenants in the property, and also contending that he was not bound to warrant to the Company the use of the property as a slaughter-house against the complaints of the neighbourhood, they entered into a submission, on the 5th of November 1824, to Mr. Irving, advocate, (the present Lord Newton,) who, on the 7th of April 1825, pronounced a decreet-arbitral, whereby he found that the agreement was obligatory, in consequence of the rei interventus which had taken place; and that the second article of the agreement "does not import an obligation on the pursuer to warrant the subject, and the use of it, as a slaughter-house against all objections on the ground of nuisance, but only against all burdens, encumbrances, and servitudes, not specially excepted, which may affect the subject;" and he also ordained the parties to acquiesce in and implement the decreet-arbitral in all respects to each other.

On the 11th of April, (four days after the date of the decreet-arbitral,) the Company's agent wrote to Charles's agent, stating that they were ready to pay the price on receiving a clear title, supported by certificates of search; and further, "that the Company will be great losers if any delay in giving them a complete title be allowed to take place, and that Mr. Charles shall be responsible for all the consequences arising from any such delay." On the 29th Charles's agent sent to the agent for the Company certain title-deeds and certificates of search, showing a variety of inhibitions and encumbrances affecting the property, greatly beyond its value. These were returned next day by the Company's agent, who pointed out certain defects in the progress, and omissions in the searches, and required discharges to be produced of the inhibitions and encumbrances standing on the record. In answer, Charles's agent stated that the debts and encumbrances had, as to some, been already paid; and as to the remainder, that they would be paid. The Company's agent in turn, by letter of 6th May, required regular renunciations on the record before paying the price; and, on the 27th, no unencumbered title having been offered them, they served Charles with a protest, setting forth the previous delay, and that he was not able to give them a title from complete searches; and intimating that they would no longer hold themselves bound by the agreement. No answer was returned to this

No. 379.

June 10. 1829.

as to the encumbrances, I think the whole delay a seller purging the encumbrances ab ante out of his time necessary for him to raise money. It is said that is not now before us in reviewing the Lord O

Lord Justice-Clerk.—When I read the rec undue delay; but after reading the correspondenc to all the circumstances, I am not satisfied that t reject the purchase at the time they did. I can e bargain for titles by such a day for a particular o given to such a stipulation. But the particular ci lay arose from an attempt to get rid of the bargain arbiter, and not closed till April 1825. Now, du sible to expect that the seller could be taking step bargain was to be considered certain, and the dela the purchasers. Then it was impossible that they sunday 1824, and there must be a reasonable time were reasonable; but they very soon alter their to to have nothing to do with the bargain. They tool and, down to the conclusion of the correspondence the foundation of their refusal. Although I agree to purge encumbrances out of the price unico co under all the circumstances, it being clear that t to reject the contract in May 1825, and they kee coupling the proposal in September with the con utterly impracticable in the circumstances, I thin had no serious intention of adhering to the bargai this, was there such unreasonable delay as to lil seller cannot give a clear title now, this would ju v. Carsewell, and he could not now ask further de us, and I do not think there was such delay as to time they broke off.

Lord Pitmilly.—I am inclined to acquiesce this case is, by the proceedings before the arbiter referred to. It became a different case after de only question that remains is, what is to be con that? On that point I concur in the opinions del

Their Lordships accordingly recalled the int in hoc statu, repelled the first defence, and parties on the second.

Defenders' Authorities.—Lockhart v. Johnston, July 1 well, Dec. 20. 1743, (14177); Little v. Dickson, Feb. v. Cuninghame, Nov. 14. 1738, (14176); Hunter v. Car No. 287); Fleming v. Harley, June 6. 1823, (ante, Vol. I

Ainslie and Macallan, W. S.—Ritchie and

JOHN NICHOLSON, Pursuer.—*Robertson—W. Bell.*
A. M'ALISTER and TRUSTEES, Defender.—*Sol.-Gen. Hope—M'Neill.*

No. 380.

Reference to Oath.—1.—No relevant objection to a reference to oath that the party is alleged to be in an advanced stage of life, and his faculties impaired as to the recollection and apprehension of facts, it not being averred that he is non compos mentis.—2.—The Court refused to instruct the Commissioner who was to take the oath to report as to the party's state of mind.

June 11. 1829. 2D DIVISION. Ld. Mackenzie. R.

NICHOLSON having raised an action against M'Alister, whose daughter he had married, for payment of a tocher of £1000, which he alleged M'Alister had, on the occasion of the marriage in 1806, verbally bound himself to pay, and also for payment of a certain sum for improvements on a farm belonging to M'Alister, alleged to have been made under an agreement that the pursuer was to be allowed the value of them, defences were given in for M'Alister, and for trustees, in whose favour he had executed a disposition of all his property, denying the statements in the summons. The pursuer immediately referred his claim to M'Alister's oath. This reference was, however, objected to chiefly on the ground that M'Alister was "in an advanced stage of life, and his faculties so much impaired, as neither to be distinct in recollection or in apprehension of facts and their bearing." The Lord Ordinary sustained the reference, oberving in a note, 'As it is not said that the defender Mr. M'Alister is 'non compos, the Lord Ordinary thinks it impossible to reject the refer-'ence to his oath in a case of this sort.'

The defenders then reclaimed, and proposed that at least instructions should be given to the Commissioner to report on M'Alister's state of mind; but this the Court refused, and adhered to the Lord Ordinary's interlocutor.

J. THOMSON, —M. N. M'DONALD, W. S.—Agents.

MRS. A. MOODIE OF ANDERSON, Pursuer.—*Sol.-Gen. Hope—More.*
JAMES ANDERSON, Defender.—*Jeffrey—Skene—Coventry.*

No. 381.

Discharge—Clause.—A widow having executed a deed of renunciation of certain liferent provisions in her contract of marriage, stating in the narrative that her object was to afford funds for the maintenance of her two daughters; and that, for this purpose, she had agreed to renounce these provisions in favour of her daughters, without mention of their heirs; but the obligatory clause of the deed bearing a renunciation in favour of her daughters, 'their heirs and assignees;' and both daughters having died in minority, without issue—Held, in a question with their paternal uncle and heir at law, that the deed was ineffectual so far as it bore a renunciation in favour of the daughters' heirs, or at least that the heirs mentioned must be understood as heirs of the body only.

June 11. 1829. 2D DIVISION. Lord Medwyn. R.

BY antenuptial contract of marriage, entered into, in 1809, between the pursuer Mrs. Amelia Moodie and the late John Anderson, the latter conveyed and disponed to himself and the pursuer, in conjunct fee and liferent, for her liferent use allenarly, and to the children to be procreated of the marriage in fee, all property, heritable and moveable, belonging or which should belong to him at his death; declaring, however, that in

No. 381. June 11. 1829.

the event of there being a child or children in ex liferent interest should be restricted, during the children, to an annuity of £100; but that, in ca should predecease her without lawful issue of thei case her right "should revert to a total liferent able and moveable property."

In 1812 Mr. Anderson died, leaving issue of ters, to whom the defender James Anderson, served himself tutor at law. It having turned lands of Hallhill (which constituted the whole derson) would not satisfy the restricted annuity son, she let them to the defender, for the perio £90, subject to the deduction of public burden to the extent of £23, and, of the same date, ciation and conveyance, the narrative of which, of marriage, and setting forth that the lands h at a rent of £90, proceeds as follows:—"And as the heritable estate of my said husband will rent of £90, from which there must be deduct public and parochial burdens, and also the ties, amounting to £23, to Mrs. Anderson of son, her daughter; and as his moveables will c not yet ascertained, after paying his debts, fu of labouring and managing the farm, it is n income arising from his whole estate, heritabl short of the above annuity of £100 provided tract; and that were I to receive the whol arising from my said husband's estate, there w maintenance of the said children; from w agreed to restrict my said annuity to one thir said lands of Hallhill and others, after ded and parochial burdens, and the foresaid lifere and that the remaining two third parts of t ductions, shall pertain and belong and be p and Johan Anderson, my children; and fur the said annuitants, the said sums of £20 a entirely to the said Margaret and Johan A in addition to their two third parts of the by the tack of the said lands executed be behalf of my said infant children on the Anderson on the other part, of the date of t lated rent is made payable to me and my sai mentioned:" "And seeing that in order ment into effect for the benefit and security per that I should execute the following d do in manner underwritten; therefore I

do hereby restrict the foresaid liferent annuity of £100 sterling, and all other provisions stipulated in my favour from the estate of my said deceased husband by the said contract of marriage between him and me, in any event whatever, to one just and equal third part of the free yearly rent of the said lands of Hallhill and others, which belonged to him, and now to the said Margaret and Johan Anderson his children, and which are now set to the said James Anderson by the tack above mentioned, after deduction of the feu-duty, and of all public and parochial burdens exigible, or which may become exigible, forth of the same; and also after deduction of the said liferent annuity of £20 payable to Mrs. Anderson of Golland, and of the said liferent annuity of £3 to Mary Anderson her daughter; declaring hereby that the other two just and equal third parts of the said free rent shall pertain and belong and be payable to the said Margaret and Johan Anderson, and their heirs and assignees, in terms of the tack above mentioned; and declaring also, that, upon the death of the said annuitants, the above sums of £20 and £3 shall thereafter belong entirely to the said Margaret and Johan Anderson, and be paid to them and their foresaids in addition to their two third parts of the said rents, and that not only during the subsistence of the said tack, but during all the period of my lifetime, I being only entitled to receive one third part of the said rents after deduction of the said £23, and of the annual burdens and taxes affecting or which may affect the said lands; and I hereby renounce and for ever discharge all claims competent to me against my said daughters as heirs-portioners of their said father, or their foresaids, founded on the said contract of marriage or otherwise, to any greater extent than one third of the free rent of the said lands, whatever the rent may be for the time, after the deductions above mentioned; to which third, under these deductions, my said claims are hereby expressly restricted."

No. 881.
June 11. 1829.

In 1824 the eldest of the children died, and the other died in 1827—both in minority, and without issue. On this event, the pursuer claimed the liferent of her husband's property in virtue of the marriage contract, which declared that, on the death of the children of the marriage, her right, restricted during their life to an annuity, should revert to a full liferent. This demand was opposed by the defender, who was now entitled to succeed to the property, on the ground that the deed of renunciation and conveyance executed by the pursuer after her husband's death did not give up her rights under the contract of marriage in favour of her daughters merely, but in favour of them, 'their heirs and assignees;' and that he, as their heir, was entitled to the benefit of it.

In consequence of this, the pursuer executed a revocation of that deed, and thereafter raised a summons, concluding for reduction of it, on the grounds, 1. That the defender had, in the preparation of the deed, fraudulently obtained the insertion of the words 'heirs and assignees;' but it did not ultimately become necessary to insist in this; and, 2. That

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so far as it gave up the pursuer's rights under th the 'heirs' of the children, it was granted by the rance of its nature and consequences, contrary to in the deed, to her great hurt and lesion; and l nature, and granted without any onerous or just vocable at pleasure; and having been so revoked, null.

The pursuer also raised another action for co against the defenders under the marriage cont ordained to make up titles in the lands of Hallhil and convey them in liferent to the pursuer in im of marriage.

These actions having been conjoined, it was p that the agreement made by her being specially of the deed as an agreement to restrict her ann leaving something for the maintenance of the c the remainder in favour of them alone, and th deed being stated to be for carrying this agreem the deed, in so far as it renounced all the pursu riage contract in favour of the 'heirs and assig beyond intention and without cause, and as suc and at all events, that, according to the true in it altogether, she could not be held to have ren the contract of marriage in favour of the defen hand, it was contended for the defender, that w positive and obligatory clause were clear and here,) they could not be overcome by expressio

The Lord Ordinary pronounced the followi he added the subjoined note* :—'In respect

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* "The marriage contract conveys to the pursuer the life claring that if there shall be a child or children existing at the widow's right is to be restricted to an annuity of £100. die without lawful issue, the widow's right is to revert to t band died, leaving two children, and without property suffi was natural for the defender, as the tutor and guardian of t restriction of the annuity from the widow, who accordingly third of the rents, on the narrative, that if she received the thing left for the maintenance of the children; and 'in ord into effect for the benefit and security of my said children, &c. If she had merely restricted her annuity, this was all course went to the daughters, as the fiars in the property; her object, the narrative bears, 'that the remaining two th and be payable to the said children;' and the restricting o declaration, 'that the other two third parts shall pertain said Margaret and Johan Anderson, and their heirs and a

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'a ...d intention of the pursuer, in executing the deed of renunciation in '1...8, was to restrict her annuity of £100 under her contract of mar-'...age, while that should be the measure of her rights, and that she did 'not consent, or, so far as it appears, was required to consent, to any thing 'beyond this, finds that in so far as the said deed of renunciation im-'ports a conveyance of the two thirds of the rents in favour of her child-'ren, their heirs and assignees, and a discharge of her claims under the 'contract of marriage against her children and their foresaids, to the 'effect of the heir at law of her children excluding her liferent, in terms 'of the said contract of marriage, the same is reducible, as going beyond 'the manifest intention of the granter; and to that effect sustains the rea-'sons of reduction, and reduces, decerns, and declares accordingly; and 'finds that the defender, as the heir-apparent in the lands, the liferent of 'which is conveyed to the pursuer under her contract of marriage, is 'bound to make up titles, and grant a liferent right in the same to the 'pursuer, that she may draw the rents thereof during her life; and ap-'points parties to be further heard in the process of constitution.'

The defender having reclaimed—

Lord Glenlee.—When a special cause for a discharge or renunciation is assigned, we are not to apply the renunciation to totally different causes, so as to make a deed sine causa. Here there is not a mere preamble; but the deed declares that it is granted for a particular cause, viz. to provide for her daughters; and that in order to effectuate this her intention in favour of her children, she is to do so and so. Then in the enacting clause come in heirs and assignees; and this defender wants to make this include collateral heirs, which is totally beyond the cause assigned for the renunciation. We may add to this the flexibility of the word 'heirs;' for if ever there was a case where it was confined to heirs of the body, it is this. I am therefore for adhering.

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ever to have been in the contemplation of either of the parties to regulate the rights of the widow or the heir in the event of the annuity under the marriage ceasing, and the right to the liferent reviving. The Lord Ordinary is always unwilling to impute fraud to any one's conduct, if it can be rationally accounted for on other principles; and although the defender may think himself now entitled to avail himself of what he may suppose his legal rights under this renunciation, the Lord Ordinary sees no ground for supposing that he contemplated at the time the possibility of both the children predeceasing both him and their mother without issue, and that he framed the deed accordingly. On the contrary, the Lord Ordinary is inclined to think that the terms 'heirs and assignees' in this place, and 'their foresaids' in an after part of the deed, were added, without adverting to their possible effect on the rights of the parties, as being the usual clause of style in bonds and dispositions; and even when the pursuer is made to renounce and discharge all claim competent to her under the marriage contract, 'to any greater extent than one third of the free rent,' this must be held to apply solely to her situation as entitled to draw the annuity, (the only subject about which the parties were transacting,) and that she does not thereby, either expressly or by legal implication, renounce her title of possession as liferentrix, when the event occurred which would revive that right. The words of the deed may perhaps have gone somewhat beyond the meaning and intention of the parties, (see Principles of Equity, vol. ii. p. 222); but the pursuer is entitled to have the true import of the deed enforced by confining its application to the period when she was to draw the annuity which she restricted, but that it is not to be extended also to the period when her liferent revived, to which it was never meant to apply."

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LORD PITMILLY.—There are two reasons of reducti fraud, which is denied; and if it were necessary to go i proof. But the second ground libelled is in distinct t in ignorance of the consequences &c., and was testament without any just cause; and having been revoked, is nul that this ground of reduction is well founded. I think this error. There were two deeds of the same date- tack. In writing the tack, the rent is, in the usual children, their 'heirs and assignees;' and these words, the tack, are copied in the renunciation; for they are rative, or where the nature of the agreement is stated mentioned; and it is said to be done in terms of the is satisfactory to see from this that it has been merely the children had died before the tack expired, it woul duce it; but it has expired. The true ground of redu a gratuitous deed, granted in ignorance of its effect, the children. That is revoked; and I go so far as to cessity for reduction at all. (LORD GLENLEE—I th however, does not make it worse. I therefore con interlocutor.

LORD JUSTICE-CLERK.—I am clearly of the same ciple on which the Lord Ordinary has proceeded. this deed, and there is no indication that any benefit collateral heirs; and having the declaration of the p purpose of the deed, that it was for the benefit and and them alone, and when the purpose is so plain, I t into the views of Lord Glenlee as to the flexible cha I think the construction of that word may properly the case of Urrard effect was given to the most po the deed; but I said then, and I say now, that if I the deed a declaration of the purpose of the grante we put upon it, I would have agreed with my Lo the majority of the Court on that occasion. Here adhere to the interlocutor of the Lord Ordinary.

THE COURT adhered.

Defender's Authorities.—Campbell, Nov. 28. 1770, H. of L., April 8. 1824, (2. Shaw's Ap. Ca. 149.)

MACRITCHIES, BAYLEY, and HENDERSON, W. S.

J. RAMSAY, (GLASS'S TRUSTEE;) Pursuer.—*Jeffrey—Jameson—Gillies.* No. 382.
REPRESENTATIVES of W. SCALES, Defenders.—*Skene—Reddie.*
JOHN KIRKWOOD, Defender.—*Sol.-Gen. Hope—M'Neill—Spears.*

Bankrupt—1696, *c.* 5.—A party having sold certain premises under a stipulation with the purchaser, made in knowledge of a creditor, that the price was to be applied in extinction of that creditor's debt; and part of the price having been accordingly paid him in cash, and another part by bill, the debt for which the bill was given not being, however, presently due; and the seller having been sequestrated within sixty days; but there being no evidence that the purchaser was an interposed person in collusion with the bankrupt and creditor—Held,—1.—That the sale was valid;—and,—2.—That the payment by the purchaser in cash did not, while the payment by bill did fall under the statute 1696.

June 11. 1829.
2D DIVISION.
Lord Newton.
T.

THOMAS GLASS, builder in Glasgow, contracted with the defender Kirkwood, a wright, and other tradesmen, to execute the different branches of work in a house which he was about to erect on a piece of ground belonging to him in Glasgow. There was no period stipulated when these tradesmen should be paid; but the practice of Glasgow is to advance money to tradesmen so employed occasionally as the work proceeds, and in proportion to its progress. In November 1825, when the house was partly built, Glass gave Kirkwood a bill for £150 at three months, but he failed to retire it; and when the greater part of the house was completed, Kirkwood and the other tradesmen having urgently demanded payment of the amount due for the work executed, Glass, on the 4th February 1826, to enable him to comply with this demand, sold the premises on which the house was building for the sum of £600, and £100 being a burden in favour of the superior, to the late William Scales, writer in Glasgow, who was immediately infeft. The disposition to Scales contained an acknowledgment of the receipt of the price; but, in point of fact, the price was not paid over to Glass, who, of the same date with the disposition, signed the following minute, written by Scales, and witnessed by a clerk of Kirkwood's:—"The condition of my sale per disposition this day to Mr. Scales is, that he pays, so far as it will go, the £600 to Mr. Kirkwood, and other tradesmen of the brick-house, the accounts at his credit, and the balance I am to receive after the house is finished—my said disponee also paying £100 sterling, and the £3: 0: 6. annually expressed in the disposition. Thus the price is settled, I having so deposited the £600 and £100 in my disponee's hands."

At this period, the price of the work actually executed on the house was about £470; and on the day immediately subsequent to the date of disposition, Scales paid to Kirkwood the sum of £200 on a receipt written by Scales, and bearing that the payment was made "in terms of agreement,"—Kirkwood at the same time undertaking to finish the house in a tradesman-like manner for the £600 price in all, "or whatever less may take." Part of this £200, to the extent of £175, Kirkwood employed in paying the other tradesmen, and the balance he applied pro

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tanto in satisfaction of his own account. On the granted to Kirkwood a mandate in these terms:- to get payment from Mr. Scales in full of you done by you for me in Moore street, and sold b said house is completely finished;" and Kirk order to Scales, obtained from him, on the sa on a person called Baird, payable at Whits knowledgment of which, Kirkwood's clerk "Received from William Scales bill for £2 payable at Whitsunday first; and as the £25 wood sooner than Whitsunday, of course ther either one way or other. It will be credited newed other three months, or retired by a th sunday, if asked. Therefore Mr. Scales is £250."

Kirkwood proceeded with the work of the h the amount remaining due to him, after receivi the above-mentioned bill, was £144. In the i was sequestrated within sixty days of the dat tioned, and the pursuer Ramsay appointed t estate. Thereupon Scales raised a multiple of Lanarkshire as to the balance of the price i £150, which was claimed by the trustee on th wood on the other, to the extent of £144, as incurred since the sale on the employment of

Ramsay at the same time raised an actio for reduction of the sale to Scales—the min Kirkwood &c., and for repetition by Kirkwo the proceeds of the bill for £250 indorsed grounds,

1. That the whole was a concerted and fra for the purpose of giving an undue preferenc

2. That supposing the sale to be good, the p der of Glass fell under the statute 1696, not b but assignations of the price in satisfaction events, that the indorsation of the bill coulc the exception of cash-payments.

The multiplepoinding before the Sheriff advocated ob contingentiam, the two proc Lord Ordinary pronounced this interlocut joined note:*—'Having considered the clo

* "The Lord Ordinary sees no relevant ground un Scales's disposition and infeftment. The sale to him so far as appears, a fair one. He was not a prior cred although his purchase should have enabled the debtor t has never been held a ground for voiding the sale. If

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'cesses, and heard parties' procurators thereon, in the reduction sustains 'the defences for the defenders Scales and Aitken, and assoilzies them 'from the conclusions of the action; repels the defences for John Kirk- 'wood, in so far as respects the bill for £250 received by him from Wil- 'liam Scales, and finds that he must repeat and pay to the pursuer the 'contents of said bill, with interest from the time when he received pay- 'ment of it; but sustains his defences, and assoilzies him quoad ultra: 'In the advocation, advocates the cause, prefers the said John Kirkwood 'to the fund in medio to the extent of the sum of £144: 14: 5, being the 'value of the work executed by him after the purchase by Mr. Scales, 'with interest from the time when the whole work was completed; and 'prefers the trustee on Glass's estate to the remainder of said sum, and 'decerns; finds the defenders Scales and Aitken entitled to their ex- 'penses, allows an account thereof to be given in, and remits to the Au- 'ditor to tax the same, and to report; finds no other expenses due.'

Against this interlocutor the trustee reclaimed, in so far as it assoilzied Scales, and also in so far as it assoilzied Kirkwood from the claim for repetition of the £200, and preferred him to the £144 in the multiplepoinding; while Kirkwood, on the other hand, also reclaimed against it, *in so far as* he was not likewise assoilzied from the conclusion as to the bill.

Jeffrey, for the trustee, began to speak to the validity of the sale, when the Court put it to him whether his client would undertake to prove his averments regarding Scales being an interposed person, acting in collusion with Glass and Kirkwood, to give the latter a preference. On ascertaining that they would not undertake to establish this, he gave up the objection to the sale, and also to Kirkwood's being preferred to the balance of the price for the work subsequently done on the employment of Scales, necessarily following from the sale being held valid; and with regard

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dy money, the debtor may apply this in extinction of prior debts; and such payments, alugh constituting a preference, cannot be redemanded under the statute 1696. It does not ear to the Lord Ordinary to be of any consequence whether the cash is paid by the debtor self, or by the purchaser in virtue of his direction, provided it be immediately paid; and his view he inclines to hold the payment of £200 by Scales, the day after the disposition delivered, to be a ready money payment, in the same situation as if it had been made dily to Glass, and by him again to the creditors who obtained shares of it. The bill for 0 seems to stand in a different predicament. Scales either could not, or did not choose ay more than £200 in cash. For the remainder of the £450 which he agreed to advance, ndorsed this bill to Kirkwood. This was not a cash payment; and on the same principle hich the Lord Ordinary holds the £200 to stand as if it had passed through Glass's hands, ust hold the bill to be in the same situation as if Scales had indorsed it to Glass, and again to Kirkwood. But an indorsation by Glass would have been clearly reducible as urity, and the circumstance that the indorsation was made at once to Kirkwood ought to no difference. Accordingly, in the case of Barbour, where the purchaser granted a bill ly to the creditor, the Court held this to be truly an assignation to the price. As to the ation, the Lord Ordinary holds the £150 to have been a part of the price retained to e work which still remained to be done, and that Kirkwood had a right to look to Scales yment of such work from the sum so retained to answer it."

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to the other points proceeded:—It is clear that Kirkwood, the preferred creditor, whereby he debt out of this property. It was an assignme the house, and not a cash-payment within the Then as to the bill, it falls exactly under the cas May 30. 1823, (ante, Vol. II. No. 335. p. 35 also applies equally to the £200, that being, to have been held in the case of Barbour, " by the bankrupt of the price of his lands i in order to give an undue preference."*

Sol.-Gen. Hope for Kirkwood.—The paym on the order of Glass, is in substance just had paid the price to Glass, and he had paid and this would undoubtedly have been a cas tion. But the same principle should extend merely gave an order for payment out of It was optional to Scales, or a matter of Kirkwood, whether the whole should be pa rupt had no concern with this; and the complied with the order by means of a b whether the order by Glass was not equi for, as between him and Kirkwood, he wa cepting the bill from Scales.

Lord Glenlee.—I am inclined, on the w that if the money had been in Scales's hands, ditor could not have stood in the way of t and would just be a deed falling under the made the day after the sale, I think it may might have known that Glass was in bankr of that; and I cannot think that Kirkwood the money had been placed in a bank, and

* The following are the opinions in that case, no

Lord Glenlee.—It is very plain that the interl the discharge of the price in respect of a bill giv tioner got the money as by transference from L Anderson for the price. It was in virtue of the the price due to Lowden. It was merely part of t This is, in point of fact, the true state of the cas the act 1696.

Lord Craigie.—I view it in rather a different to have been called into Court; and if both had been perfectly good, viz. that Anderson alone i perty without paying the price to the trustee.

Lord Robertson.—I concur with Lord Glen

Lord Bannatyne.—I concur with Lord Crai

Lord Justice-Clerk.—I am satisfied that which Johnstone was participant. His story is of the lands, and the discharge is in the minute act 1696.

and I am rather inclined to sustain that payment. But the second is in a situation altogether different. The debt was not due at the time he took the bill, and he remained Glass's creditor till the bill was paid to him. There was no discharge of Glass, unless the bill was paid. So I hold it to be the case of a creditor obtaining further security; and it would be dangerous to sustain the payment by the bill. No. 382. June 11. 1829.

Lord Pitmilly.—I concur in the opinion delivered. I think the Lord Ordinary has discriminated with great accuracy and distinctness. We are to hold the sale a fair transaction; and then I think the interlocutor right in holding the payment of £200 just the same as if it had been paid by Scales to Glass, and by him to Kirkwood. I cannot see any difference. But the bill is in a different situation. If Scales had granted the bill to Glass, and Glass had indorsed it to Kirkwood, it would have been reducible; and applying the same principle here as in regard to the cash-payment, that it must be considered as if done by Glass himself, it follows that the bill is reducible.

Lord Justice-Clerk.—Having got rid of the challenge of the sale, this question is brought to a narrow point; and it is clear that the payment by Scales, on the order of Glass, to the persons having debts due, is to be held a cash-payment, and protected. Then as to the bill, it is equally clear that it cannot be considered so, and must be cut down, just as if the indorsation had been by Glass himself.

W. Martin, S. S. C.—Tod and Wright, W. S.—Agents.

J. Patison Jun. (Blincow's Trustee,) Pursuer.—*Skene—Wilson.*
A. Allan and Company, Defenders.—*Jeffrey—Sandford.* No. 383.

Bankrupt.—Question raised, whether a payment in cash made by a bankrupt to a banker who was his creditor, was a payment in the ordinary course of trade.

After the case reported ante, Vol. VII. No. 60. p. 124, (which see,) June 12. 1829.
had been remitted to the Lord Ordinary, a difficulty arose as to the mean- 1st Division.
ing of part of the interlocutor. The bankrupt Blincow, and his brother Lord Newton.
Valentine, had granted a bond to Allan and Company, bankers in Edin- D.
burgh, for £2500, payable by three instalments of £833: 6: 8—the last
on 4th October 1827. The two first instalments were paid, and there
remained a balance in Allan and Company's hands of £132: 19: 9. On
the 12th of May, Blincow indorsed bills to them, which, together with
the acceptance by Valentine delivered to them on the same day, made the
bills in their hands amount to £848. Blincow, on the same day, had
given a cheque on Allan and Company for £838: 13: 4 to Valentine,
who delivered it to Allan and Company. It was then placed by Allan
and Company to the credit of the last instalment of the bond, by which it
was extinguished, and they debited his account-current with the amount
of that instalment,—thus leaving a small balance due to Blincow, who, a
few days thereafter, was rendered bankrupt.

In regard to this part of the transaction, the Court pronounced this interlocutor:—"Find, in the circumstances of the case, particularly the

No. 383.

June 12. 1829.

'situation of William Blincow, and the third ins
'becoming due till the 4th day of October 18
'£833 : 6 : 8, and £5 : 6 : 8 of interest accruing t
'of May 1827 by means of a cheque or order,
'be considered as an evasion of the statute 169
'reasons of reduction quoad said payment, and
'said cheque or order; — that the said sums
'account-current between the parties, in the sa
'the said order or cheque had never been
'declare accordingly: Further find that the
'common creditors by bond, were also the or
'Blincow and Company; that they transacte
'counted their bills in the ordinary way of t
'actions do not fall under the sanction of the
'assoilzie the defenders on that head, and de
'bound to account to the trustee for the c
'and Company for their intromissions in the
'rights of the defenders as ordinary creditor
'parties interested, as accords of law; and f
'said matters, remit to the Lord Ordinary t
'the case, as to his Lordship shall seem prc

When the case came before the Lord Ord to the meaning of this part of the interlocu with the subjoined note.*

The Court thereupon 'remitted to the 'decide whether the funds in the defend 'cheque for the amount of the third instaln 'were paid to the defenders in the fair an 'were deposited with the view, and for th 'an undue preference over the other cred

J. Patison Jun. W. S.—Allan and

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* "The Lord Ordinary is doubtful whether that p finds 'that the defenders, besides being common c bankers of William Blincow and Company—that th ed their bills in the ordinary way of trade, and tha sanction of the act 1696, and therefore assoilzie th was meant to apply not only to the bills lodged in 1827, when the cheque which has been reduced wa also to the cash and bills delivered to the defender cow on that day. If that cash and these particu held as received in the ordinary course of trade, a the remit be, whether the defenders were or were n in their hands what was required for payment of Ordinary considers it to be quite clear that they take nothing by the reduction of the cheque.

"If, on [illegible] it is still open to hin were or we

MAGISTRATES of EARLSFERRY, Pursuers.—*Sol.-Gen. Hope—Cuninghame—Hon L. Melville.*
SIR MICHAEL MALCOLM and R. CARSTAIRS, Defenders.—*Jeffrey—Jameson.*

No. 384.

Burgh Royal—Witness—Servitude.—Held,—1.—That the burgh of Earlsferry is a royal burgh.—2.—That it has a servitude of golfing, under certain limitations, over the Ferry Links;—and,—3.—That burgesses and proprietors in a burgh claiming servitudes are not admissible as witnesses in support of the claim.

June 12. 1829.

1ST DIVISION.
Lords Alloway, Eldin, and Corehouse.

THE pursuers, as Magistrates of the royal burgh of Earlsferry, presented a petition to the Sheriff of Fife, alleging that the burgh had a servitude on an adjoining commonty, called the Ferry Links, of golfing, bleaching clothes, steeping lint, casting divots, and of perambulating over it, or at least having roads through it; that they had right to a piece of land called Coalbaikie; but that Carstairs, the tenant of Sir Michael Malcolm, an adjoining proprietor, had unwarrantably begun to plough up the Links, and to quarry stones from Coalbaikie, and therefore praying for interdict. The Sheriff granted interim interdict; and Sir Michael Malcolm having been called as a party, the pursuers, after some procedure, raised an action of declarator, concluding to have it found that they were proprietors of the Links, or at least had right to the above servitudes, and were proprietors of Coalbaikie. At first their title as a royal burgh was disputed; but having produced an extract of charter by James VI. from the Great Seal, this defence was not insisted on. A proof of possession having been allowed, the pursuers produced several of the burgesses, proprietors and residenters in Earlsferry, as witnesses, who were objected to by Sir Michael Malcolm, but admitted by the Commissioner.

On the part of Sir Michael Malcolm it was contended,—1. That these witnesses were inadmissible, as having a direct interest;—2. That he was the proprietor both of the Links and Coalbaikie;—3. That there was no such servitude as that of golfing recognised by law over the property of a private person; and that the cases in which it had hitherto been sustained were cases in which the property belonged to the community, and the inhabitants had, either by prescription or written deeds, a right to this servitude;—and, 4. That the Magistrates had no right to the other servitudes claimed.

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from the whole circumstances of the case, that they were placed in the defenders' hands, in the ordinary course of trade, but for the express purpose of being applied, through the sum of the cheque, to the extinction of the sum in the bond; and that, unless this object had been in view, they would not have been received at all.

But as the parties differ as to what they conceive to have been the meaning of the Court in that part of the interlocutor which is above quoted, and it does not appear so clear in itself to the Lord Ordinary as to enable him to say which is right, he has thought it advisable to report the matter on Cases."

No. 384.
June 12. 1829.

The Magistrates, on the other had, contende admissible, and that they had established their Lord Alloway pronounced this interlocutor: 'having resumed consideration of the memoria 'very long proof, which is held as repeated in 'together with the whole of the conjoined pro 'finds that the burgh of Earlsferry has, past a 'rights and privileges of a royal burgh, excep 'liament—a privilege which many of the roy 'possess; and that this burgh has enjoyed pr 'is instructed even by the statements made 'by the defenders,—seeing that they have s 'understood to be the marches betwixt the e 'perty of the burgh; but although it is a 'poverty of this burgh excluding them fr 'preserving their original charters and pa 'and even the charter granted by James VI 'the burgh, of which they have been able from the register of the Great Seal, finds 'is in possession, it is entitled to protect i 'derable number of the witnesses having a 'protection of rights claimed by the burgh 'terested witnesses; and therefore the Lo 'opinion entirely upon the depositions of 'the pursuers who did not reside in Ear 'the issue of the cause;—that there is a 'the testimonies of the witnesses adduced 'ther the pit marked M, as contended f 'marked D on the plan, leading to what 'ter R, is the march betwixt the prope 'dence that that part of the ground call 'been possessed by the inhabitants of 'time, and that the march should be as 'to the line above mentioned, from th 'inhabitants of this burgh, and strang 'upon the eastern links, and enjoyed 'upon these links, when not ploughed 'that period the proprietor and tenan 'of property, by ploughing them at di 'upon them, and that the whole of the 'regular cultivation, except some sma 'golfing course upon the links to the 'by part of the ground being enclose 'plan to afford a sufficient space for g 'must be exercised in the same way 'least possible injury to the servien

'as marked upon the west links, seems perfectly suffi
'the amusement of golfing, such as the population
'require, without having any title to exercise that rig
'the sands or links, where aration cannot well take pl
'to prevent any dispute in time to come, appoints Mr.
'veyor who prepared the plan in process, at the sight
'put in march-stones in the course N N, such as he
'least prejudicial to the estate of Grange, and may suffi
'exercise of golfing to the inhabitants of Earlsferry: Fi
'suers have not established a sufficient right to take feal a
'mortar, to water their cattle, to steep their lint, and
'clothes, or to dry their lint, on the links in question
'assoilzies the defenders from all these conclusions of t
'cerns. With regard to the roads, finds that when gr
'closed and not cultivated, persons in the neighbourhood
'to roam through the same in all directions; yet, when
'comes cultivated, the right of road through the same
'to such ways as appear sufficient to supply the demands
'Finds that there seems to be a road at present leading
'end of the town, entitled on the map 'Road leading to
'Colinsburgh,' &c., and another road from the west end
'entitled 'Road to Largo, Leven,' &c., and also a cross
'from the west end of the town, which seems to connect th
'entitled 'Road from Leven to Earlsferry and Elie,' an
'perfectly sufficient to supply every convenient access to t
'therefore assoilzies the defenders also from the whole conc
'libel as to roads, and decerns; advocates the cause, and
'interdict granted by the Sheriff, to the extent only of the
'the west links, as limited by the terms of this interlocutor;
'declarator decerns and declares accordingly, as also with
'line from the letter D to the Coach Rock, being the march
'properties of the parties; and, quoad ultra, assoilzies the d
'decerns.'

Against this judgment both parties lodged representatio
advising them, Lord Eldin issued the subjoined note.* Parti

* "The burgh of Earlsferry is of great antiquity; and though its possession
small, there are indications of a more extensive possession in former tim
neighbour and most formidable enemy is Sir Michael Malcolm of Balbed
gentleman and his tenant have been encroaching upon the burgh property an
so long a time past, that there is much reason to believe that a considerable pa
property has in that way been carried off. Sir Michael's titles having been wi
not found what they comprehend. I only suspect that some parts of the town'
been affected by prescription; but of this I am not certain. In point of fact,
and inhabitants of the town, if they neglected some part of the town's proper
attended with sufficient care to other parts of it; and so far as I can perceive
lost sight of a great number of servitudes, if the rights which they have been
be so termed: For if the property which has been subject to the administrati

No. 884.
June 12. 1829.

heard, when his Lordship issued this other having come before Lord Corehouse, he Both parties then reclaimed, and the Court, counsel on each side, pronounced this inte 'locutor of the Lord Ordinary reclaimed ag 'thereby laid out through the lands in que 'riff-substitute of the county of Fife to exan 'lines of road or roads will be most conven 'and, at the same time, most suitable to th 'the property; and remit further to the s 'the best and most convenient track for the 'power to him to call in the assistance of a 'report; and, quoad ultra, refuse the pray 'to the interlocutor of the Lord Ordinar 'to either party.'

Pursuers' Authorities.—(Admissibility of Witnesses. M'Kenzie, June 14. 1709, (16717); T. of Perth, Nov 1679, (16679.)

Defenders' Authorities.—(Witnesses.)—Halton, Ju 2. 25.—(Golfing.)—Cochrane, Feb. 8. 1759, (14518); Cleghorn, May 17. 1805, (16141, and F. C. v. 17. p. 6

D. M. Adamson,—A. Stevenson

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trates, or of the inhabitants of the town, belongs to n in question, used by the inhabitants, may be the prop right to it. But it seems to be taken for granted, in been pronounced, that the property in question belon Magistrates and inhabitants of the town have no ri trifling servitude. I do not think, however, that su uses to which the lands in question have been applie the town. I think it is evident that from time im tants have cultivated these lands in a variety of diff establish their rights either in one way or another; a be argued in that view, whereby the burgh may lose s same time, make good its claims in other respects. both parties, let the cause be called and argued."

* "It seems to be quite evident that a great part Grange, if not the whole, belongs to the burgh of Ear burgh. It appears that the lands of Grange had been ed in the investitures. These are totally inconsiste tailed, and yet a great part of these lands are subje to no such entail as the entail of Grange. On the ot lands but the entail of Grange; and it follows that th at all, and no title to the lands to which the entail d the title to the lands is in the burgh of Earlsferry, a may be true that the burgh is not in possession; but the burgh may soon have a sufficient title to the pos may have, in many respects, a sufficient title to the for it does not appear that the proprietor of Grange burgh has a very strong and clear title to the burgh

A. LAING and A. RHYND, Suspenders.—*Cuninghame.*
A. ANDERSON, Charger.—*Sol.-Gen. Hope—Currie.*

Oath on Reference.—After the decision mentioned ante, Vol. VI. No. 414. p. 851, the suspenders referred the matter at issue to the *oath of* the charger, who emitted two depositions of considerable length. On advising these, the Lord Ordinary found, 'that it sufficiently appears from 'these depositions that the ground on which this action is attempted by 'the charger to be supported, viz. that he and the suspenders signed the 'bill libelled all equally as cautioners for Brander, to whom the whole 'contents of the bill were thereupon paid over by the charger, is not true; 'and that the only other view of the case which can be taken is, that the 'bill libelled was a renewal of a former bill to the same amount for the 'accommodation of the charger, or of the charger and Brander, who had 'dealings together, and which renewed bill the suspenders signed without receiving any value.' His Lordship accordingly suspended the letters simpliciter, and found the charger liable in expenses; and the Court, putting the same construction on the depositions, adhered.

A. DUFF, W. S.—C. GORDON,—Agents.

DAVID CHRYSTIE, Advocator.—*Jeffrey—Russell.*
INCORPORATION of WEAVERS of GLASGOW, Respondents.—*Sol.-Gen. Hope—Forsyth.*

Exclusive Privilege—Corporation.—1.—The employment by an unfree manufacturer of unfree weavers within burgh to weave cloth for sale within the same, and the selling it therein, held violations of the exclusive privilege of a Corporation of Weavers.—2.—Held that the weaving of cotton cloth falls within such privilege, though unknown at the date of the seal of cause of the Corporation.

BY seal of cause in favour of the Incorporation of Weavers of Glasgow, or "wabster craft," as they are termed, dated the 4th of June 1528, followed by a charter in 1605, and ratified by Act of Parliament in 1681, it is declared, "that nouther prentice, nor nouther person of the craft, be suffered to let up ane buith within the said burgh and citie, without he be found sufficient and worthie thereto in practice, and admitted by the sworn members of the craft, and thereafter to be made a freeman of the goode towne." In virtue of these titles, the Incorporation have enjoyed the exclusive privilege of weaving within the burgh, and of selling within burgh goods so woven (excepting linen goods exempted by special statute. The suspender Chrystie, a manufacturer in Glasgow, not entered with the Incorporation, having, as they conceived, encroached upon their privileges in regard to the manufacture of cotton stuffs, they presented a petition to the Magistrates, praying for an interdict, and for damages. Under this petition a proof was allowed, from which it appeared that the

No. 386.
June 12. 1829.

suspender kept a warehouse within burgh, webs of cotton stuff, which he gave out to l resident within the burgh; that he then en and dye the webs so woven; and that, exportation, he did occasionally sell within factured. On advising this proof, the M in general terms, "from carrying on the s entered as a member of the Incorporatio liable in expenses.

Chrystie thereupon brought a suspensi

1. Monopolies must be strictly interpre beyond the limits of the original grant. was granted to this Incorporation, cotton- deed was only introduced into Glasgow It is therefore a new manufacture, which within an exclusive privilege granted pri was found in the case of Porteous, March

2. Supposing the privilege of weavir within the monopoly of the Incorporation it. He is not in the situation of a maste to work for him. He is a manufacturer come into the situation, with reference to formerly stood, being merely their custor as they do the dyers and bleachers; and in a suspension and interdict, because the cannot know to be such,—the proper rer to oblige such unfreemen, and not the ma At all events, he is entitled to employ u reign markets.

On the other hand, the Incorporation

1. Incorporations are entitled to a fair grants of exclusive privilege; and it is o terials unfreemen weave, if they exercise ing cloth by means of the beam and shu more than whether bakers make thei flour. This question, however, was d Jan. 22. 1778, (19175,) with regard to manufacture in Glasgow than cotton; a dently incorrectly reported, there having the general question,—the unfreemen, challenged in that case, being employed and to make cloths which were not to b

2. The suspender has a warehouse wi webs for the loom, gives them out to h

No. 2
June 12.

maintain that this is not exercising the weaving craft, and violating the privileges of the Corporation. The Lord Ordinary pronounced this interlocutor:—'Finds evidence that the suspender had violated the exclu-'sive privilege of the chargers, sufficient to warrant the granting of an 'interdict against him;—that the interdict granted against him is well 'founded in law, to the extent of prohibiting him from weaving within 'the royal burgh of Glasgow cotton cloth for sale within the same, either 'by his own hands, or by the employment of others not being freemen 'weavers of that burgh, and from selling within the said burgh cotton 'cloth woven within the same by himself, or others not being freemen 'weavers; and to that extent finds the letters orderly proceeded, and 'decerns; but, quoad ultra, suspends the letters simpliciter, and decerns, 'except in respect to expenses; and in regard to expenses, finds the 'chargers entitled to them both in the Inferior Court and this Court, 'subject to modification.'

Both parties reclaimed,—the suspender on the general point, and the chargers in so far as the prohibition did not include the weaving of cloth for the use of the inhabitants on their employment, though not for sale by them; in regard to which, however, it was not alleged that the suspender had violated their privileges.

The Court refused the suspender's note, and also that for the chargers, with this variation, that they inserted as the ratio for suspending the letters simpliciter quoad ultra, 'in respect no allegation is made of any other 'illegal acts than those interdicted having been committed by the sus-'pender;' and, with this variation, they adhered to the Lord Ordinary's interlocutor.

Lord Justice-Clerk.—I have no difficulty in saying, that if we could yield to the argument of the suspender, on which he maintains that the manufacture of cotton cloth is not within the privilege of this Incorporation, it would annihilate their privileges; for nothing would remain to the Corporation but the manufacture of the coarsest woollen stuffs, as those in use to be made at the date of the seal of cause; and indeed it would be impossible to know the particular stuffs manufactured at that date. But I cannot agree with the argument that the privilege is to be confined to the rude stuffs then manufactured, though certainly we are not to extend it beyond the meaning of the grant. Now the complaint is, that this person, residing within the burgh, manufactures or causes to be manufactured cotton goods occasionally by unfreemen; and before he gives out the goods, he prepares them by warping. Then the question is raised, Is this person, who is not entered with the Incorporation, to carry on trade in this way? I understand that warping is a necessary preliminary, and it is done in his premises. I hold this to be part of the manufacture. Then is he entitled to weave the cloth by the employment of unfreemen? It is not a question of buying goods; but he is charged as the actual manufacturer, by doing in part himself, and giving out, quoad ultra, to others unfreemen. Even if the case were open, I have formed the same opinion with the Lord Ordinary; but it is of importance that we have a solemn decision in 1778, Freeland and others against this Incorporation, in a regular process of declarator. Now what has happened since? The case of Lanark

No. 386. June 12. 1829.

is appealed to; but that was totally different. T
there did not interfere with the principles of the
ment was from beyond the burgh; and although
thrown out on the decision in the case of Freelan
they rested; and I cannot hold this obiter dictu
the case, to warrant a departure from the solem
case of Freeland. I am disposed, therefore, to
The other Judges concurred.

Suspender's Authority.—Weavers of Lanark v. I
Royal, 6.)

Chargers' Authority.—Freeland v. Weavers of Gla

C. Fisher,—D. Fisher, S. S

No. 387.

David Clyne, S. S. C. Pursue
William Swanson, Defer

June 13. 1829.
1st Division.
Lord Newton.
H.

Expenses.—This was a question as to e
nary modified; and Clyne having reclaim

D. Clyne, S. S. C.—A. Snody,

No. 388.

P. Miller and Others, Petitione
William More and Others, Respon

Et è contr

June 13. 1829.
1st Division.
H.

Competition for the office of commis
of M'Gregors and Company. Each par
were disqualified on grounds of a specia
new election.

A. Hamilton, W. S.—E. M'Mi

No. 389.

John Innes, Suspender.—*Sol.*-
William Innes, Respondent.

Appeal.—A bill of suspension and interdict again
deed having been refused, and the certificate of ref
Lords having been taken, the Court passed a new
sale during the dependence of the appeal.

June 13. 1829.
2d Division.
Bill-Chamber.
Ld. Fullerton.

The respondent William Innes, holdi
the suspender, with power to sell the lan
made large advances, and come unde
extent on the faith of it, advertised th
the summer 1828. The suspender ther
sion and interdict, which was allowed to
being at the same time granted. On a

(18th December 1828) refused a reclaiming note against hi
interlocutor, (see ante, No. 97. page 206,) and a certifica
of the bill was thereafter issued. The suspender then en
peal to the House of Lords, which was duly served upon
ent; but he having, notwithstanding, taken steps for proce
sale of the lands, the suspender presented a new bill of sus
tending that all proceedings were necessarily stopped by the
the interim interdict originally granted on the bill being p
subsisted till the disposal of the appeal against the judgme
called it; and that the proper mode of procedure, if the respo
to attempt to sell, was by application for execution pending

On the other hand, the respondent maintained, that by t
Scotland, an appeal to Parliament did not stay execution;
since the Union, a different rule had been adopted, that exte
ther than to prevent execution on the decree appealed fro
here the sale was not to take place in virtue of the judg
Court, (on which no execution pending appeal could be gra
virtue of the powers in the bond, which were attempted to
by the bill of suspension; but that a certificate of refusal of
ing been issued, there was now nothing to stop the proceedir
powers of the trust-deed, notwithstanding the appeal to t
Lords.

The Lord Ordinary having reported the bill and answe
passed the bill, without prejudice to the respondent applyin
execution.

LORD JUSTICE-CLERK.—We would be wilfully interfering i
which we have no concern, if we refused this bill. With the c
the exercise of the right to appeal, we have nothing to do. Wh
its evils, it is not for the Court of Session to remedy them. T
vested the House of Lords with power to remedy injuries arising
appeals, by allowing full costs of suit. But we have no right
an appeal is taken. Although the certificate of refusal be is
our regulations for facilitating our forms of procedure prevent an
House of Lords of our interlocutor refusing interdict? I have
of doubt that we have no right to allow a sale, unless the resp
the ordinary way, obtain interim execution on finding caution.

LORD PITMILLY.—I am disposed to think it necessary to pa
order to try the question. The principle which the responde
combats, is not that on which we must decide the case. I t
carrying the judgment of the Court into execution at all, but
and that he need not apply for interim execution, and that it
competent to do so. But here is a lis pendens as to the ri
estate. The question is appealed; and shall we allow this sale
its legality is under dependence in the House of Lords? If t
had not presented this bill, the respondent might, or he might n
sold; but he having applied, and stated that he had appealed

No. 389. June 13. 1829.

is, whether we should not extend our equitable while the legality is still under discussion! T lite nihil innovandum, particularly if the innova the case; and therefore I think we are bound to peal is discussed.

LORD GLENLEE.—I could have wished to ha brethren. I doubt the competency of the Court issuing certificate of refusal of the former bill. If of refusal at all, it might have done very well; b of the appeal being taken, I doubt very much grounds for preventing the respondent from exer bond.

J. J. FRASER, W. S.—P. CROOKS, W.

No. 390.

ALEXANDER ROBERTSON, Pursuer.—S.
ANDREW ROBERTSON, Defende

June 16. 1829. 1ST DIVISION. Lord Newton. H.

THIS was a question whether a discharge datory of the pursuer, who was then a minor a process, in which the Lord Ordinary had in 1813, and with reference to which the n Lord Ordinary dismissed the summons of wa of opinion that, under the circumstances, altered, and remitted to his Lordship to pro

T. MEGGET, W. S.—J. and W. JOLLI

No. 391.

HULL and LEITH SHIPPING COMPANY, Su
PATRICK SANDEMAN, Charger.—S

Jurisdiction.—Bill of suspension passed simpliciter Leith in an action at the instance of the collector of trates of Edinburgh, of whom the Admiral Depute is o

June 16. 1829. 1ST DIVISION. Bill-Chamber. Lord Fullerton.

SANDEMAN, as collector of the shore-du of Edinburgh, raised an action before t (who is one of the Magistrates of Edin Leith Shipping Company, for payment o pany alleged were not lawfully exigible. of declarator at the instance of the Ma Court of Session, to have it found that t the nature of those in question,—and also having the same object, to which the M fence the Shipping Company pleaded, i action at the instance of the collector f

suing as a party in the above processes, and therefore was disqual The Admiral having repelled the defences, and decerned in terms o libel, the Shipping Company presented a bill of suspension, which Lord Ordinary passed simpliciter; and the Court, in respect of the jection to the jurisdiction, adhered.

Suspenders' Authorities.—Kintore, Feb. 27. 1802, (7673); Robertson, Nov. 21. (ante, Vol. II. No. 498); Towers, June 3. 1828, (ante, Vol. VI. No. 326. p. 906); Wil on Munic. Corp. p. 83; 12. Mod. Rep. 669.

Charger's Authorities.—1. Ersk. 2. 25; T. of Dunbar, July 17. 1706, (3422); Na Nov. 24. 1821, (ante, Vol. I. No. 198); Wallace, Jan. 21. 1823, (ante, Vol. II. No. 1 Harvie, Nov. 17. 1826, (ante, Vol. V. No. 8); M'Intosh, Jan. 16. 1828, (ante, Vol. VI. 118. p. 358.)

GRAY and SCARTH, W. S.—MACRITCHIES, BAYLEY, and HENDERSON, W. S.—Agents

MARQUIS of QUEENSBERRY and TRUSTEE, Pursuers.—*Jeffrey—Sandford.*
EXECUTORS of the DUKE of QUEENSBERRY, Defenders.—*Murray.*

Entail.—A remit made to the Jury Court in an action of damages against the represe tives of an heir of entail alleged to have violated the entail, to ascertain whether he had l lucratus by the violation.

SEQUEL of the case noticed ante, Vol. VI. No. 253. p. 706, (which s By the judgment there pronounced, the Court repelled the objection the competency of the action, that an heir of entail could not insist any other redress than that afforded by the entail, and particularly reparation of damage sustained by acts of the heir in possession, in lation of the terms of the entail; but "with reference to the ques whether such action lies where the heir is not lucratus," they remitte the Lord Ordinary to prepare the cause. A record having been n up, and the question having been reported on Cases, and the pa being at issue as to the fact whether the heir had been lucratus or the Court remitted the cause to the Jury Court.

WALKER, RICHARDSON, and MELVILLE, W. S.—LAMONT and NEWTON, W. S.—Agent

HON. ARCH. MACDONALD and Others, Pursuers.—*Cockburn—Mo*
LORD MACDONALD, Defender.—*Sol.-Gen. Hope—Skene—M'Nei*

Process—Preliminary Defence—Submission.—Allegation that the subject-matter of a tion was involved in a pending submission, not a preliminary defence to the effect of dis ing the action.

IN an action at the instance of the Hon. Archibald Macdonald others against Lord Macdonald, the latter alleged that the subject-m ter of the action was included in a submission subsisting between parties, and pleaded as a preliminary defence, "that the pursuers barred from insisting in the present action by the reference above m tioned, and proceedings therein." The pursuers denied that the sub

No. 393.
June 16. 1829.

sion included the claim made in the prese
dinary having repelled " the preliminar
Macdonald reclaimed.

LORD GLENLEE.—The defence stated is to t
totally dismissed, and the Lord Ordinary only
fore I think his Lordship did not mean to repel
bar to the action in the mean time. It may
under the submission; but as an action may be
cree, there would, even in that case, be no inco
and after decree is pronounced in the submissio
dinary to get decree in terms of it. I think
done; though it may be right, in adhering, to
may still be pleaded as a defence.

The other Judges having concurred,

THE COURT, ' in respect that the interlo
' preclude the defender from pleading c
' or of the proceedings of the referees,
' of this action, in whole or in part, no
' swer to any such defence as accords,'

VANS HATHORN, W. S.—EOWIE and C

No. 394.

WILLIAM BAIRD, Suspe
ROBERT ROSS, Respondent.—

Servitude.—The proprietor of a house having ac
another party, held entitled to load and unload carts

June 17. 1829.
2D DIVISION.
Bill-Chamber.
Ld. Fullerton.
F.

THE suspender Baird and the respon
certain premises, part of a sequestrated e
there was included in Baird's lot a cou
titled to a right of entry to his house, th
while Baird was taken bound to make
the court to Ross's lot; and he was f
buildings (except as specially allowed in
it was declared should " mean property
Disputes having arisen as to the use of
sented a bill of suspension and interdic
loading and unloading carts in it. The
and the Court adhered.

LORD JUSTICE-CLERK.—Ross has free is
through this court to his house, which opens
is, that he loads and unloads his carts in this
that he is entitled to bring a cart into the c
provided he do not exercise his right emulou

The other Judges concurred.

T. DARLING, S. S. C.—J. W

ROBERT HAMILTON, Advocator.—*Jeffrey—Russell.*
MRS. LETHAN CUTHILL'S TRUSTEES, Respondents.—*Thomson.*

Process.— A party having allowed an interlocutor to become final appointing him to pay a sum of money on getting a receipt in certain terms, not entitled afterwards to insist on an alteration being made on it.

MRS. CUTHILL'S trustees having brought a process of sequestration before the Sheriff of Lanarkshire against Hamilton, tenant in a farm belonging to Mrs. Cuthill, for the half year's rent due at Candlemas 1828, and that to fall due at Martinmas thereafter, and having craved warrant of sale for the half year's rent which had fallen due, Hamilton offered to make payment on getting a discharge applicable to that half year. This the trustees refused to grant, on the ground that he was owing arrears for previous years, and they insisted that they were entitled to take the money on a general receipt, and go on with the sequestration for that half year's rent. The Sheriff having granted warrant of sale, Hamilton brought an advocation, in which the Lord Ordinary found that he was entitled to stop the sequestration by payment of the year's rent for which sequestration was sought, and that the landlord was bound to receive it, and discharge it as payment of the rent of that year, and appointed him to make the payment in two days, after which prorogated to a further period. This interlocutor was allowed to become final; but Hamilton now further insisted that the receipt should bear the rent to be 'due by written lease' between the parties, with reference to a dispute between them whether there was a subsisting writter which imposed certain obligations on the landlord; and he refused to pay the money, except on such a receipt.

The Lord Ordinary, in respect of the money not being paid, refused the reasons of advocation, remitted simpliciter, and found Hamilton liable in expenses; and the Court adhered.

LORD JUSTICE-CLERK.—The first interlocutor of the Lord Ordinary is final; and where an interlocutor is so precise, we cannot allow a party when it is final, to ask to add another condition to the receipt, not sanctioned by the interlocutor.

The other Judges concurred.

A. HAMILTON, W. S.—MOWBRAY and HOWDEN, W. S.—Agents.

CLAUD RUSSELL, (CAMPBELL'S TRUSTEE,) Pursuer.—*Sol—Keay.*
EARL of BREADALBANE, Defender.—*Jardine.*

Right in Security—Retention.—A party having obtained an assignation declared by a back bond to be in security merely of certain specified sums, in addition with other creditors, that he was entitled to retain it in security of the whole contracted.

No. 896.

June 18. 1829.
2D DIVISION.
Ld. Mackenzie.
T.

IN 1813, Mr. John Campbell, partner w
the Easdale Slate Company, (which compr
of slate and marble quarries from his Lo
favour an ex facie absolute conveyance o
This conveyance, however, being truly in
and £5000, it was qualified by a back bo
ing on the narrative, "that the foresaid
rated was granted to me by the said Jol
for security and relief to me of two bil
March 1813, and payable twelve months a
and the other for £1000 sterling, drawn l
and accepted by me; and for which b
received no value from the said John C
for his accommodation merely, and also
contents when the same are renewed;
able and proper that I should grant
The bond accordingly proceeded:—"
that the conveyance above mentioned wa
Campbell in trust only, and for my reli
tionary engagement come under by m
Campbell; and whenever the said John
relieve me of the payment of the bills a
be put into circulation, and of the payr
aforesaid, which I have accepted, or w
out value, or on his account and for h
all damage, interest, and expense which
to the said bills or cautionary engagem
payment of the same from him, and of
in relation to the premises in any mann
of Breadalbane do hereby bind and ol
whomsoever, upon the expense of the s
to denude of the foresaid trust-convey
Campbell and his foresaids in their ow

Campbell soon after paid the £1(
the other, it was finally paid by Lo
employed to manage the affairs of th
ship's share of profits, incurred furth
to his Lordship; so that at the perio
happened in 1818, his Lordship was
the above-mentioned debt of £5000.
action was raised by the pursuer Rus
his property in trust for his creditor
conveyance to Lord Breadalbane, on

In regard to the question of reduction, the Court s
reasons, and reduced the conveyance;* but an appea
to the House of Lords, and the cause having been re
the judgment, and to take the opinions of the other
altered their former interlocutor, and repelled the re
'except in so far as it is alleged that the conveyance l
'lenge was granted in trust and security only, and
with reference to which allegation they remitted to th
hear parties further. ‡

His Lordship ordered Cases.

Pleaded for the Pursuer—

1. Although third parties, trusting to absolute title
record, ought not to be affected by the terms of the
which they are qualified, yet, in a question with the g
bond himself, he is not entitled to trust to the right
stands limited by his own obligation; and the present
any that have been decided, in so far as the back bond c
future obligations, viz. renewals of the bills mentione
tain future obligations being specified, necessarily imp
to be extended to any other future obligations. The co
falls to be restricted to a security for the debt of £500

2. Besides, it is not denied that a conveyance qualifi
declaring it to be in security of a particular debt will
debt then due, but will only give rise to a claim of r
subsequently contracted; but here there was no intim
till the year 1818, prior to which Lord Breadalbane
contracted; and as the date of the conveyance must be
its intimation, all debts contracted prior to that mus
subsisting at the date of the deed, and so affording no gr

Pleaded for the Defender—

1. It has been settled by various cases, and particu
sion in the late case of Maitland v. Cockerell, Nov
Vol. VI. No. 80. p. 109,) that an absolute conveyance
by a back bond, may be retained by the grantee for d
contracted, and there is no essential difference betwe
the present.

2. All the debts for which the defender seeks to mak
available, were contracted subsequently to its date; and
ing been completed, if that were essential, the Court he
ation by one partner to another, of his interests in the
require intimation, so that the conveyance was complete

The Lord Ordinary found 'that the defender has r

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* Russell v. E. of Breadalbane, Dec. 3. 1822, (ante, Vol. II. No
† E. of Breadalbane v. Russell, June 28. 1825, (1. Shaw and Wi
‡ Russell v. E. of Breadalbane, July 3. 1827, (ante, Vol. V. No

No. 396. June 18. 1829.

'session of the share in the Easdale conc
'due to him by Mr. John Campbell, and
'assignation of the said share, shall be
the declaratory conclusions of the libel.*

LORD JUSTICE-CLERK.—I must own I ex
would have been made by Mr. Russell to
case and those cited by Lord Breadalbane;
ciple being laid down in these cases, that wh
though with a back bond, effect must be
advances, we cannot alter the interlocutor
decisions; and although there is a great
paper for Mr. Russell, I do not feel warra
A case, it is true, occurred this session,
in possession of them were held not subject
That, however, arose from this circumsta
custody alone, and no other purpose; and
those quoted by Lord Breadalbane; and
case, I am for adhering in the present.

LORD GLENLEE.—I rather think the int

LORD PITMILLY.—I also think this case
cided; and in particular the late case of
matter, that it is impossible to get over it.
that last fixes it so distinctly, that we can
however, I would have had great doubt, c
third parties, but with Lord Breadalbane
ditors in the face of his own back bond.

THE COURT accordingly adhered to

Defender's Authorities.—3. Ersk. 4. 20; 1. Be
16. 1782, (1154); Brough's Creditors v. Jollie,
June 11. 1794, (Bell's Cases, p. 41); Robb's Credi
Maitland v. Cockerell, Nov. 23. 1827, (ante, Vol.

VANS HATHORN, W. S.—H. D.

* His Lordship added this note:—"The Lor
to view this as a right in security, limited by its
of right to more than is sufficient for payment of
tion is not limited. It warrants entire possession
and absolutely; and accordingly the back bond
for the profits. It does not seem to the Lord
principle established by a series of decisions, to
and account, without notice of the debt afterwar

† Stuarts and Fletcher v. M'Gregor and Con

MASSON, Pursuer.—*Marshall.*
MASSON, Defender.—*Ivory.*

Process— Prorogation. —Competent to grant a prorogation where the cause has been enrolled during the currency of the time for that purpose, although the time has expired before the motion is made.

DURING the currency of an order on the defender to lodge answers, he enrolled the case to get a prorogation; but, before the motion was made, the time had expired. It was then objected by the pursuer, that as the Judicature Act (§ 12.) only gave authority to prorogate, if, " before the lapse of the time fixed, special application shall be made for such prorogation," and as no such special application or motion had been made, the Lord Ordinary had no power to grant it. The Court, on the verbal report of Lord Fullerton, holding it to be sufficient that the cause was enrolled during the currency of the time, repelled the objection.

GEORGE SMITH, Claimant.—*Cockburn—Fletcher.*
WILLIAM BELL, (MITCHELL'S TRUSTEE,) Respondent.—*Ro. Bell.*

Septennial Prescription—Triennial Prescription.—Held,—1.—That a British Consul, who ordered goods in a foreign port from a merchant there for a British flotilla, was not entitled to plead the septennial prescription on the footing of being a cautioner;—and,—2.—That the triennial prescription is not pleadable against an action for advances in money.

IN 1814, an English flotilla arrived in the Elbe, and having run short of provisions, the Commodore applied to Mr. Mitchell, the British Consul for Norway, who employed the claimant Mr. Smith, a merchant in Hamburgh, to procure a supply. Mr. Smith did so; but, before the goods were delivered, provisions arrived from England, and the Commodore refused to take delivery; and the goods were then sold by auction. A claim was then made by Mr. Smith on Mr. Mitchell for the loss thus sustained, which Mr. Mitchell agreed to see paid; and having afterwards executed a trust in favour of Mr. Bell for behoof of his creditors, he died. Mr. Bell brought a multiplepoinding, in which Mr. Smith lodged a claim both for the amount of his loss, and for certain advances in money made by him to Mr. Mitchell's family during his life. Against these claims Mr. Bell objected, 1. That as Mr. Mitchell had interposed merely as cautioner for the British Government, and as more than seven years had elapsed, the claim for the loss was extinguished by the septennial limitation; and, 2. That the claim for the advances to the family was cut off by the triennial prescription.

The Lord Ordinary 'repelled the plea of the septennial prescription 'to the claim for the loss arising from the purchase of provisions &c. for 'the flotilla in 1814;' but 'sustained the plea of the triennial pre-'cription to the claim for Mr. Smith for advances to Mr. Mitchell's 'family.'

No. 398.

June 19. 1829.

Both parties having reclaimed,

R. Bell, for the Respondent, admitted that the scription could not be maintained, and therefore tended that as Mr. Mitchell was merely a cauti the benefit of the septennial limitation.

Lord Gillies.—The claim is not against Mr. on the ground that he was the employer.

Lord President.—Precisely. Where a gov foreigner, the agent must be responsible, in the fi just as in the case of the purser of a man of war, from whom he buys provisions. No doubt, if thes on the Treasury, they must go to the Treasury for

The Court accordingly adhered as to the scription, but altered as to the triennial Ordinary to proceed accordingly.

J. A. Campbell, W. S.—W. Bell, W

No. 399.

Mrs. Dickson or Roughhead, Pu James Hunter, Defender.—

Trust.—A trustee on the estate of a deceased party allo ing and selling the crop, and the expenses of process order

June 19. 1829.

1st Division. Lord Meadowbank. H.

This was a branch of the case noticed ant and the question now was, whether the defen of the late husband of the pursuer, was entitl dit for the expense of reaping and selling the liable in expenses of process. The Lord O accountant, decerned against him with exper found him entitled to credit for the expense expenses of process should be paid out of th

R. Matthew,—J. H. Lothian,

No. 400.

William Paton, Pursuer.—*Sol.*-G Robert Warden, Defender.-

Mutual Contract—Mora.—Circumstances under wl damages for alleged undue delay in taking delivery of a

June 19. 1829.

1st Division. Admiralty.

Warden freighted from Paton the sl cargo of 91 tons of coals from Inverkeithing The vessel arrived on Friday morning, the there being no formed harbour, she was evening. Paton, alleging that there had b vessel had thereby suffered damage, brou Admiral, who, after a proof, found that in question early on Friday morning, the

that the discharge of the coals commenced on or about six o'c
morning, and continued without intermission, except when interr
the tides, and wanting light, until the Saturday evening, when t
were discharged; that there was no undue delay proved again
fender; and therefore assoilzied him, with expenses." Paton b
reduction; but the Court repelled the reasons, and assoilzied W

J. Jamieson, S. S. C.—J. Morgan, S. S. C.—Agents.

George Greig, Advocator.—*Sol.-Gen. Hope—Moir.*
George Clark, Respondent.—*Cockburn—Thomson.*

Forgery.—The Lord Ordinary having found forgery proved comparatione litt
Court qualified his interlocutor by finding that it was proved by witnesses and con

Greig, as treasurer of a Mason Lodge in Aberdeen, lent Peter
£30, for which Strachan delivered to him a promissory note,
June 1824, payable on the 1st of January 1825, subscribed b
one Pratt, and apparently by George Clark, with whom Stra
been an apprentice. When the note fell due, Strachan gave a
to the depute-master of the lodge, which also apparently was
by Clark, but which was now admitted to be a forgery. Th
note remained in Greig's hands; and, in September 1825, St
conded in bankrupt circumstances. In November Greig
action before the Sheriff of Aberdeenshire against Clark, fo
of the original note. In defence, Clark alleged forgery.
having been allowed, several persons of skill deponed, comp
terarum, that the subscription was a forgery. Other witne
that Strachan had been in the practice of imitating Clark's h
and others who were acquainted with it, deponed that the s
the note was not like that of Clark. The Sheriff found
proved, and assoilzied with expenses; and in an advocation t
dinary pronounced this interlocutor:—'Finds it proved
'Strachan, mentioned in the summons, absconded from Aber
'rupt circumstances in September 1825; that, some montl
'flight, he put into the hands of the depute-master of the
'Lodge a bill to retire the promissory note libelled on, u
'the signature of George Clark, the respondent, is admitt
'gery; and further, that Peter Strachan was in the frequ
'imitating George Clark's signature among his associates
'dence of forgery arising comparatione literarum prepon
'the evidence to the contrary; that nothing is proved in
'George Clark, after the note in question was presented
'leads to an inference that the signature was genuine, and
'simpliciter to the Sheriff of Aberdeen, and decerns;' and
due.

Greig reclaimed, and contended that as the interlocuto

No 401. June 19. 1829.

dence comparatione litterarum, and as this was not sufficient to establish forgery, and as the signature on the second note, which was written by Strachan, was not at all like that on the one in question, the inference was, that the latter signature had not been made by Strachan, and therefore the forgery had not been proved.

LORD PRESIDENT.—The hand of a forger, even as to the same name, will not always be the same; so that there is no force in the argument on the diversity of the subscriptions. But here it is admitted that Strachan did forge Clark's name, and he must have done so to conceal, as long as possible, the previous forgery.

LORD GILLIES.—My only objection to the interlocutor is, that it finds the forgery proved comparatione litterarum.

LORD BALGRAY.—That is very dangerous evidence to rest on.

LORD PRESIDENT.—But there are many witnesses who swear it is a forgery. We may qualify the interlocutor by introducing a finding to that effect.

THE COURT accordingly pronounced this interlocutor:—'In respect the 'evidence of forgery by witnesses who know Clark's handwriting, as well 'as that arising ex comparatione litterarum, preponderates against the evi- 'dence to the contrary, therefore, and for the other reasons assigned by the 'Lord Ordinary, adhered.'

J. HUNTER, W. S.—DANIEL and ROSS, W. S.—Agents.

No. 402.

M'KENZIE'S TRUSTEES, Pursuers.—*Skene—Rutherfurd.*
W. LECKIE and Others, Defenders.—*Sol.-Gen. Hope—Brown.*

Discharge. — Circumstances in which executors were held bound by a discharge granted by them, as attorneys of the deceased.

June 19. 1829.
2D DIVISION.
Ld. Mackenzie.
R.

THE defenders Leckie &c. having, in the character of executors of the late Alexander M'Kenzie, raised an action against the trustees of the late John M'Kenzie, with whom he had been in partnership, for payment of a certain sum as his alleged share of profits and yearly salary, the latter pleaded in defence a deed of renunciation which had been executed, during Alexander M'Kenzie's life, by Leckie &c. as his attorneys; and they further raised against Leckie &c. this action of relief, concluding that they should either show that they possessed sufficient power to bind Alexander M'Kenzie by this deed, or failing thereof, that they should be decerned to relieve John M'Kenzie's trustees of the action at their instance, as executors of Alexander M'Kenzie. In defence against this action, Leckie &c. pleaded, inter alia, that the deed executed by them was conditional, on its being approved by Alexander M'Kenzie, who was abroad; but there being no evidence of this, the Lord Ordinary repelled the defences, and decerned in the action of relief; and the Court adhered to his Lordship's interlocutor, in so far as it repelled the defences above mentioned, and remitted to the Lord Ordinary to hear parties further as to the conclusions of relief.

A. PEARSON, W. S.—J. GRANGER, W. S.—Agents.

ROBERT ADAM, Suspender.—*Greenshe*
ROBERT WATSON, Charger.—*Sol.-Gen. Hoy*

Expenses—Process.—A party not having insisted, during a long lit in his reasons of suspension, which, however, only went to the effect o the sum charged for, and having, at a final debate, unexpectedly br liable, although it was sustained, in all the previous expenses,—all his repelled, and refused the expenses of the debate at which it was thus

IN a suspension, at the instance of Adam, of a charg bill of exchange, there was inserted in the reasons of which went to the effect of obtaining a partial aba charged for; but, in a variety of proceedings and ple Outer and Inner House, this plea was never insisted the principal reasons of suspension had been decide pender, he, in a final debate before the Lord Ordinary this plea, to which his Lordship gave effect, but at the sa liable in all the expenses of the previous procedure, w points decided against him, and also refused to allow l the debate when this plea had been introduced, bec had chiefly insisted on other points, and only introduce without the other party being aware that it was to be

THE COURT adhered.

W. PATRICK, W. S.—CAMPBELL and BURNSIDE, W.S.-

H. SWAN and Others, Suspenders.—*R.*
RICHARD ALLAN, Charger.—*More.*

Process—Damages—Warrant to Extract.—A party having broug for removal of an encroachment on his property, and for a random su some procedure in which there was no discussion as to damages, (in fences were silent,) having obtained decree in terms of the libel, a the decree as for the amount of damages concluded for—Held, in a s this decree, that there was no warrant for extracting a decerniture for mages, and (altering the Lord Ordinary's interlocutor) that the charge

IN 1822, the charger Allan raised an action again Swan &c., stent-masters of Kelso, concluding, 1. To h a certain well erected by them against a wall belong encroachment on his property, and erected without a that effect. 2. To have them ordained to remove th of; and, 3. To have them found liable in damages, c random sum of £50. The defences to this action were to the first two conclusions, and nothing was said in a relative to the claim for damages. After certain pr Ordinary (Lord Pitmilly, 14th June 1823,) in gene the defences, and decerned, "conform to the conclu

No. 404. June 19. 1829.

and found Allan entitled to his expenses. He accordingly immediately extracted the decree, and gave a charge for removal of the well, which was obeyed, and the amount of expenses decerned for was likewise paid.* The extract decree, however, further contained a decerniture for the £50 of damages concluded for in the summons; and in 1828, Allan having threatened to charge Swan &c., the stent-masters, for payment of this sum, they brought a suspension, on the grounds,

1. That the conclusion for damages never having been decided, the extractor had no warrant for filling up the amount of damages with any sum, and was not entitled to fill it up with the random sum concluded for in the summons; and,

2. That the decree was null and void, so far as damages were found due, without a remit to the Jury Court.

To this it was answered,

1. A general decree in foro includes every conclusion in the libel but that of expenses; and so a sum of interest, of which the amount was not specially set forth or concluded for in the summons, was found to be carried by such a decree in Glendinning v. Wilson, Dec. 27. 1699, (4. Brown's Supplement, p. 469.)

2. As no defences were given in to the claim of damages, it was competent to decern for them without a remit to the Jury Court.

The Lord Ordinary, 'in respect it appears that, in the process between 'the present parties before Lord Pitmilly, the only discussion which took 'place was relative to the removing of the well, and that the conclusion 'for damages was neither discussed nor decided, not having been insisted 'in by the charger,' suspended the letters simpliciter, but found no expenses due. Against his Lordship's interlocutor, in so far as it found no expenses due, the suspenders reclaimed.

Lord Justice-Clerk.—I have great doubts of the propriety of refusing expenses here. This charge is threatened on the most frivolous grounds imaginable.

Lord Glenlee.—The case of Glendinning has nothing to do with the present, as the decree for annual rent was ascertained by the ascertainment of the principal sum. That was quite different from a vague conclusion for a random sum of damages.

Lord Pitmilly.—The interlocutor on the merits is quite right. It is clear that the former judgment was confined to the declaratory conclusions, and did not touch the conclusion for damages; and though generally averse to altering a Lord Ordinary's interlocutor as to expenses, I think they should be given here.

The Court accordingly so far altered the Lord Ordinary's interlocutor, and found the suspenders entitled to their expenses.

A. Douglas, W. S.—J. B. Laidlaw,—Agents.

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* See ante, Vol. III. No. 56.

THOMAS NICOL, Pursuer.—*Jameson.* No. 405.
REV. ROBERT CAMERON and Others, Defenders.—*Greenshields.*

Expenses.—Trustees having refused to show extrajudicially a trust-deed in their possession to a party having a certain interest therein; and he having, in ignorance of the tenor of it, raised a summons of exhibition ad deliberandum and delivery; but on their producing the deed in process, (which they only did after certain preliminary defences were repelled,) having declined to insist further in the conclusions; found entitled to his expenses.

June 19. 1829.
2D DIVISION.
Lord Medwyn.
F.

THE pursuer, as heir in general served and retoured to his uncle, the deceased Robert Anderson, who was eldest son and heir of the deceased Thomas Anderson, having applied to the trustees of the deceased John Anderson, another son of Thomas, for exhibition of a trust-deed in their possession executed by Thomas, raised against them a summons of exhibition ad deliberandum, and for delivery. To this summons the trustees gave in defences, objecting to the pursuer's title; and on these being repelled, they produced a trust-deed by Thomas Anderson, whereby a certain interest, after the death of an individual still alive, was conferred on Robert Anderson, to whom the pursuer had served heir; and they offered to put this deed on record. The pursuer, on this, declined to insist further in his conclusions for delivery, and the Lord Ordinary found it unnecessary to pronounce any interlocutor on the merits; but 'in respect 'that the refusal of the defenders extrajudicially to show the deed which 'has now been produced, led to the drawing of the summons in its pre-'sent form, in order to be applicable to any demand which might be com-'petent to him under the deed; and as the pursuer craves nothing fur-'ther, now that the deed has been produced, it is to be presumed that 'the action would not have been raised, if the deed had been produced 'extrajudicially; and as the defenders did not consent to produce the 'deed till the Lord Ordinary had repelled the preliminary defences,'—his Lordship found them liable in expenses; and the Court adhered.

C. FISHER,—T. JOHNSTONE, S. S. C.—Agents.

A. SMITH, (TRUSTEE for STIRLING BANK,) Pursuer.—*Baird.* No. 406.
T. MURDOCH and Others, (BUCHANAN'S TRUSTEES,) Defenders.—*Forsyth.*

Counsel—Auditor.—A fee paid to counsel for attending an examination of havers sustained.

June 20. 1829.
1ST DIVISION.
H.

WHEN the account of expenses was laid before the Auditor in the case reported ante, No. 341, he refused to allow a fee paid to the defenders' counsel for attending the examination of havers; but the Court, considering that it was a case in which the attendance of counsel was proper, altered, and allowed the fee.

DALLAS and INNES, W. S.—D. FISHER, S. S. C.—Agents.

No. 407.

JAMES COOK, Complainer.—*Jeffrey—Neaves.*
JOHN MOWBRAY, Respondent.—*Sol.-Gen. Hope—Moir.*

Sequestration.—A meeting of creditors on a sequestrated estate not entitled to fix beforehand that all disputes which might arise should be submitted to arbitration.

June 20. 1829.

2D DIVISION.

R.

AFTER sequestration of Mr. Cuthill's estates had been awarded, as mentioned ante, No. 233. p. 452, and a trustee appointed, the respondent Mowbray, at a general meeting of creditors, moved that the trustee be instructed, inter alia, "in general to study economy on all occasions as much as possible; and in particular, after taking the opinion of eminent counsel on all disputable points, not to have recourse to any actions at law until after a reference has been offered to and refused by the other party to two lawyers, one to be named by each party, with power to them to name an umpire; and, before commencing any action at law, to convene the commissioners, and report to them the opinions of counsel on all the disputable points, that they may judge of the expediency, or not, of having recourse to legal measures." This resolution was opposed by the petitioner Cook, who had ranked on the estate for £913; but Mowbray being ranked for a personal debt of £902, and, along with Mrs. Cuthill's other trustees, for a claim of £80,342, and Cook being the only other creditor, (excepting a Mr. Fleming for £12. 12s.) it was carried as a matter of course.

Cook thereupon presented a petition and complaint, in which he craved,

1. That this resolution should be annulled, as improperly pledging the creditors to submit every dispute which might arise, which they were not entitled to determine beforehand, the more particularly as the claim of Mrs. Cuthill's trustees was likely to become a subject of discussion, whereby they would have the choice of both arbiters, the one as parties, and the other as having a majority in meetings of creditors; and,

2. That it should be found that neither Mowbray nor Mrs. Cuthill's trustees were entitled to vote in questions relating to any claims or disputes in which they might have an interest adverse to that of the general creditors.

To this it was answered by Mowbray,

1. That creditors were entitled to resolve to submit disputes, instead of wasting the funds of the estate in litigation; and he offered, in order to avoid the charge of a partial selection of arbiters in any disputes which he or Mrs. Cuthill's trustees might have, to take the complainer's own counsel, as the arbiter to be chosen by them; and,

2. That the circumstance of creditors having a separate interest could not disqualify them from voting; at all events, the Court could not make a general finding as to this matter with reference to future cases.

The Court found that the creditors could not fix that all disputes must be referred, and so far recalled the resolution; but, quoad ultra, refused the prayer of the petition.

LORD GLENLEE.—I understood the only objection to be insisted in was, that it was premature for the creditors to determine that all disputed claims must

be referred; and it appears to me absurd that it should be so fixed that every claim whatever must be submitted. They have always the power of submitting particular cases; but I do not think the general resolution right. No. 407. June 20. 1829.

Lord Justice-Clerk.—I have no difficulty in saying, that the more creditors proceed by reference, the more expedient it will be for all concerned. But can this Court confirm a resolution fixing a general rule that all claims must be referred? I do not think the Court has the power to do so. I am not moved by the circumstance that there are only three creditors ranked on this estate. I treat it just the same as if there were five hundred; and I think the resolution cannot be confirmed.

Lord Pitmilly.—I think the proposal to submit pretty fair; only, if it be seriously maintained that it is to bind the creditors not to go to law, I agree that it is not right for creditors to do this, or for the Court to sanction it; though I scarcely thought it bore that construction.

Campbell and Macdowall, S. S. C.—Mowbray and Howden, W. S.—Agents.

Thomas Muckarsie, Petitioner.—*Robertson—W. Bell.*
Andrew Small, Respondent.—*Monteith.* No. 408.

Inhibition.—The Court refused to recall, without caution, an inhibition used on the dependence of an action of relief by the assignee to a bond which had been reduced as not duly tested, against his cedent, who had granted warrandice from fact and deed only.

The petitioner Muckarsie held an heritable bond for £70 over certain property in Auchtermuchty, granted by the late Mrs. Elizabeth Halkerston. Having applied for payment of this bond to Misses Margaret and Catherine Halkerston, the representatives of the deceased, the amount was paid to him by their uncle, the respondent Small, on obtaining an assignation from Muckarsie, the warrandice in which was from fact and deed only. Thereafter the Misses Halkerston brought a reduction of the bond, on the ground that the granter's name was written on an erasure, and had been adhibited outwith the presence of witnesses. Small offered to give up the bond to Muckarsie, to be produced in the reduction, if he chose to enter appearance; but he having declined to do so, decree contra non producta was pronounced. Small thereupon raised an action against Muckarsie for repetition of the amount paid him in consideration of the assignation to the bond, and on the dependence he used inhibition and arrestment. For recall of these Muckarsie presented a petition, but without offering caution, on the ground that Small being in the knowledge of the defect, and having taken an assignation with warrandice from fact and deed only, his claim for repetition was totally untenable. Small denied previous knowledge of the defect, and contended, on the authority of the case of Ferrier v. Graham, May 16. 1828, (ante, Vol. VI. No. 85. p. 818,) that though the expressed warrandice was from fact and deed only, there was an implied warrandice debitum subesse; but, at any rate, that however clear the case might be on the merits, the diligence used on the dependance of his action could not be recalled without caution. June 20. 1829. 2d Division. F.

The Court refused the petition.

J. Johnson,—W. A. G. and R. Ellis, W. S.—Agents.

No. 409.

MRS. MARGARET M'LAREN, Suspender.—*Jameson.*
ANDREW BUIK, Charger.—*Shaw.*

Reference to Oath.—(1.)—Reference to oath of certain facts previously found by the Court not relevant to infer an obligation, refused to be allowed.—(2.)—Proper form of reference as to the subsistence of a debt is, whether it be 'resting owing,' not whether it be '*still* resting owing.'

June 20. 1829.

2D DIVISION.

T.

AFTER the decision in this case, mentioned ante, No. 250. p. 488, (which see,) the charger gave in a minute of reference to the suspender's oath, in these terms:—"1. In regard to the claim for the sums paid by the charger as losses on the ships Dandy and Crichton, That the suspender was, at the time when she acquired right to the Zealous, (being the vessel in question,) perfectly aware that the usual and customary mode of insuring vessels belonging to Perth, Dundee, and other adjacent ports, was, by the respective owners entering into an association of mutual insurance of their respective vessels, whereby no premiums were paid in advance, but only by a mutual contribution in the event of any of the vessels entered with the association being lost or injured; that she was also aware that the Zealous was insured in an association of that nature, viz. in the Dundee Union Assurance Association, and took an obligation of relief from John Bower for the expense of insurance in such an association; that from the date of the vendition in her favour, and at a period when the losses libelled (being of the nature of premiums of insurance) became due by and exigible from the owner of the Zealous, she knew that that vessel was insured in that manner, and trusted to that insurance, and to no other insurance, for indemnity in the event of the Zealous being lost or damaged. 2. In regard to the other claim for furnishings, he offered to prove by the oath of the suspender that the sum of £18: 4: 4½, being the amount of the account libelled on for furnishings made by the charger to and for the use of the sloop Zealous, is still resting owing and unpaid."

To this reference it was objected, 1. In so far as regarded the claims for insurance, that the Court had found that these "were not of a kind to subject the suspender;" and if the reference were sustained, it would be allowing the charger to prove by the suspender's oath facts which the Court had decided not to afford relevant grounds for subjecting her in liability; and, 2. As to the other claim, that the reference should not be put, whether the debt is '*still*' resting owing, as that assumed that it had once been owing; but should simply be, whether it is resting owing.

The Court altered the reference as to this matter by leaving out the word 'still,' and sustained it as amended; but refused to allow the reference as to the claim for insurances.

The suspender thereafter emitted an oath, in which she deponed that it did not consist with her knowledge that the repairs and furnishings the amount of which was claimed, were made for the sloop Zealous, and that she knew nothing of them. The Court found the oath negative.

W. MURRAY, W. S.—A. DUNCAN, S. S. C.—Agents.

DAVID MOFFAT, Advocator.—*Cockburn—Ivory.*
JAMES DENHAM, Respondent.—*Sol.-Gen. Hope—A. M'Neill.*

No. 410.

Process—Advocation.—Not sufficient to warrant an advocation from an interlocutory judgment under the 50th Geo. III. c. 112, as for defect of jurisdiction, that the citation has been irregular, no objection to it having been taken in the Inferior Court; and premature to allow advocation on proper defect of jurisdiction, while a proof has been allowed by the Inferior Court, with a view to give a judgment on an objection to the jurisdiction.

June 20. 1829.

2D DIVISION. Ld. Cringletie. T.

IN the month of January 1824, the respondent Denham presented a petition to the Magistrates of Edinburgh, setting forth that he had sent a parcel to the quarters in Edinburgh of the advocator Moffat, who was stated to be a public carrier between Edinburgh and Cairnmuir, and that the same was regularly booked, but that Moffat had refused to carry it, and praying that he might be subjected in a fine of £10, besides damages and expenses. A copy of this petition was left at Moffat's quarters; but no answers having been given in, the Magistrates, on the 4th of February, "in respect that the present is a penal action, and that it is not alleged that the defender has a domicile within this city," appointed the petition to be laid before the procurator-fiscal for his consideration and concourse, and to be served personally on Moffat. A copy of the petition, bearing to be with concourse of the procurator-fiscal, was accordingly served on Moffat on the 11th of February; but the concourse adjected to the original petition was only dated on the 13th. Moffat appeared; and, without stating any objection to the regularity of the procedure, he pleaded that he had no domicile in Edinburgh, and that he was not a public carrier, but the private servant of Sir Thomas Gibson Carmichael, and consequently that the Magistrates had no jurisdiction over him. The Magistrates having allowed Moffat a proof of his allegations, he brought an advocation, chiefly on the ground of want of jurisdiction, and on the incompetency and irregularity of the proceedings. To the competency of this advocation, it was objected by Denham that it was of an interlocutory judgment, and did not fall within the exceptions of the 50th Geo. II. c. 112; because, 1. There was no objection to the mode of proof, and at any rate no leave of the inferior Judge. 2. It was premature to advocate on defect of jurisdiction, the proof allowed by the Magistrates being to enable them to decide on that objection; and, 3. The alleged irregularities did not constitute defect of jurisdiction, so as to warrant an advocation under the statute; and the advocator having appeared and pleaded in the Inferior Court without stating them, was barred from now insisting in them.

The Lord Ordinary found that the advocation was 'premature and incompetent hoc statu,' and dismissed the same, with expenses; and the Court adhered.

LORD PITMILLY.—I am disposed to think that the Lord Ordinary is right in finding this advocation to be incompetent; for supposing that these are irregularities, I do not think we can go back on them at present, although I cannot go

No. 410. June 20. 1829.

so far as to hold that the advocator is to be precluded altogether from going back on them. The only question is, if the advocation be competent hoc statu? And I own I think it is not. The party must go on with the proof before the Inferior Court; and although he will not be excluded ultimately from pleading these irregularities either here or in the Inferior Court, yet I do not see sufficient grounds to alter at present.

LORD GLENLEE.—I concur. Of all the grounds of advocation, the only one of the least importance is that regarding the irregularity of the citation. But it is one of those matters which should have been pleaded in the Inferior Court; and not having been pleaded there, we cannot go back on it. The whole foundation of the allegation, is, that the date of the concourse, which is in figures, is later than the service; and I think it must have been an error or mistake in inserting the date, for I cannot believe that the copy served could bear any thing not in the original.

LORD JUSTICE-CLERK.—I am also of opinion that, under the circumstances, the advocation is not competent. This objection to the citation should have been stated in limine, when it could have been cured. This is not an advocation which we can admit as for defect of jurisdiction, for the question of jurisdiction is not raised; and though I do not think the weight of the objection to the citation has been removed, yet that not forming a proper substantive ground of want of jurisdiction, I think the advocation cannot be entertained; and being incompetent, expenses necessarily follow.

GIBSON-CRAIGS and WARDLAW, W. S.—J. YOUNG, S. S. C.—Agents.

No. 411.

CAMPBELL MACKINTOSH, Pursuer.—*Skene.*
ARTHUR COOPER, Defender.—*Sol.-Gen. Hope—W. Bell.*

Fraud.—A party having been intrusted with a bill to retire a previous one, which the person who gave the bill was not bound to pay, and having applied the proceeds to other purposes—Held liable to repeat the amount to the person from whom he received it, although the first bill was ultimately retired by the proper debtors in it.

June 20. 1829. 2D DIVISION. Ld. Mackenzie. F.

THE pursuer Campbell Mackintosh, collector of assessed taxes for the county of Inverness, took from Mr. Grant of Rothiemurcus a bill drawn upon, and accepted by his agent, Mr. James Grant, W. S., for £418: 3: 8, being the amount of arrears of assessed taxes due by Rothiemurcus. When this bill fell due, the acceptor being unable to retire it, Mackintosh agreed to a renewal, and for that purpose drew on him a new bill for £424: 4: 6, being the amount of the former bill, with interest and expenses. This bill was intrusted to the defender Cooper, a solicitor in Inverness, then acting for Rothiemurcus, for the purpose of his discounting it, and remitting the proceeds to Edinburgh, to take up the first bill which was there payable. Instead, however, of applying the bill in this way, Cooper discounted it, and appropriated the proceeds to some other purpose,—being, as he alleged, to satisfy some pressing demand on Rothiemurcus. In consequence of this, the first bill was returned on Mackintosh dishonoured, as was also the second bill when it became due,—Mr. Grant, W. S. being unable to retire it. Mackintosh

consented to several renewals of these bills; but in 1822 he raised this action, concluding against Cooper for repetition of the amount of the £424 bill. In the mean time, and after the action was raised, various partial payments were made by Mr. Grant, W. S., and by Rothiemurcus, which extinguished the first bill, and reduced the balance due on the second to £104. 2s. As to this sum, (which alone was now claimed from Cooper,) he, besides denying that he had been intrusted with the second bill to retire the first, pleaded that at any rate the only claim competent to Mackintosh was, that the first bill should be retired; and that having now been done, (whether by the defender or not was of no consequence,) he had no right to demand any thing more. It appearing, however, from the correspondence produced in process, that Cooper had been intrusted with the bill for the purpose alleged by Mackintosh, and had misapplied the money, the Lord Ordinary decerned against him for the balance of £104. 2s., without prejudice to his claiming relief from any of the other parties in the bill; and the Court adhered.

No. 411.

June 20. 1829.

Lord Justice-Clerk.—This is an action for recovering money fraudulently misapplied. I think that has been clearly made out to have been the case; and there remaining this balance of £104 still due, the defender must be liable in payment of it.

Lord Glenlee.—I can have no earthly doubt on the matter. It is of no consequence what has become of the first bill. It is only introduced into the summons as showing the object of placing the second in Cooper's hands. Suppose it had even been retired before the second fell due, would not the pursuer have been entitled to say to Cooper, give me back my money?

Lord Pitmilly.—I agree. The case is unfortunately a great deal too clear.

D. Mackintosh, W. S.—J. Shand, W. S.—Agents.

John Thomson, (Fraser's Trustee.)—*Skene—M'Dougal.*
Alex. Shepperd.—*Rutherfurd.*

No. 412.

Implied Abandonment.—Circumstances in which a trustee on a sequestrated estate was held have abandoned a policy of insurance on the bankrupt's life in favour of a cautioner.

On the 18th of September 1822, Edward Fraser, merchant in Inverness, effected a policy on his life with the Norwich Union Assurance Society for £3000. In October he entered into an agreement with Mr. Lindeman of Leith, by which the latter agreed to discount Fraser's bills to the extent of £2000, in security of which Fraser assigned him the policy; and Shepperd and another person became bound for payment of the premium and interest. Shepperd was obliged to pay these sums at almost every subsequent term; and in April 1827 Fraser's estate was sequestrated, and Thomson appointed trustee. When the premium fell due in September, Shepperd applied to Thomson to pay it; but he declined to do so, and Shepperd therefore paid it. Fraser died in October, and Shepperd claimed right to the proceeds of the policy, to the extent of the interest, and the premiums which he had paid. This was opposed by

June 23. 1829.

1st Division. Ld. Corehouse. D.

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Thomson, who contended that Shepperd must claim as an ordinary creditor on the estate. The Insurance Company having brought a multiplepoinding, the Lord Ordinary pronounced this interlocutor:—'In respect 'it is admitted that, after the bankruptcy of Edward Fraser, the claimant 'Alexander Shepperd applied to the trustee on Fraser's sequestrated 'estate to pay the premium of insurance, which he refused to do, finds 'that this must be held as an intentional abandonment of the policy on 'the part of the trustee, and that Shepperd was entitled in consequence 'to pay the premium, for the purpose of keeping up the insurance for 'his own relief;' and remitted to an accountant to ascertain the amount of his advances. Thomson reclaimed; but the Court, without hearing Shepperd's counsel, adhered.

H. Fraser, W. S.—Æ. Macbean, W. S.—Agents.

No. 413.

J. Allan, Advocator.—*Jeffrey—G. G. Bell.*
W. Thomson, Respondent.—*Forsyth.*

Landlord and Tenant—Consuetude.— Custom of a small estate not relevant to affect the rule of law, that a landlord must pay for the dung left by an outgoing tenant, when that matter is not regulated by the lease.

June 23. 1829. 2d Division. Ld. Mackenzie. F.

Thomson was tenant of the farm of Henshilend, part of the estate of Elsrickle, belonging to Allan, under a missive of lease which contained no stipulations whatever regarding the dung. The lease was to endure for nineteen years from 1806, the terms of removal being Martinmas as to the arable lands, and as to the grass and houses, the Whitsunday thereafter. On the expiry of the lease in 1825, Allan presented a petition to the Sheriff of Lanarkshire, to have it found that he was entitled to the dung left by Thomson on the farm, without paying any consideration for it; and he rested this claim on an alleged usage on his estate (consisting of about four farms) by which the landlord (as he averred) had always been held entitled to the dung, which was given to the incoming tenant gratis. The Sheriff allowed a proof, which was not very satisfactory. It appeared, however, that in certain formal leases granted between 1764 and 1790, there had generally been inserted a clause whereby the tenant "renounces all right to a bear crop the year of his removal, and declares the fulzie or dung to belong to said master at that period;" while, since the period, the farms had generally been let on informal missives, which said nothing about dung. The Sheriff, "in respect that the missive of lease under which the defender possesses the farm, does not stipulate that the dung upon the farm at the issue of the lease was to be left by the tenant without receiving payment therefor, and in respect that the proof adduced as to the alleged practice on his estate, of leaving the dung to the landlord gratis, is insufficient to constitute such an obligation against the defender," found "that the case must be decided on the general law and practice of the country, by which a landlord or his incoming tenant must pay for the manure on the farm left by the outgoing tenant," and there-

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fore that Thomson was entitled to the price of the dung. Allan then brought an advocation, in which the Lord Ordinary pronounced this interlocutor:—'Finds that, by the general law of Scotland, a tenant, 'at the expiry of his lease, is entitled to carry away or receive value for 'the dung that remains on the farm at said expiry, he having laid upon 'the land all the dung that it was in his power to do with the last crop; 'finds no allegation in this case that the tenant, William Thomson, had 'improperly withheld dung from the land, which ought to have been 'laid upon it; finds that he held the farm of Henshilend by a written 'missive of lease, in which there is no express stipulation respecting the 'dung, nor any thing from which such stipulation can be implied; finds 'it not sufficiently proved that there was upon the estate of Elsrickle a 'custom of the tenants leaving the dung at the expiry of their leases, 'without a special stipulation on the subject; and therefore finds it not 'necessary to determine how far such custom, if it had existed, could 'have affected a tenant holding by written missive, in which was no 'reference thereto; and, on the whole, finds that the said William 'Thomson had right either to carry away the dung on the farm of 'Henshilend, or receive the value thereof as reported in process; there-'fore repels the reasons of advocation.'

Allan having reclaimed—

Lord Justice-Clerk.—It is not alleged that the tenant did not bestow a proper quantity of dung on his last crop; but the landlord claims what remains, without paying for it. The missive of lease is quite silent on the subject, and there is no reference in it to any alleged custom of the estate. If the lease had stipulated that the tenant should conform to the practice of the estate, an investigation might properly have been allowed. This is not the case, however; and it is the first time I ever heard of a contract of lease being regulated by the custom of an estate of four farms; and at any rate there is no proof of invariable practice. I cannot alter the Lord Ordinary's interlocutor.

Lord Glenlee.—I am of the same opinion.

Lord Pitmilly.—I cannot have the least doubt on this case. Every presumption of law is against the landlord, and he is obliged to rest his whole case on the alleged custom of his own small estate. On the general point this is a clearer case than usual, as the terms of removal are unusual, being from the arable ground at Martinmas, and the grass at Whitsunday thereafter. Then, as to the practice of the estate, I doubt much, even if it were a general practice in the district that the dung should be steelbow, whether that be relevant where there is a written lease, and this stipulation is omitted. But it is needless to go into that here; for the allegation of the advocator is merely, that it is the practice of his own small estate, containing four farms. It further appears that from 1764 till 1790 the leases contained an express stipulation that the dung should belong to the landlord; and its being omitted since then, affords a presumption just the reverse of what the landlord maintains. Besides, even if relevant, the usage is not established by the proof; and I have not the

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smallest doubt, therefore, that the interlocutor is perfectly well founded, both as to the law and as to the fact.

Allan's reclaiming note was accordingly refused

J. Wemyss, W. S.—A. Stevenson, W. S.—Agents.

No. 414.

John Alison and Others, Pursuers.—*Cockburn.*
Thomas Watt and Others, Defenders.—*Jeffrey—Cowan.*

Process—Preliminary Defence—Nuisance.—Held that an action resting on an allegation that a party intended to create a nuisance, and concluding for interdict, was competent; but all questions as to relevancy reserved till a condescendence was lodged.

June 24. 1829. 1st Division. Ld. Corehouse. H.

Alison and others raised an action, setting forth that they were proprietors of villas adjacent to the Sea-braes of Dundee; that Watt had recently purchased the Sea-braes, and sold part to Brown and Allan, machine-makers, who had begun to erect a machine-manufactory and spinning-mill, and that Watt intended to dispose of the rest for a similar purpose; that the noise and smoke which would be occasioned by these manufactories would form an intolerable nuisance; and therefore concluding that Watt and Brown and Allan "should be decerned and ordained, by decree foresaid, to desist and cease from building, erecting, or maintaining upon the Sea-braes, and embankment before described, or any part thereof, any steam-engine, spinning-mill, saw-mill, smithy, manufactory for machine-making, or any manufactory of any kind whatever, which, from the noise, smoke, or other concomitants necessarily attendant thereupon, may be deemed a nuisance to the pursuers, or to the neighbourhood: And if the said defenders have done or shall do on the contrary, they ought and should be decerned and ordained, by decree foresaid, to remove from the said Sea-braes, and embankment before described, all such steam-engines, spinning-mills, saw-mills, smithies, manufactories for machine-making, or other manufactories foresaid, with the buildings necessary therefor; or at least to cease and desist from using such buildings for working steam-engines, or for spinning-mills, saw-mills, smithies, manufactories for machine-making, or other manufactories which shall be deemed to be a nuisance to the pursuers, or to the neighbourhood." The pursuers did not allege that there was any limitation in the titles of the defenders, or that they had any servitude over the property. As a preliminary defence, the defenders pleaded, that although a party was entitled to object to an existing nuisance, yet no one had a right to institute an action on the assumption that another intended to commit a nuisance; that in this case the defenders, for their own sakes, would be careful to avoid doing any act which might expose them to an action for nuisance; and therefore, as confessedly there was no existing nuisance the action was incompetent.

The Lord Ordinary 'repelled the objection to the competency of the action, reserving all questions as to relevancy until a condescendence

'given in,' and subjoined this note.* The defenders having reclaimed, the Court, for the reasons assigned by the Lord Ordinary, adhered. No. 414. June 24. 1829.

W. Murray, W. S.—Tweedie and Graham, W. S.—Agents.

Miss Margaret Thomson, Pursuer.—*Sol.-Gen. Hope—Rutherfurd—G. Craig.*
Arch. M'Lachlan and Others, (M'Lachlan's Trustees,) Defenders.—*Skene—Monteith.* No. 415.

Trustees, Personal Liability of.—Circumstances under which gratuitous family trustees were found liable personally in payment of a bill granted by them to a third party for a debt due by the truster.

June 24. 1829.

1st Division. Ld. Corehouse. H.

The late Colin Thomson bequeathed to his sister Miss Thomson £3000 which the late Colin M'Lachlan owed to him; and for this sum Mr. M'Lachlan granted to Miss Thomson an heritable bond over a house belonging to him in Glasgow. He died in 1822, leaving a trust-disposition and deed of settlement in favour of the defenders, Archibald M'Lachlan, the Reverend Archibald Wilson, Robert Finlay, and James Buchanan, for payment, 1. Of his debts; and, 2. Of certain legacies. By the deed the trustees were authorized to sell the estate, so as to convert it into money; but no power was given to borrow money, or bind the estate by personal obligations; and it was declared that the trustees "shall be entitled to the fullest powers, privileges, and exemptions usually conferred on trustees, executors, and curators, according to the most liberal interpretation, and as due to persons acting gratuitously, from motives of friendship, in the affairs of others; and particularly, without prejudice to the said generality, they shall not be liable for omissions, nor to do any other diligence than to them shall seem necessary, nor in solidum nor pro rata, for the intromissions of each other; but each of them shall be liable for his own actual intromissions only, as ascertained by receipts under his hand, deducting and detaining necessary charges and disbursements: That they shall not be liable for the persons to whom, or the subjects upon which, any part of the trust-funds shall have been lent out or secured, provided that such persons or subjects were deemed sponsible and sufficient at the time of such lending." Mr. M'Lachlan was possessed of extensive funds, which were invested in the stock of mercantile companies of which he had been a partner, and where, after his death, they were allowed to remain. In 1823, the trustees, with consent of Miss Thomson, sold the house, received the price, paid her £500, and gave her a bill in these terms:—"£2500.—Glasgow, 30th May 1823.—One day after date, we, trustees of the late Colin M'Lachlan, promise to pay to Miss Margaret Thomson, or order, at her house here, £2500 sterling for value received. (Signed) Archibald Wilson, Archibald M'Lachlan, Robert

* "It is not very likely that the pursuers will be able to establish that the buildings now in the course of erection will become nuisances at a future period. But there seems no good reason why he should not be allowed to make the attempt. The description in the summons appears to be too general, but that may be corrected in a condescendence; and the conclusion may be too extensive; but these are not objections to competency."

No. 415. June 24. 1829.

Finlay, James Buchanan." Archibald M'Lach bill was put by him to his debit in account with paid on it for several years. Subsequent to g the extent of £600 were paid, and interest or upwards of £4000. At this time the estate the funds, according to a statement by the tru of £40,000. Thereafter, by the bankruptcy the funds had been vested, the trustees allege dered insolvent, and that they had not the me bill. Mr. Buchanan, one of the trustees, was nies; and, on the suggestion of Mr. M'Lachl on his estate for the bill, and received a divid action against the other trustees, founding on payment of it from them personally.

In defence the trustees pleaded,

1. That as the bill was granted by them must be held to have taken it from them *in re* trust-estate, and not on their personal respons

2. That as they were gratuitous family trust out optimâ fide, and the insolvency of the esta stances over which they had no control, they payment personally.

To this it was answered,

1. That by the renunciation of the herita the house, value had been put into the ha their bill they had undertaken to pay, and ance that it was granted by them as trustee acted on the footing of a personal liability debit, and advising Miss Thomson to rank of their number; and,

2. That, independently of the bill, they before the debts were satisfied, incurred a p

The Lord Ordinary repelled the defence the libel, 'in respect that the pursuer gave 'note in question by relinquishing her herit 'estate, and that the note is made payable 'the obligation to pay is unqualified; and 'denied that the defenders paid the interes 'well as the debts of the truster;' and fou

The trustees having reclaimed, the Court

'In respect that the pursuer Miss Margar 'the arrangement with the late Mr. Colin M 'left to her by her brother Mr. Colin Th 'of the said Colin M'Lachlan, and that 'a preferable and heritable security over 'Glasgow; and in respect that the said 'security, and that the said trustees took

'tromit with the proceeds of the said subject sold by them; and that,
'consequence, the promissory note in question must be considered
'granted by them to the pursuer for value received by themselves, an
'for which they are accountable; and also in respect that the trust-dee
'of the late Mr. Colin M'Lachlan bestowed upon his trustees no pow
'to borrow money, or to grant personal obligations to bind his trust-estat
'and that the promissory note so granted contains an unqualified oblig
'tion to pay one day after date, and that it is stated in the accounts c
'the said Archibald M'Lachlan as a personal debt of himself, and th
'pursuer was directed by him to rank upon the bankrupt estates of th
'other trustees—Repel the defences, and decern, and so far adhere to th
'interlocutor of the Lord Ordinary, and refuse the note; but, in th
'particular circumstances of the case, find no expenses due, and so fa
'alter the Lord Ordinary's interlocutor.'

Pursuer's Authorities.—Thomson on Bills, p. 256, and Cases there.

GIBSON-CRAIGS and WARDLAW, W. S.—A. DOUGLAS, W. S.—Agents.

ALEXANDER SMITH, (for the STIRLING BANK,) Pursuer.—*Baird.*
WILLIAM CAMPBELL, Defender.—*Sol.-Gen. Hope—More.*

Cautioner—Mora.—Circumstances under which a cautioner was held discharged by undue delay in discussing the principal obligants.

ON the 5th of March 1814, the Stirling Bank agreed to allow Cameron a cash-credit to the extent of £500, in consideration of which he granted, along with certain other parties as joint obligants, (but who were truly cautioners,) a bond for £500; and, on the 12th of the same month, Mr Campbell, the defender, addressed a letter to the Bank, by which he agreed to "become bound to guarantee the Bank against any loss upon the said bond of credit, and become liable for said sum of £500 sterling, or such part thereof as may be drawn by the said Hugh Cameron; it being understood that I shall only be liable subsidiariè, or for such amount as may remain due after the persons above named, who are joint obligants in said bond, shall be fully discussed according to law." The cash-credit was operated on till September 1818, at which time it was alleged that there was a balance of about £500 due to the Bank. Cameron had become bankrupt, but no measures were taken to discuss the other obligants. The estates of the Bank having been sequestrated, and Smith appointed trustee, he raised an action, in March 1827, against the other obligants, and against Campbell, founding on the bond and the above letter. Defences were lodged in June by Campbell, stating that the other obligants had not been discussed. Smith then raised and executed letters of horning against them, on which they were denounced. Campbell, however, alleged that, at the time when the account was closed, these parties were perfectly solvent, and contended that, after so great a delay, he could not be subjected in payment.

To this it was answered, That as the bond and the letter were not limited in point of endurance, and the only condition of the letter was that the other obligants should be discussed, and as this had been done,

No. 416. June 24. 1829.

Campbell was bound to pay the debt. Th
Campbell 'in respect of the undue delay
'Banking Company to discuss the caution
'principal debtor had become bankrupt, a
'quence had ceased to be operated upon,' a
penses. Smith having reclaimed, the Court,
counsel, adhered.

DALLAS and INNES, W. S.—CAMPBELL and

No. 417.

T. STUBBS, BROTHERS, and COMPANY, P
A. SMITH and Others, Defenders

Trustees, Personal Liability of—Bankrupt.—In a v
where a non-acceding creditor had not attached the
mated any interdict of sale to the trustees, found that t
trust-estate, without incurring any other responsibility
funds, although the non-acceding creditor had previou
edly to reduce the trust-deed, and executed a summons
the second day of the sale, which lasted for a week ther

June 24. 1826.

2D DIVISION. Lord Newton.

T.

ALEXANDER SMITH, merchant in P
arrangement with his creditors for payir
debts by three instalments, failed to mak
ment, which fell due on the 2d of Janu
January, with a view to prevent separat
ditors, he executed a trust-disposition of
defenders, for the general behoof of his c
merchants in Manchester, refused to ac
their agent, directing a poinding of Smi
never executed; but parties were at issu
had been interrupted by the defenders o
a letter was sent to the defenders' agent,
to render Smith bankrupt, and to reduce
after some further correspondence, they
2d of March, in terms of the act 1696,
defenders advertised an intended sale of
on the 29th of March; and on the 28th
as the defenders said, on the evening of
from the pursuers' agent, stating that a
deed would be served on them in a few
tioning them against proceeding with
applied for an interdict against the def
was never intimated to the defenders,
of reduction was served in the course c
that they could not then have stopped

No. 417.
June 24. 1829.

ing to associate the pursuers along with themselves in the trust, if they desired it.

The summons of reduction, besides concluding for reduction of the trust-deed under the act 1696, contained petitory conclusions (founded on the assumption of the trust-deed being reducible under the act 1696) to have the defenders ordained to restore the whole moveable estate of the bankrupt to the situation in which it stood prior to the trust-deed; or, in default thereof, to pay the pursuers their full debt and expenses. The defenders did not oppose decree going out in terms of the reductive conclusions; but in their defences they resisted the petitory conclusions, on the ground, that as they had committed no malversation, and were not in mala fide, and as the pursuers had not effectually attached the trust-funds, or interpelled the trustees from realizing the trust-estate, prior to executing the summons of reduction, the defenders were liable no further than simply to account for their intromissions, which they were ready to do; and at all events that no decerniture should be directed against them personally, but merely as trustees holding the bankrupt's funds.

The Lord Ordinary reduced and decerned conform to the reductive conclusions; and 'in respect the defenders have, in their defences, expressed their willingness that the deed should be reduced, and that the pursuers have unsuccessfully maintained the other conclusions of their libel,' found the pursuers liable in expenses since the date of lodging the defences. Against this interlocutor the pursuers reclaimed; but the Court adhered, merely supplying a verbal omission of the Lord Ordinary, who had not assoilzied the defenders from the petitory conclusions of the libel, although it was evident that his Lordship intended to do so.

Lord Justice-Clerk.—As the trustees here were merely proceeding to carry into effect the purposes of a lawful trust, they cannot be held to have been sufficiently interpelled by any party merely informing them that he intended to poind. There was no poinding completed here, and there appears, on examination, to have been no intimation of the interdict to the trustees; and therefore, as the defenders were not in mala fide, there is no room for subjecting them in personal liability. I am for adhering to the interlocutor of the Lord Ordinary, after supplying the verbal omission to assoilzie from the petitory conclusions.

Lord Glenlee.—The summons here concludes, that because the trust-deed in question is reducible under the act 1696, c. 5, therefore it should not only be reduced, but also a personal responsibility for the debt in question should be fixed against the trustees. But this last conclusion is a non sequitur from these premises. And although such a statement of facts might have been set forth by the pursuers as, when proved, would have warranted both the reductive and petitory conclusions, yet that is not the case here; and I concur in approving of the Lord Ordinary's interlocutor.

Lord Pitmilly concurred.

Defender's Authority.—Ker and Dickson v. Graham's Trustees, Nov. 17. 1827, (ante, Vol. VI. No. 16. p. 73); and Dec. 21. (No. 102. p. 270.)

A. P. Henderson,—J. Malcolm,—Agents.

No. 418. ALEX. SMITH, (for the STIRLING BANK,) Pursuer.—*Baird.*
JOHN DRUMMOND and EDWARD BAYNE, Defenders.—*Jameson—Small Keir—Macdonald.*

Clause—Passive Title.— Held,—1.—That a clause in a bond to a bank, bearing balance ascertained by the cashier should fix the sum due by the obligant, did not him from showing that the balance was erroneous.—2.—That it is not sufficient to party in a passive title, that in a closed record he has pleaded not only that he present, but that the debt was not justly due.

June 25. 1829.

1ST DIVISION. Lord Newton. S.

IN 1803, Drummond, along with Morison and others, granted to the Stirling Bank for £700, in consideration of a cash Drummond, and in which there was the usual clause that a count certified by the cashier should constitute the balance on On the 30th of June 1823 the account was balanced, and certified that £746: 15: 8 were due, including interest. For this sum, Smith, as trustee on the sequestrated estate of the an action against Drummond, and against Bayne as represe (now dead), and against the other obligants. In defence Dr that he was entitled to production of the vouchers on wh made against him were founded, and to go into a count and he alleged specially that credit had not been given him stated that he did not represent Morison, and that h nounce; and therefore he could not be found liable. pared and closed, in which Bayne repeated the above stated defences on the merits. In answer to Drummo contended that as the balance was ascertained in the was entitled to decree, and that no evidence of the been shown. With regard to Bayne he maintai pleaded to the merits, he had subjected himself The Lord Ordinary decerned in terms of the Drummond and Bayne having reclaimed, and the that although the stipulation in the bond was balance, so as to throw the burden on the def was erroneous, yet it did not preclude him fro by the Judicature Act a party was bound to st record, and Bayne had not departed from the not be subjected personally; therefore, in mond, 'altered the interlocutor reclaimed a 'the sum of £50 alleged not to have been d 'account, and remitted to the Lord Ordinar 'the cause, and to proceed as he shall see cau 'to the interlocutor reclaimed against, and 'forth and be extracted for the sums four 'claimed against, deducting the aforesa question with Bayne, 'remitted to the 'ther into the question of representation, 'cause.'

DALLAS and INNES, W. S.—J. BROWN,—C

WILLIAM MOYES, Pursuer.—*Sol.-Gen. Hope—Neaves.*
WILLIAM and S. COOK, Defenders.—*Jeffrey—Smythe.*

No. 419.

Partnership.—Where a company holds out an individual as a partner, the company is responsible to the public as if he were in fact a partner.

June 25. 1829.
1st DIVISION.
Lord Meadowbank.

MOYES, being a creditor of Smith Cook, executed an arrestment *in the* hands of the company of William and Smith Cook, or William *and S.* Cook, on the footing that Smith was a partner, and then raised a process of forthcoming before the Magistrates of Dundee. Appearance was made for William Cook, the brother of Smith, who denied that Smith was a partner. A proof having been allowed and taken, the Magistrates, on the 2d of October 1828, found that there was "no sufficient evidence that the common debtor Smith Cook was a partner of the company carrying on business under the firm of William and S. Cook, or that the *said* company, or the alleged company of William and Smith Cook, had, at the date of the arrestment, any funds or effects belonging to the said *common* debtor; and therefore assoilzied the defenders."

Moyes having brought an advocation, the Lord Ordinary, 'in respect 'of the ratio contained in the interlocutor of the Magistrates of the 2d 'of October last,' remitted simpliciter, with expenses.

Against this judgment Moyes reclaimed; and the case was assigned as part of the trials of Lord Probationer Moncreiff, who delivered an *opinion* that the evidence sufficiently established that Smith Cook was a partner, and therefore that the interlocutor should be altered.

LORD PRESIDENT.—It is clearly proved that the company held out Smith Cook as a partner; and although that will not make the person so held out liable for the debts of the company, yet it will subject the company to a responsibility as if he had been actually a partner.

LORD GILLIES.—This is not a question between partners. It is a question between the company and the public. If a poor company hold out a rich man as a partner, the company will be liable as if he were so; and in like manner, if a rich company hold out a poor man as a partner, they shall be responsible as if he were truly so.

LORD CRAIGIE.—If the case is to be viewed as one of fraud, there are sufficient grounds for subjecting the company in payment of the debt.

LORD BALGRAY concurred.

THE COURT accordingly 'altered the interlocutor complained of; advocated 'the cause; found it sufficiently proved that the defender William Cook 'held out to the world his brother Smith Cook as a partner of the business carried on in Fish street, Dundee, under the firm of William and 'S. Cook, and is therefore liable to account to the pursuer for the said 'Smith Cook's share of the stock of the said firm, and of the profit thereon; and remitted to the Lord Ordinary to hear parties, and proceed accordingly;' and found expenses due.

J. PEDDIE Jun. W.S.—C. and D. STEWART,—Agents.

No. 420. J. T. TAYLOR Jun. Suspen
J. T. TAYLOR Sen.

Lawburrows — Parent and Child. — Lawburrows, on child, should not be granted without some evidence of

June 25. 1829.
2D DIVISION.
Bill-Chamber.
Ld. Moncreiff.

LORD MONCREIFF reported a bill of s burrows which had been obtained from t by a father against his son, a lad of eighte the father, accompanied by the usual oath, rative, or any evidence as to the cause of f that, considering the near relationship, it i of husband and wife, that some such evi duced. The Court, concurring with his L with power to the Lord Ordinary to call him such admonitions as he might think i

W. POLLOCK,—J. G. HOPKIR

No. 421. J. SCOTT, (Cashier of the PAISLEY BA
W. Bell.
JOHN ERSKINE Senior and Junior, Res

Proof—Admission.—In a competition between a lord's sequestration, the admission of the tenant, a taken per se as evidence of the amount of rent.

June 25. 1829.
2D DIVISION.
Ld. Cringletie.
D.

THE respondents, John Erskine seni son, were proprietors of a house in Both of the former, also called John Erskine, person's furniture having been poinded of the Paisley Bank, for a debt due by sale having been granted by the Sheriff, tition, praying for sequestration of the t against the sale by Scott. This petitio agent; but the Sheriff, in respect of n and also an interim interdict till the futur had heard of the application on the part to pay them any rent which might be d their right of hypothec. In answer to thi their hypothec on getting payment of th for that of the current half year; but th rent was £30. As the tenant, howe surveyor of taxes and officers of Ex collusion between them, and presente for an order on the respondents to pro and interdict, and execution thereof, a

After some procedure on this petitic

riff ordered production of the petition for sequestration &c., he disn Scott's petition, and found the respondents entitled to expenses, "; spect the amount of the rent is admitted by the tenant to be £3(annum, and that the respondents, in their letter of 4th May last, of to assign their letter of hypothec to the Bank upon payment of the year's rent due at Martinmas, and payment or security for the half y rent about to fall due, and that this offer was made before the present *plaint* was preferred." Scott thereupon brought an advocation, in whic contended that the Sheriff ought not to have assumed the rent to be *on the* mere statement of the tenant, who was conjunct and confident the landlord; while the latter contended that the application by S *to the* Sheriff was incompetent, being of the nature of a rescissory ac to obtain recall of an interdict granted in another process.

The Lord Ordinary remitted to the Sheriff 'to recall his award of 'penses, to ascertain the rent of the subjects in question, to hear pa 'thereon, and thereafter to proceed, as he shall see just, both on 'merits, and as to the expenses before the Sheriff Court;' and his L ship found the respondents liable in the expenses of the advocation.

The Court adhered.

LORD GLENLEE.—The interlocutor is right. It may be true that the *vocator* might have appeared in the process of sequestration; but this inci tal petition was not a bad way of appearing in it; and in fact the S orders the proceedings in the sequestration to be produced, but without ing any inquiry as to the rent, and just because it is admitted by the tena *de plano* holds it to be £30. The Lord Ordinary thinks there is no suffi evidence of this, and properly remits to the Sheriff to investigate and rece award of expenses. I am for adhering.

The other Judges concurred.

J. WHITEHEAD,—A. FLEMING, W. S.—Agents.

ROBERT WAYNE, Pursuer.—*Keay—Maitland.*
ANDREW WADDELL, Defender.—*Cuninghame—Brownlee.*

Irritancy—Clause.—Construction of a clause of irritancy in a back letter qualifying facie absolute disposition.

THE defender Waddell, in 1822, granted to Wayne, the purs disposition of a certain small property ex facie absolute, but qualifi a back letter from Wayne, in the following terms:—"Sir, althoug have granted in my favour a disposition, ex facie absolute, of two su in Langloan, dated the 22d day of November current, and bearin sum of £148 to have been paid by me as the price of said subject I hereby declare that the sum actually advanced by me was £12 that you are to have the power of redeeming, at your own expen said subjects, at any time within ten years from the date of the d tion, upon repaying me the said sum of £120, with all interest due t at the rate of five per cent.; and further, that you are to have th

No. 422.
June 25. 1829.

of occupying, or letting to tenants, the sai
years, providing only you pay me the inte
at five per cent., regularly at Whitsund
equal portions. It is also understood tha
upon me for any further advance of mon
and that, failing your redeeming and pa
letter becomes null and void." In 1827
ting forth that Waddell had failed to pay
ing Martinmas 1826 and Whitsunday 18
declared that the back letter had become
and that the disposition was now absolute
Waddell averred that he had frequently
on getting regular stamped receipts, whic
but that at any rate no irritancy was i
construction of the back letter, by the
term's interest, but only on the failure, a
principal sum borrowed, with all the inte
and consequently that there could be no
period. The Lord Ordinary assoilzied
the subjoined note.* The Court adhere

C. FISHER,—W. WADDELL,

No. 423.

JAMES SCOTT, Pursuer.
ALEX. ROBERTSON, W. S., Def

Law Agent.—An agent held personally liable in t
prepared by him under a remit by the Court, althc
the remit, or during the preparation of the report,
received it from the accountant.

June 25. 1829.
2D DIVISION.
Lord Medwyn.
T.

IN an action brought into Court in 1
to the late Robert Wilson, an accountai
accounts which were the subject of dis
and the parties agreed that the report sh
Scott, his partner in business. This was

* "It seems unnecessary to proceed to the inve
as the back letter founded on by the pursuer in
Lord Ordinary, support the action. Not having
not very clearly express the true meaning of the
nary puts upon it is this—that the power of redee
interest during these years was not regularly paid
the right, but his redress was by entering into po
it was only on the expiry of the ten years that, '
aforesaid'—i. e. paying up the £120, with all in
come null and void; and even then it would no
that this was not a sale for an adequate price,
money on the security of a subject of greater
irritancy at the bar."

was, in 1819, delivered to the defender Robertson, W. S., then agent for the pursuers in the cause. He, however, had only become agent a very short time previously, and had not been engaged in the cause when the remit on which the report was in preparation was made.

In 1827, Scott for his own interest, and as factor for Mr. Wilson's trustees, raised an action against Robertson, concluding for payment of a certain sum as a remuneration for the trouble of preparing the report above mentioned. Against this claim Robertson pleaded in defence, that not having been agent when the remit was made, nor while the expense of preparing the report was in course of being incurred, he could not be held responsible. The Lord Ordinary having repelled Robertson's defence, and decerned against him for the sum claimed, "the amount of which," the interlocutor bore, "is not disputed," he reclaimed; and, besides maintaining his general plea, he contended that the interlocutor was premature in decerning against him for a specific sum, because, in an action of relief brought by him against his clients, they had disputed the amount, and insisted on the accountant's claim being submitted to the Auditor, who had given an opinion that there was an overcharge of £50, though no final report had been made on it.

LORD JUSTICE-CLERK.—There is an insurmountable difficulty in adhering absolutely to this interlocutor, that it gives decree for the full sum, while, in the question with the principal party, there seems reason to hold that £50 will be struck off; at least that amount is disputed. On the general question, however, it is clear that the agent is liable; but we cannot decern for this particular sum while it is still sub judicio what is the amount due.

The other Judges concurring,

THE COURT adhered to the Lord Ordinary's interlocutor, so far as regarded the general question of liability, but remitted to his Lordship as to the quantum.

Pursuer's Authorities.—Milne v. M'Lean, May 31. 1825, (ante, Vol. IV. No. 37. p. 45); Brown v. Duke of Gordon, March 2. 1827, (ante, Vol. V. No. 258. p. 514.)

J. G. DAVIDSON, W. S.—A. ROBERTSON, W. S.—Agents.

MRS. M'GHIE, Pursuer.—*Murray—Shaw.*
MISS BUTTER, Defender.—*Sol.-Gen. Hope—J. W. Dickson.*

No. 424.

Fraud—Personal Objection.—Held that a pursuer who insists in an action founded on a fraud alleged to have been committed on a third party by the defender to the loss of the pursuer, but in which the pursuer was participant, is not entitled to maintain the action.

June 26. 1829.
1ST DIVISION.
Lord Newton.

MRS. M'GHIE raised an action, as executrix of her husband, against Miss Butter, as representative of her father, setting forth that in May 1813, Mr. Butter had let a house to her husband M'Ghie in Shakspeare square, Edinburgh, by missives, at a rent of £220 per annum;

No. 424.

June 26. 1829.

that the house being in the line of the Reg
which was soon thereafter resolved upon, I
had concocted new missives, representing th
had placed in the hands of M'Ghie, who w
had held forth the rental at this latter sum
missioners, and had received from them a p
ing to that rental; that the Commissione
rent at that rate; and she therefore conclu
be ordained to repay to her the difference b
and the fictitious rent of £250. The all
denied; but it was pleaded in defence, tha
was proved by a letter written by the pursu
band was participant in the fraud, and th
insist in the action.

The Lord Ordinary assoilzied the defen
a Note, stating, that although there was s
fraud had been practised upon the Comm
'that, supposing such a fraud, which is
'pursuer's claim, she is barred from insis
'or she herself, was particeps fraudis;'—
'it is no answer to say, that as the defe
'she is not entitled to plead that the p
'in it. It is not necessary that she sho
'to plead as a matter of relevancy, th
'and taking the pursuer's allegations c
'her participation in it is obvious, she c
'cannot pretend to claim from the def
'voluntarily paid to the Commissioner
'them.'

The pursuer having reclaimed, the
hered on the merits, but found the def

Defender's Authority

A. Hutchison,—J. Craw

No. 425.

J. Macdonell, W. S. Pursu
M. Mackenzie, Defender.

Settled Account—Agent and Client.—Circum
an agent to his client, and for which the client g
and not liable to be opened up.

June 26. 1829.

1st Division.
Ld. Corehouse.
D.

Mackenzie of Ardross had empl
and in October 1825 requested that,
suer would render his account. He
vember, bringing it up to the 11
9th of November, Mackenzie wrot

Lockhart and Swan, W. S. to be his agents in future, and begged that he would deliver to them all his papers. The pursuer, on the following day, intimated to Lockhart and Swan that he would do so, on receiving payment of the account which had been rendered, and of a continuation of it which he subsequently transmitted to them, making in all £323. 17s. Mackenzie having, a few days thereafter, complained of the retention of the papers, the pursuer delivered them up to Lockhart and Swan. A bill for the full amount of the account was then granted by Mackenzie to the pursuer; and in December he paid another account to the pursuer of about £9 for making inventories of the papers, and including an account due to a country agent. In May 1826 Mackenzie again employed the pursuer as his agent, and a new account of £16: 12: 10 was incurred. He, however, withdrew his agency in June; and for payment of this last account the present action was brought.

No. 425.
June 26. 1829.

In defence, Mackenzie alleged that the former account contained overcharges more than sufficient to extinguish the claim now made, (but he did not specify them); that the bill had been obtained by concussion,—the pursuer having withheld the papers until it should be granted; and that the bill having been put into the hands of a third party, he had been obliged to retire it. This was denied by the pursuer, who maintained that the account must be held settled, and could not now be opened up. The Lord Ordinary pronounced this interlocutor:—'Finds that the accounts contracted before the account libelled on were paid by the defender without objection on his part, or that of his new agents Lockhart and Swan, and without any demand that they should be taxed by the Auditor;—that there is no foundation for the defender's averment that the bill by which that payment was made, was extorted by the pursuer threatening to withhold the defender's papers subject to his hypothec—an averment disproved by the correspondence produced in process;—that nearly a year elapsed after that settlement, without any proposal on the part of the defender to open it up;—that there is no averment on the record of any specific overcharge in those accounts;—and therefore finds the defender is not entitled to demand that they shall now be held as unsettled, and be liable to taxation; and, before further answer, remits the account libelled on to the Auditor to be taxed.'

To this interlocutor the Court adhered.

Pursuer's Authorities.—M'Donald, Feb. 6. 1823, (ante, Vol. II. No. 169); M'Michan, 7. 1826, (ante, Vol. IV. No. 484.)

J. Macdonell, W. S.—R. Roy, W. S.—Agents.

No. 426. R. ELLIOT, Petitioner.—*Sol.-Gen. Hope*
H. JOHNSTON, (for the LEITH BANK,)
Anderson.

Legal Diligence — Inhibition — Erasure. — A party bond for £5000, praying for letters of inhibition, in £10,000; and having got the usual warrant, and the erasure in the expede letters at the place where the bill Held that the diligence was inept.

June 26. 1829.

1ST DIVISION.
H.

IN 1822 Scot was appointed agent for and found caution to the extent of £10 required from him in 1825; and in A scribed a bond for £5000, in which the narrated. Scot was removed from the ag was alleged, he was in arrear to the ext Elliot was put upon record, and a bill excerpt of the bond, for letters of inhibit ing the bond, which was correctly done; a stated account it appeared that the bal for £5000 of which they had made a d the said registered bond, and stated acc the letter-book of the said Banking Com The bill then proceeded in these term Scot and Robert Elliot, knowing perfec nagers and cashiers and trustees foresai tion against them for payment of the f *sand* pounds sterling, with interest the bruary 1827, being the date of the de aforesaid, all contained in and due by t they, in manifest defraud" &c., intend therefore letters of inhibition were pr usual terms was then issued:—'Fiat ' 'seen the registered bond, stated acc 'mentioned.' The letters of inhibitio them corresponding with the above c ten thousand pounds had been origin and 'five' substituted. This, it was had passed the Signet; but this was fact was taken. In every other resp with the above exception, the wor written; in particular, they were writ stated to be £5000 in the executions

About two years thereafter, Ellio have the letters recalled, on the gro ceeded on the allegation that the E

payment of £10,000, whereas the bond was for £5000, and letters of inhibition had been granted to that effect; and as the letters were vitiated and erased in a material part, the diligence was informal and irregular; and at all events, as the bill and the letters were disconform—the one referring to a sum of £10,000, and the other to £5000—the diligence was inept.

To this it was answered, that the objection was a great deal too critical to warrant the Court to deprive the Bank of the security obtained by the inhibition; that it was not necessary to mention any sum at the place where the error had been committed, and that the words might be held pro non scriptis; in which case not the slightest objection could be made to the diligence.

The Court, however, on the ground that it was necessary to enforce strict accuracy in diligence of this nature, sustained the objection, recalled the letters, and ordered a marking to that effect to be made on the record.

Respondent's Authorities.—Blackwood, Nov. 6. 1750, (6891); Scott, Feb. 6. 1751, (6993); Pearce, 1791, (Bell's Cases, p. 266); Maxwell, Feb. 5. 1743, (110 and 5174); Nairne, 22. 1712, (204.)

W. Martin, S. S. C.—Bisset and Morison, S. S. C.—Agents.

James Glass, Advocator.—*Skene—Ritchie.*
George Ross, Respondent.—*Jameson—Brown.*

No.

Mandate.—A party having accepted a mandate, whereby he became bound to pay to a creditor of the mandants, part of the price of a property which was to become payable to them on their furnishing him a title, assoilzied hoc statu from an action for payment at the instance of the creditor, the title not having been furnished, and the price accordingly not being yet due.

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2d Div
Ld. Crie
F.

Gordon and Bennet, W. S.—R. Lockhart, S. S. C.—Agents.

Magistrates and Town Council of Dundee, Pursuers.—*Forsyth—Walker.*
Patrick Kid and Others, Defenders.—*Buchanan.*

No. 4

Superior and Vassal—Non-Entry.—In a process of reduction-improbation and declarator of non-entry at the instance of a superior against singular successors in possession of the lands, not necessary to call the heirs of the last vassal entered, if such vassal have granted a disposition containing procuratory as well as precept.

The Magistrates and Town Council of Dundee, as infeft in the barony of Dundee, raised an action of reduction-improbation and declarator of non-entry against Kid and others, who held feus of parts of the barony by singular titles, in regard to which there had been no entry with the Magistrates as superiors for a considerable period—in some instances,

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Lord N
T

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more than a century. The summons, after titles of the defenders, and concluding for usual form:—"At least, in case it shall this process that the said defenders shal perty of any part of the said lands and their predecessors, holden by them of the p or authors, as immediate lawful superiors tl be found sufficient to exclude the pursue thereof, then and in that case it ought a clared, by decree foresaid, that these par burgh of barony, and others above ment have or pretend to have right, are in n several vassals who stood last infeft and s failure of the lawful righteous heirs to retoured, entered, and infeft in the same entry of such heir or legal disponee, a retour mails thereof, and the full rents, i of the citation to be given by virtue he and their aforesaid, as superiors of the sa

The defenders pleaded, inter alia, that tained, "in respect the pursuers have fai parties thereto, the several heirs of the la subjects held by the defenders, and to wl singular successors."

On hearing parties on this plea, the L 'the pursuers shall call the apparent h 'where these heirs are known to them 'unknown, till they call such person as 'ticular feu shall point out to them as 'a requisition by either to this effect is 'their agent.' His Lordship added the

The pursuers reclaimed.

Forsyth in support of the Reclaiming of the Court on the point, as it is very

---

* "In spite of the authorities cited by the defen fied as to the necessity of calling the heirs of the v removed by the report of the case of Haig, 16 seems rather to indicate a decision to the contrary ceives it better for the pursuers to remove the known, than to protract the cause till a decision c has no doubt, considering the nature of the pre which the conclusions as to non-entry are only cor the defender as exclude the pursuers' right to the the heirs after the production is satisfied, and tha of this process, as the defenders did not bring after the record had been closed. If the pursuer and wish to try the question, they may do so by i

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have the question settled. No action is competent to a superior directly to compel entry. He does it indirectly by a reduction-improbation, with an alternative, that if titles to exclude him are produced, the lands shall be declared in non-entry. The passage in Stair (2. 4. 21.) relied upon by the defenders is not conclusive, being applicable to the common case; and, long after Lord Stair's time, the A. S. Feb. 15. 1723 declares that it is not necessary to cite the authors of defenders in reductions-improbation.

LORD GLENLEE.—I should like to know the precise nature of the titles produced. Are they dispositions with procuratory and precept from vassals themselves infeft, and now dead?

Forsyth.—In general they are dispositions with procuratory and precept, proceeding originally from a vassal infeft.

LORD GLENLEE.—Then the case is similar to that of Dundas against Drummond.

Buchanan for Defenders.—The conclusions of the summons are dependent on the failure of the heirs to enter, and yet the pursuers do not call them. It is clear in principle, and on authority, that such an action cannot proceed without calling the heir of the vassal last infeft. The superior has nothing to do with any possessors but the heir of the last vassal. Accordingly the passage from Stair (2. 4. 21.) is quite in point; and the A. S. 15th February 1723 does not affect this, because the heir of the last vassal is not my author. The same doctrine is likewise confirmed by the following authorities:—Bank. ii. 4. 18; Ersk. ii. 5. 42; Duke of Hamilton v. Lady Callander, Dec. 15. 1686, (2211); Napier v. Kincaid, Dec. 8. 1748, (Elchies, voce Non-entry, 2. and Notes); Haig, May 16. 1821, (ante, Vol. I. No. 8.)

Forsyth.—In the case of Dundas v. Drummond, mentioned by Lord Glenlee, (Feb. 10. 1769, 15035,) it was decided that the heir of a party who has granted disposition with procuratory and precept is not bound to enter, and it follows of course that the superior is not bound to call him.

Buchanan.—We do not say that the heir is bound to enter, but still the superior should call him.

LORD GLENLEE.—*You* should call him, if you require to have him in process.

LORD JUSTICE-CLERK.—I should wish to look at the authorities, and my notes of a previous question between the parties in the case of Haig referred to by the Lord Ordinary.

The cause was accordingly delayed till this day, when their Lordships delivered the following opinions:—

LORD JUSTICE-CLERK.—I have looked to these authorities, and though I do not doubt the correctness of the decision in the case of Dundas, yet, with reference to the shape of the summons, I think the course recommended by the Lord Ordinary is the proper course, and I am therefore not disposed to disturb the interlocutor.

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LORD GLENLEE.—It would be very dangerous the superior must call the heir of the last vassal. the defenders applies merely to the simple decla different from this, where the superior calls for p bation. In the one case, the superior sets forth hold of him, and are in non-entry since the deatl different in a reduction-improbation; there, if no takes possession; and before the defenders can b entry, they must produce rights; and if these sh poned the feu with procuratory and precept, wh can see no necessity to call the heir in such circ v. Drummond, the heir was called by a purchas rior's claims, but it was found that the heir w whole, I would remit to the Lord Ordinary to who may be entitled to make the demand to ha

LORD CRINGLETIE.—The interlocutor of th opinion on the part of his Lordship that it was last vassal infeft, where he has granted a disp precept; and I confess I concur with Lord Gle tion what a person *may* do, and what he *must* of the last vassal, as he is not to know that th I think the authorities quoted by the defender that he must do so, or that although the supe was divested by a disposition with procuratory call the heir; for why should he be called, if contrary, he is bound not to enter, as his enterin deed, and vacate the procuratory granted by might refuse to receive him, on the ground th fraud him of his year's rent. It can never b order a person to be called who has no intere enter, if he did appear; and if the vassal be d and no propriety, in calling him. In the cas sale was made by the heirs, and of course th the titles. That is quite different from whe If it was necessary to call the heir, it would superior could not find him out, and so in benefit of this process altogether.

LORD PITMILLY.—I have looked into th concur in the opinions delivered. The Lo cutor, does not find that it is necessary to c and therefore I see no reason to alter.

LORD GLENLEE.—I can easily conceive call the heir, as if the party in possession h no procuratory; and therefore I would p the particular defenders are entitled to ask called.

The other Judges havi--

THE COURT accordingly, in respect that the particular titles of each defender are not explained, remitted to the Lord Ordinary to consider which are entitled to have the process sisted till the heir of the last vassal should be called. No. 428. June 26. 1829.

J. YULE, W. S.—H. MACQUEEN, W. S.—Agents.

AGNES WEIR or HART, Petitioner.—*A. Dunlop.*
THOMAS and JAMES PRENTICE, Respondents.—*Marshall.* No. 429.

Factor loco Tutoris.—A factor loco tutoris appointed hoc statu to a pupil, although the tutor at law stated that he intended to serve.

MRS. ISABEL PRENTICE executed a deed of settlement, by which she conveyed her property to trustees, who were directed, on the lapse of a certain period which was to expire in the course of the ensuing vacation, to denude in favour of her son John, and the lawful issue of his body —whom failing, of the respondents, also her sons. John married the petitioner, who, after his death, had a posthumous child. The petitioner then applied for the appointment of a factor loco tutoris to the infant, with the view of preserving the property bequeathed by Mrs. Prentice. This was opposed by the respondent Thomas, on the ground that he was entitled to the office of tutor at law, and that at present there were no funds to administer, but that he was just about to serve prior to the period when the trustees were to denude. June 27. 1829. 1ST DIVISION. H.

The Court, however, holding that it was expedient to appoint a factor loco tutoris to act until the tutor at law obtained himself served, and to see inventories properly made up, granted the prayer of the petition.

J. PATTEN, W. S.—HILL and THOMSON, W. S.—Agents.

ROBERT KNOX, Suspender.—*A. Wood.*
A. CRAIG and COMPANY, Chargers.—*Cockburn.* No. 430.

Inferior Court Expenses—Sheriff Clerk Fees—A. S. 16th March 1748.—Bill of suspension of a charge for expenses awarded in a Sheriff Court passed on the allegation that the fees of extract, which had been paid by the charger, were not sanctioned by the A. S. 16th March 1748; and that certain charges were higher than those allowed in the Supreme Court, though with the fees and these charges were warranted by the regulations of the Sheriff Court; and held competent to object to the fees against the party charging, without calling the Sheriff Clerk.

BILL of suspension of a charge for a certain sum of expenses decerned for in the Sheriff Court of Edinburgh, on the ground that the charges which had been allowed by the Sheriff, on report of the Auditor, were higher than those allowed for similar business in the Court of Session; and also as to certain dues of extract included in the sum charged for, that they were not allowed by the A. S. 16th March 1748. To this it is answered, that the accounts had been regularly taxed according to the regulations of the Sheriff Court; and as to the dues of extract, that these were also in conformity to these regulations, and that if they were to be objected to, it ought to be in a process with the Sheriff Clerk, who alone was interested, and not in a suspension against the party in the case. June 27. 1829. 2D DIVISION. Bill-Chamber. Ld. Fullerton. F.

No. 430. The Lord Ordinary having refused the bi

June 27. 1829. LORD JUSTICE-CLERK.—I understand the av that the fees of extract here charged are not sa so, we must certainly give effect to the A. S.; a to require the harsh measure of making the S spondent asks. As to the other matters, althc are rather loose, yet if full caution is offered charges are greater than in the Court of Sess ground.

The other Judges concurring—

THE COURT recalled the Lord Ordinar bill on caution.

W. FORBES,—RITCHIE and MILLE

No. 431. MANN and COMPANY and H. HALL, Ad ALEX. SKINNER, Respondent.

Carrier—Mora.—Circumstances of delay to inqui not reached its destination, held not sufficient to pre from a Society of Porters, to one of whose members sponsible for each other.

June 27. 1829.

2D DIVISION. Lord Medwyn. T.

THE advocators Mann and Company mingham, in the end of December 1825 Hall, merchant in Aberdeen, that they h Miller's wharf, London, to be forwarded Hall received this letter on the 1st of Ja month of February, no goods having reac made at the public weigh-house in Aberd rected goods were in use to be deposited found there, he wrote, about the middle pany, acquainting them that they had no pany wrote to the agent at Miller's wh and the result to be communicated to February) they wrote to Hall, mentioni wharf, and enclosing the receipt for t Birmingham, by whom it had been fo Hall to make inquiry in his quarter. inquiries at the Shipping Company's success; and on the 29th April he ag the box was still missing. Mann and taken it for granted that the box had ever, again wrote the agent at Miller's previous letter, but who now informe that the box had been forwarded by on the 9th of January. This infor cated by Mann and Company to H

No. 481.
June 27. 1829.

an account of freights from the agent of the Shipping Company at Aberdeen, in which a charge was made for the box in question. This showed that the box must have arrived at Aberdeen; and Hall accordingly (it being now the end of May, or beginning of June) made a demand for the box, or its value, from the Porter's Society of Aberdeen, who have a monopoly of the privilege of carrying and delivering all goods landed at Aberdeen, under the counter obligation of being all responsible, "jointly and severally, for the value of such goods and packages so landed and entered in the wharfinger's landing-book."

One of the regulations established by the Magistrates of Aberdeen, in virtue of which this society enjoys its exclusive privilege, is, "that no goods are to be removed from the quay until the same shall have been first bulked, and the bulking-master's mark put thereon; and none are to be entered in the bulking-master's books until safely landed;" and on examining the bulking-master's books, it appeared that the box in question had been landed on the 18th of January. Mann and Company and Hall thereupon raised an action before the Magistrates of Aberdeen against the Society of Porters, (of which the respondent Skinner is deacon,) concluding against them for the value of the box. It appeared that the box had been given to one of the porters called Jamieson, who alleged that he had delivered it to Hall; and the Magistrates accordingly allowed a proof of the delivery, in which they admitted Jamieson and other members of the society as witnesses. On advising this proof, the Magistrates assoilzied the society; whereupon Mann and Company advocated, and contended that the members of the society, and Jamieson in particular, were not competent witnesses to prove the delivery; and at all events, that even admitting their testimony, there was no proof that the box had been delivered.

The Lord Ordinary being satisfied that, even with the evidence of these persons, there was no proof of delivery, found it unnecessary to determine the question as to their admissibility; but remitted to the Magistrates to alter their interlocutor, and to proceed with the inquiry as to the value of the contents of the box.

The respondent having reclaimed against his Lordship's interlocutor, the Court (May 28. 1828) adhered to it in so far as it found that the proof did not establish the delivery of the box; but remitted 'to hear parties on the plea of the defenders founded on the delay of the pursuers in notifying the non-delivery of the box, and making their claim on that account against the defenders.'

The Lord Ordinary, after hearing parties, ordered Cases to the Inner House.

Pleaded for the Respondent.—The character in which the society are to be considered as responsible for goods committed to the charge of any individual porter is that of cautioners; and consequently they are entitled to require from parties seeking relief against them the strictest diligence in the search after goods missing, and the earliest notification to them,

No. 431. June 27. 1829.

in order that they may de recenti inquire a recovery. Here, however, it was about fi of the box in question from Birmingham w intimation of the loss was made to the soc Aberdeen, must have been acquainted with of Porters, and he ought at once to have in in the bulking-master's books, whereby he at once if it had been landed at Aberdeen; so, and the society being by the delay prec so effectually as they might have done at from their obligation.

Pleaded for the Advocators.—The Soci exclusive privilege on condition of being all cannot be considered as cautioners, but ar with the individual porter who has failed to his charge; and his obligation is not one fr by mere delay to claim performance of it. are not chargeable with any undue delay t recourse. In winter the transmission of g land to London, and thence to Aberdeen, frost in the canals, and storms at sea, that after the dispatch of goods is notified, b have gone amissing; so that Hall's not w for about a fortnight after the time whe the goods had actually arrived, is not a part. Then, so soon as Mann and Comp arrived, they took the natural course of t ham onwards to Aberdeen, and immediat the box had arrived at Aberdeen, notifica that there was no delay whatever in maki cators were aware of it; and delay in t which the society could competently com

Lord Justice-Clerk.—I confess that I some difficulty, and I am not at present able society. Although we have found the deli to the nature of the obligation under whic tions there are certain important stipulatio goods are to be removed from the quay till that they are not to be entered till landed party to whom a package is addressed at A apply to see whether it is entered in these is provided that the society shall only be wharfinger's book. Now, when we have a body, of which Hall, as a residenter in A self, it must be presumed this is decisive as to H

great delay in taking the necessary steps to discover tempestivè what had become of the goods, after the letter mentioning their being dispatched had been received. It is clear that Hall must have known that when the goods were transmitted to Miller's wharf, they were to go by sea; and on the 22d of February he was specially instructed by Mann and Company to make inquiries in his quarter. There was nevertheless a delay of months in taking any one step that could lead to the discovery of the casus amissionis. The bulker swears that his books would have discovered the arrival of the goods as soon as consulted. The proof of actual delivery has been decided to be defective. Still, after the lapse of three or four months without inquiry, or the body of porters being made aware that any goods were missing, Jamieson as an individual, and the society as a body, if tempestivè warned, would have had a facility in tracing out the delivery of the goods, of which they were deprived by the delay allowed to occur. In looking at the peculiar nature of the obligation here attempted to be enforced, and the principles which have been applied in cases between consigner and consignee, vender and vendee, &c. we have an analogy for the decision of this case. There has been the grossest *negligence* on the part of Mann and Company, and also of Hall. From the *25th of December* to the 22d of February, there was nothing like special instructions *for inquiry* given; and when given, they were not properly acted on till near the middle of May.

Lord Pitmilly.—I take a different view. The delivery of the box to Jamieson on the quay of Aberdeen is proved, and the fact of its delivery to *Hall* is not proved. Are the porter and the society (who are not cautioners for Jamieson, but all bound together) to get quit of their responsibility entirely on account of the delay of the Birmingham merchants? There may have been a culpable delay on their part; but how does that free from responsibility a man to whom the goods are traced, and who cannot prove delivery of them? The delay, in part at least, is pretty well accounted for. Mann and Company wait *till* inquiries are made. Before tracing to the porter at Aberdeen, many previous inquiries at all the steps of transmitting the goods might be necessary; but as soon as it is discovered that the goods were landed at Aberdeen, and bulked there, then the action is immediately brought. Still, no doubt, there was some delay in conducting these previous inquiries. The sole benefit from that, however, is to give Jamieson a title to say, in the question of proof, that he had been deprived of various means of proof, as loss of a witness &c., and that he was exposed to this by the delay, but no further benefit; for, in the question of proof, the goods are traced to Jamieson, who cannot plead that he is freed from the responsibility of delivering them through any delay of the other party.

Lord Glenlee.—This is a very doubtful case. There may be certain customs established by course of time, the neglect of which, though it does not bar action, may yet affect the result of the action. I think we would need to know the precise practice. I cannot agree simpliciter to alter and assoilzie, and would rather that the matter stood over a little.

The case accordingly stood over till Lord Cringletie took his seat on the Bench.

Lord Cringletie.—I cannot see how mora can be pleaded here at all.

No. 431. June 27. 1829.

If the respondent could show that the delay
as if he might otherwise have proved that h
be something in it. But Jamieson admits tha
identified with him by its regulations, I canno

THE COURT accordingly adhered to the
Ordinary.

C. GORDON, W. S.—CARNEGY and SHE

No. 432.

MRS. MORRISON, Pursuer.—*Jameson*—
A. NISBET and Others, (CAUVIN'S TRU
Hope—Marsh

Writ—Erasure—Trust.—1.—Held not a suffic
'pages' in the testing clause was written on an erasu
in trying the validity of a trust-deed, ordered to be
pursuer was unsuccessful.

June 30. 1829.

1ST DIVISION.
Ld. Newton.
D.

LOUIS CAUVIN, formerly teacher of
burgh, conveyed his estates to the defe
settlement executed in 1817, for the pur
the maintenance and education of boys,
to the pursuer, his sister. In 1819 he
the same sheet of paper as the last pag
pointed additional trustees, conferred
on the original trustees, and confirmed
in 1822, he made another codicil, by v
of the trustees named by him, he dispo
persons, for the purpose of carrying the
and his sister then brought an action o
not of the codicils,) on the allegation t
and erased. The deed consisted of
regularly marked with its proper num
last page bore at the top 'page thirte
that the deed consisted "of this a
stamped paper," &c.

By the pursuer it was averred tha
and the words '*pages of*,' were writ
defenders it was admitted that part
g e s) were written upon an erasure. T
word *pages* having been originally om
word *of* having then been erased, and

On the part of the pursuer it was c
in a material and statutory part of t
she was entitled to have it reduce

To this it was answered, '
by the writer merely fo

No. 4
June 30.

out the slightest intention of fraud, it was not sufficient to set aside the deed. *A further* plea was also maintained, that by the subsequent codicils *the pursuer's right* was excluded, even although the original trust-deed were *set aside.*

The Lord Ordinary assoilzied the defenders, and issued the subjoined note.*

The pursuer having reclaimed—

The LORD PRESIDENT observed that the objection was too critical, *and that the Court* had lately refused to sustain an objection to a deed *where the letters ve of* a word were erased.

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* "*The Lord Ordinary* does not think that the erasure which appears where the word, or part of the word 'pages,' is now written, has the effect to render the deed null and void.

"There is not the least ground to suppose that any fraudulent alteration has been made, for it is quite plain from the whole appearance and terms of the deed, as well as from the numbering of the pages, which is regularly done in words at the top of each, that there has been no change either by taking away part of the original deed, or by introducing original matter. Indeed the important word which secures against such operations, is not 'pages,' but that denoting the number, as it is on that number that, had a fraud of this kind been attempted, the change would have been made. Now there is no erasure where the word 'twelve' is written; and it is clear, indeed, from the crowding in of the word 'pages,' that the only object in what has been done, has been to rectify a clerical omission of this word, which the writer had committed in extending the deed. But where there is no room to suspect fraud, all the effect which has been given by the Court to erasures, even where they occur in substantialibus, is to hold pro non scripto what is written upon the erasure. If this has the effect to create a blank in one essential circumstance, which there is no means of supplying from other parts of the deed, the effect may be to render it void; but if, on the contrary, the blank thus made shall either be of no material consequence as creating no ambiguity, or may be supplied with absolute certainty from other parts of the instrument which show that the word appearing on the erasure is the only one which could have been meant to stand there, consistently with the meaning of the parties, and that the operation has been merely the correction of a clerical error, the instrument will remain effectual notwithstanding.

"Now the Lord Ordinary conceives, that had the deed still remained as it probably stood at first, with the word 'pages' omitted, such omission would not have been fatal, because it appears impossible, after seeing that the deed is regularly numbered on each page, and that the last on which the testing clause is written is numbered 'thirteenth,' to doubt that the words 'written on this and the twelve preceding of stamp paper' must, to make sense of them, have the word 'pages' supplied. The Lord Ordinary sees no ground in the practice of the Court for the critical adherence to the words of the statute 1696, c. 15, contended for by the pursuer. It has not been held necessary to mention the number of pages where a deed, though written bookwise, is contained on one sheet, because in such deeds there is no room for the fraud which the regulation was intended to prevent.

"The defence founded on the terms of the second codicil seems also an effectual one. This codicil does contain such dispositive words as would carry the subjects to the disponees by means of an adjudication in implement, and would exclude the heir at law, supposing the settlement to be void. It is, no doubt, a trust-disposition; but the original deed, which, although supposed there to be ineffectual, is still expressly referred to as showing the purposes of the trust, is sufficiently authenticated for this purpose; and even laying it out of view, the copy kept in Mr. Cauvin's possession, authenticated by himself, by several codicils subjoined to it, and mentioned in his codicil of 28th October 1824 as having these codicils subjoined to it, and as a copy which would be found in his repositories, would of itself be quite effectual, containing the necessary directions for executing the trust. But the pursuer, being at all events excluded by the second codicil, has no interest or title to reduce the principal settlement."

No. 432.

June 30. 1829.

LORD BALGRAY.—Even supposing that out altogether, the deed would be objectior possible, to sustain the objection, because I this nature, which exclude near relations.

Jameson, for the Pursuer, then moved ordered to be paid out of the trust-estate.

LORD BALGRAY.—Certainly; the trust question tried, so as to ascertain the validi

The other Judges having concurred, an

THE COURT adhered, but ordered the out of the trust-fund.

Pursuer's Authorities.—Balfour, 368. 382. 371; 4 (16925); Pattullo, Nov. 22. 1771, (12281); Bain, Ju 1701, (11541); Laurie, July 9. 1712, (12284); E. of I Nov. 26. 1703, (2554); Bell on Testing Deeds, p. 4 1696, c. 15; 3. Ersk. 2. 19; E. of Fife, Nov. 22. 1(*Defenders' Authorities.*—Henderson, Jan. 31. 179 D. of Roxburghe, June 4. 1741, (14332); Clark, Fe 1822, (ante, Vol. I. No. 480); Williamson, Dec. 21. (1693); M'Donell, Feb. 14. 1778, (16957); Peter (11540); Cumming, Feb. 4. 1709, (11543); Lyon, D (12285); Lockhart, March 5. 1760, (16989); Cairns 1810, (F. C.); E. of Traquair, June 26. 1822, (ante

T. B. FERRIE, W. S.—A. Sc

No. 433.

JOHN RALSTON, Pursuer.—
R. FARQUHARSON and Others, Defend

Process—Jury Court.—Incompetent to reclaim to a conclusion for damages, although an interlocut ings in regard to another conclusion.

June 30. 1829.

1ST DIVISION.
Ld. Corehouse.
D.

RALSTON brought an action against forth that he had purchased a propert by missives, and that they had failed t gain. He therefore concluded that th executing a disposition with the usua £600 of damages for delay and failure sale.

In defence it was stated, that the d title according to the tenure of booking delay on their part.

The Lord Ordinary pronounced th 'fenders are only bound to give a ti 'sold by them to the pursuer, to be h 'the way practised in the town of E 'resignation or precept of sasine usua 'tent sustains the defences, and dece

The defenders then reclaimed, pra cutor in so far as it remitted the pro

When the case came to be advised

No. 433.
June 30. 1829.

Lord Gillies objected that the reclaiming note was incompetent; that the case ought to have gone to the Jury Court; and that if the remit were there considered to be unnecessary, the case would be retransmitted to this Court.

The other Judges having concurred, the note was refused.

A. Clason, W. S.—A. Nairne. W. S.—Agents.

No. 434.

R. C. Bontine and Others, Pursuers.—*Baird—Speirs.*
R. R. Dixon and Others, Defenders.—*Sol.-Gen. Hope—Forsyth.*

Process.—One of several pursuers having withdrawn after defences had been lodged—Found that the defenders were entitled to lodge additional defences arising out of this circumstance.

June 30. 1829.
1st Division.
Lord Fullerton.
H.

An action of reduction and improbation was brought at the instance of Robert Cunningham Bontine, Esq. of Ardoch, and his two minor children William and Charlotte, and by him as their administrator in law, as heirs-substitute under the entail of Ardoch, concluding for reduction of certain deeds in favour of the defenders alleged to have been executed by his father, the present heir in possession, contrary to the entail. After defences were lodged, a tutor ad litem was appointed to the two children; and Mr. Bontine then moved the Lord Ordinary to allow him to withdraw as a pursuer, and the action to continue in name of his children. This was opposed by the defenders, except on condition of payment of expenses, and being allowed to state additional defences arising from the proposed change in the instance.

The Lord Ordinary having allowed Mr. Bontine to withdraw on payment of expenses, the defenders reclaimed, and insisted that they had a right to lodge additional defences.

The Court, being of that opinion, adhered under a qualification to that effect.

Ker and Dickson, W. S.—D. Fisher, S. S. C.—Agents.

No. 435.

John Robertson, Petitioner.—*Jeffrey—Borthwick.*
R. Barclay Allardyce and J. Boswell, Respondents.—*Sol.-Gen. Hope—H. J. Robertson.*

Execution pending Appeal—Jury Court—Jurisdiction.—Incompetent for the Court of Session to award execution pending appeal of a verdict obtained in the Jury Court in an action of damages, or of the judgments of that Court awarding expenses, even where these expenses have been partly incurred in the Court of Session.

June 30. 1829.
2d Division.
F.

By the interlocutor disallowing the bill of exceptions mentioned ante, No. 299. p. 601, (which see,) the Court found the petitioner Robertson entitled to the expenses of discussing the bill, "reserving for consideration of the Jury Court all questions as to the expenses formerly incurred." These consisted of the expenses incurred in discussing in this Court the relevancy of the action, and of the second trial and other proceedings in the Jury Court, (the expense of the first trial having been previously awarded); and they were, on a motion by the petitioner, awarded to him by the Jury Court on the 19th of May. On the 22d of

No. 485.
June 30. 1829.

May, and before judgment on the verdict f
up by the Jury Court, the respondents pre
of Lords against the interlocutor of this Co
and disallowing the bill of exceptions,—a
the Jury Court refusing a new trial, and a

On this, the petitioner applied for exe
judgments of this Court awarding the ex
exceptions, of the verdict finding damag
Jury Court awarding the other expenses i

To the petition for execution it was ob
so far as regarded the verdicts and the
Jury Court, it was incompetent for this C
appeal, as the statute 48th Geo. III. c.
applied only to judgments of the Court
being in existence at the period of its ena

To this it was answered for the petition
the intention of the Legislature, in allow
of causes to be pronounced by the Jury
all such causes of the benefit of obtaini
would necessarily be the case if the Cou
the Jury Court having confessedly no pc
appeal; that the Jury Court was merely
and that the judgments of that Court n
nounced by the Court of Session, and
ments of that Court; and that accor
v. Wight, Feb. 10, ante, No. 191. p. 3
the case, and remitted to the Auditor
the Jury Court;* and as to judgment
verdicts, it was the constant practice of
of an appeal being taken before the ac
decerned for, to remit them to the Au
decree for them, notwithstanding the a
terim execution.

The Court granted execution in so
awarded by them on the discussion of
the petition quoad ultra.

Lord Justice-Clerk.—If I were in
petition, I certainly could not do so with
sulting our brethren. But I am satisfi
as to the expenses awarded by this Cou
this Court does not go.

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* In the case of Renton v. Renton, which was
that the defender should be decerned and orda
Session, *or of the Lords Commissioners of our*

No. 435. June 30. 1829.

Lord Glenlee.—I am of the same opinion. To authorise us to award interim execution, the process must have been depending in this Court, and such that this Court could have decided it, otherwise the power under the statute to award interim execution does not apply.

Lord Pitmilly.—I am of the same opinion. Even without going into the competency of the prayer of this petition, I do not think that the Court, in the exercise of its discretion, could award execution without caution.

Lord Cringletie.—Interim execution can only apply to a judgment already pronounced. The statute gives no power both to pronounce a judgment, and also to put it to interim execution. The cause coming here under the bill of exceptions must return to the Jury Court, and this Court could not put to execution the judgment of which interim execution is truly wanted. Nothing but the expenses of discussing the bill of exceptions can be made the subject of interim execution, and even to this partial extent I would require caution.

J. Burness, S. S. C.—W. Duthie, W. S.—A. Boswell, W. S.—Agents.

No. 436.

Trustees of the late John Boyes, Pursuers.—*Keay—Maitland.*
Mrs. Ann Hamilton or Gray, Defender.—*Sol.-Gen. Hope—W. Bell.*

Prescription, Triennial.—In a general accounting, the triennial prescription not pleadable as to particular parts of the accounts on one side.

June 30. 182
2d Divisio
Ld. Macken
R.

Action of accounting raised by the deceased John Boyes, and since carried on by his trustees, against Mrs. Ann Hamilton or Gray, relative to certain accounts, from 1786 down to about 1803, between her father, the late William Hamilton of Bothwell Park, and the late Mr. Boyes and his father, who were writers in Hamilton, and agents of Mr. Hamilton. Mr. Boyes and his father had been chiefly employed in purchasing, or obtaining by excambion, for Mr. Hamilton, certain haugh acres which lay in to his property, and which were acquired at intervals, one or two at a time. In the present accounting, the trustees, on the one hand, took credit for the price of these acres, and the business accounts of the Messrs. Boyes, which related in a great part to the purchase and transfer of the acres; and, on the other hand, they gave credit to Mr. Hamilton for sums advanced in the course of these transactions, and also for furnishings made during the same period to Messrs. Boyes by Mr. Hamilton, who was an upholsterer.

Several objections were taken to these accounts by the defender; but it is only necessary to notice two.

1. That one of the acres was charged at £200, while the rest were obtained at about £100; and,

2. That the business accounts were prescribed.

To these it was answered,

1. That the acre in question had not been bought by Mr. Boyes for behoof of Mr. Hamilton, but had belonged to him, and that he had sold it to Mr. Hamilton, and charged £200 for it in an account long since

No. 436. June 30. 1829.

rendered; but that, if it was thought too much, the pursuers would take back the land, with the rents since Mr. Hamilton entered into possession, and strike that item out of the account; and,

2. That in a general accounting of this kind, the plea of the triennial prescription could not be received as to a portion of the claims on one side, the more especially, as the defender was willing to take credit for the furnishings made by her father, which would equally fall under the plea of prescription with the business accounts of Messrs. Boyes.

The Lord Ordinary repelled these objections, and the Court adhered.

LORD CRINGLETIE.—I have always understood, as to the plea of prescription, that in a question of this kind, where credit is given on the one side for sums advanced, while the account against which it is pleaded is current, and not prescribed, and where a general accounting is afterwards brought, prescription cannot be pleaded.

The other Judges concurred.

Pursuers' Authority.—Brunton v. Angus, Dec. 3. 1822, (ante, Vol. II. p. 61.)

ROD. MACKENZIE, W. S.—J. WHITEHEAD,—Agents.

No. 437.

ALEX. SMITH, (TRUSTEE of STIRLING BANK,) Pursuer.—*Baird.*
JOHN DRUMMOND, Defender.—*Small Keir.*

Compensation.—Assignation of bills to answer one claim to a greater amount, for which an action is depending, not pleadable in compensation of another subsequently arising.

June 30. 1829.
2D DIVISION.
Lord Medwyn.
F.

THE defender Drummond was agent at Crieff for the Stirling Banking Company till the year 1816. For the balance alleged to be due by him as agent, (stated at £2932,) the Bank raised an action against him; and, in security or satisfaction pro tanto of this claim, he assigned to the Bank, in April 1821, bills to the amount of £1561. In September 1821, Drummond granted a promissory note for £200 to one Rannie, who indorsed it to the Stirling Bank. For payment of this note, the pursuer Smith, trustee on the estate of the Stirling Bank, which had been sequestrated, raised an action against Drummond, who pleaded compensation, in respect of the assignation of bills above mentioned, and craved that at least this action should be remitted to that still depending for the balance of his agency accounts. The Lord Ordinary, 'in respect that 'the agency of the defender for the Stirling Bank ceased in 1816, and 'that the assignation in 1821, founded on by the defender as a defence, 'is specially granted for the balance of the defender's agency transac'tions, for which an action has been raised, concluding for a much larger 'sum than the amount of the bills assigned; and further, that the pro'missory note in question in this cause was granted by the defender in '1821, and subsequent to the assignation already mentioned,' repelled the defences, and decerned. The Court adhered.

J. BROWN, Agent.

No. 438

MRS. ANN ALEXANDER or BENNET, Pursuer.—*Greenshields.*
BENNET'S TRUSTEES, Defenders.—*Penney.*

Approbate and Reprobate.—A Scotchman having, by a Scotch deed of settlement, conveyed to trustees all the property, heritable and moveable, of which he might be possessed at his death; and having thereafter purchased a property in the Isle of Man, where he went to reside, and by the law of which island landed property not specially disposed of divides equally between the widow and the children of the deceased—Held that his widow could not claim a provision under the trust-settlement, and also take her share of the Manx property, which the deed was incapable of effectually carrying to the trustees.

July 1. 1

2D DIVIS
Ld. Macke
F.

THE late John Bennet, a Scotchman, and domiciled in Scotland, executed, in 1821, a trust-deed of settlement in the Scotch form, whereby he conveyed to the defenders "all and sundry lands, heritages, heritable bonds, tacks, debts, and sums of money, &c. belonging or owing to me, or which shall belong and be owing to me at the time of my death," for certain purposes, and, inter alia, for payment of a liferent provision of £80 yearly to his wife in the event of her survivance; it being declared that this provision should be in full of all she could ask or claim from his estate, or by his death. Shortly after the execution of this deed, Mr. Bennet went to reside in the Isle of Man, where he purchased a small estate; and he died there in 1824, leaving the pursuer, his widow, and a daughter. The deed of settlement executed in Scotland was not, according to Manx law, effectual to carry the property in the Isle of Man; and by the law of that island, (according to the statement of the pursuer,) when a person possessed of landed property there dies, leaving a widow and children, without having disposed of it by settlement, it divides equally between the widow and the children of the deceased. Mrs. Bennet accordingly claimed one half of this property, and also the annuity provided by her husband's settlement; but the trustees having refused to pay her the annuity, unless she gave up to them her share of the Manx property, she brought the present action against them, concluding for payment, and contending that the deed of settlement showed no intention to carry the Manx property subsequently acquired, and at all events that the question of whether she was thereby put to her election should be decided by the Manx law.

In defence the trustees pleaded, that the deed of settlement, though ineffectual to carry the property in question, showed so clear an intention to convey it, that the widow could not claim the annuity without complying with the intentions of the deceased, as otherwise she would be approbating and reprobating the same deed; and that the deed being a Scotch deed, the construction of it, and whether it put the pursuer to her election, were questions of Scotch law. The Lord Ordinary pronounced this interlocutor, adding the subjoined note:*—'Finds that the pursuer

* "The Lord Ordinary thinks, 1. That the Scotch deed of trust, which he holds himself competent to interpret, did intend to convey all property which should belong to the granter at the time of his death, situated in any place, not excepting the Isle of Man. 2. That therefore the pursuer cannot take or keep that property, or any part of it, away from the trustees, by the law of the Isle of Man, without reprobating the trust-deed. 3. That if she reprobate

No. 488.
July 1. 1829.

'cannot claim the annuity libelled, unless
'deed libelled, by consenting to pay over
'of the trust, the property in the Isle o
'of that island, in contradiction to the ter
'that it is not alleged that the trustees
'pay to the pursuer the said annuity, on
'therefore assoilzies the defenders from t
'decerns; finds the pursuer liable to th
'an account to be given in, and when l
'tax the same, and report.'

The pursuer having reclaimed—

Greenshields in support of the Reclain was acquired subsequently to the date o there being an intention to convey it, t to be a change of settlement by the dec provision to his widow, for he knew tha belong to his wife; and it is just the sam Scotland, and taken the titles to the exte

Penney, for the Defenders, quoted t (ante, No. 116. p. 241.)

Greenshields.—That case is different conveyed an English estate *expressly*; l veyance of lands that might belong to t not evidence of intention sufficient to the contrary, we contend that the sub perty was a virtual alteration of the s

LORD JUSTICE-CLERK.—I cannot find ferently from that of Dundas. We did nc lished in the case of Trotter, (ante, Vol. we are called upon to interpret a Scotch d of Scotland, while, in regard to an Englis counsel. The trust-deed here is in the property possessed or to be acquired; and did not intend to convey property whic Isle of Man. We therefore cannot allov the deed, and refuse to fulfil the will of t

The other Judges concurring,

THE COURT adhered to the Lord penses, which they found due to

J. Watts, W. S.—J.

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the deed, she cannot also approbate it by ta ground for refusing to find so in this Court,

L. KINLOCH and J. ANDERSON, Pursuers.—*Cockburn—Handyside.*
ROBERT FRASER, Defender.—*Robertson.*

No. 439.

Et è contra.

Warrandice—Landlord and Tenant.—Tenants held to have taken their chance as to whether a certain piece of disputed ground belonged to their landlord or not; but the landlord bound to allow them the use of his name to vindicate the property, reserving the question as to the party on whom the expense of doing so should fall.

July 1. 1829.

2D DIVISION.

Ld. Mackenzie.

R.

FRASER of Torbreck had right, by titles flowing from the Magistrates of Inverness, to 'three quarters' of the lands of Merkinch in the immediate vicinity of the town, and Mr. Duff of Muirtown had right to the remaining quarter. In 1804 the late Mr. Fraser granted a lease for the period of 300 years, at a rent of £500, of 'all and whole the three quarters of land, town and lands of Merkinch,' as described in his titles, to the pursuer Lockhart Kinloch, sheriff-clerk of Inverness-shire, and the late Peter Anderson, solicitor in Inverness, his own agent, father of the other pursuer John Anderson. This lease was granted with absolute warrandice, and under a stipulation for a deduction from the rent, at the rate of £7. 10s. per acre, for a certain part of the lands held in tack by one M'Donald, so long as his lease endured. A part of Merkinch consisted of certain links called Cappel Links, extending, with two other small pendicles, to about six acres. These had at one time been possessed by the Torbreck family; but, a few years before the date of the lease in question, they had been taken possession of by the Magistrates of Inverness, who pretended right to them, and who continued in possession at the date of the lease. The pursuers, when they entered to the rest of the lands, did not get possession of the Cappel Links, but they made no complaint till 1823; and some time thereafter they resolved to retain their rents in satisfaction of the loss sustained by them, in consequence of not having been put into possession of these links. Thereupon Robert Fraser, son and heir of the granter of the lease, now deceased, raised an action, concluding for payment of the rents; while, on the other hand, the tenants raised an action to have Fraser ordained to repeat a certain sum as the rents effeiring to the links since 1804, and to put them henceforward in possession, or allow a proportionate abatement of rent.

For the tenants it was pleaded, that under the warrandice in the tack Fraser was bound to put them in possession of every thing falling under his titles; and that in a competition between the Magistrates of Inverness and Duff of Muirtown, the late Mr. Fraser, being examined as a witness, had stated that the Cappel Links belonged to him.

For Fraser, on the other hand, it was maintained, that as both tenants knew exactly the circumstances regarding the lands, and as Anderson in particular, agent of the granter of the lease, knew that the property of these links was disputed, the true construction of the lease must be held to be, that the granter only warranted the tack of the lands of which he was actually in possession, and that the tenants had taken their chance of

No. 439. July 1. 1829.

establishing his right to the Cappel Linl his name in any action for this purpose a ness, provided they were to bear the exp

The Lord Ordinary decerned in the assoilzied him from that at the instance the Court adhered, with this qualificati to lend his name to the tenants to sue recovery of the ground in dispute, reser on whom the expense of the action agai

Lord Cringletie. — Where subjects a there must be a question as to what is incl Anderson, who was Mr. Fraser's agent, and course have been quite acquainted with the has decided without proof; but that is not ness were in possession at the time the lea known to be disputed. There was anothe and when we thus see the other piece at t parties, and known to be disputed when cannot hold that the warrandice in the leas to Fraser, they were to get it. Then this is twenty years, which they account for beca tween Duff and the Magistrates of Inverne only shows they never understood it to be i ed by the warrandice.

Lord Glenlee.—In so far as regards tenants claim to have the rent reduced, and fo and it does not decidedly say any thing as can make out that Fraser has a true right of the thing really stands as Lord Cringletie belonged to Fraser. But still the land wa titles; and I have no doubt, if the landl people will have a right to it. But this g the question of expenses will depend on h think the landlord would be liable in the is no reason, however, why the landlord i rent, nor for foreclosing the tenants fron name, reserving the question as to the ex

Lord Justice-Clerk and Lord Pi

J. Anderson

No. 440.

Stewart, Pursu
Lumsden, Defe

Cessio. — Held necessary in a process of ce abroad; and not sufficient to cite his mandat joint names.

July 2. 1829.

1st Division.

When this case was called,

Marshall objected that Lumsden been cited.

A. M'Neill answered, that the diligence had been raised and executed in name of Lumsden and his mandatory; that Lumsden was abroad when the pursuer executed his summons, and that the mandatory had been duly cited. No. 440. July 2. 1829.

The Court, however, held it necessary to cite the creditor himself, and delayed the case till this should be done.

J. Pattison, Agent.

ALEX. DUNCAN and Others, Suspenders.—*Cuninghame—Hopkirk.* No. 441.
JOHN FORBES, Charger.—*H. Bruce.*

Triennial Prescription.—1.—A party having brought an action against the joint owners of a vessel for furnishings made to it on the employment of the ship's-husband who was also a joint owner, and who was called pro forma, but did not make appearance; and the other owners having pleaded the triennial prescription, and stated that they were ignorant as to the furnishings, but not having alleged payment—Held that they were not bound to confess or deny the subsistence of the debt, and that resting-owing could only be proved by the writ or oath of the owners;—and,—2.—Question raised, whether a reference to the oath of a ship's-husband be competent to elide the triennial prescription in an action against the owners.

JOHN FORBES, a ropemaker in Buckie, raised an action, in November 1827, against Duncan and others, and also against Alexander Jameson, as joint owners of the sloop Neptune of Yarmouth, before the Judge Admiral, concluding for payment of an account of £71, ending on the 8th of April 1824, for furnishings which he alleged he had made to the sloop on the order of Jameson, the managing owner and ship's-husband. No appearance was made by Jameson; but Duncan and the other owners stated that they were ignorant of the debt, denied its existence, and pleaded the triennial prescription. July 2. 1829. 1ST DIVISION. Admiralty. D.

To this Forbes answered, that as the furnishings were made on the order of Jameson, a joint owner and ship's-husband at the time, and payment was not alleged, the plea of prescription was irrelevant; but at all events, he was ready to refer to the oath of Jameson. On the other hand, Duncan &c. stated certain special circumstances which they alleged disqualified Jameson, and particularly that he had an interest to have them subjected in payment to Forbes, with whom he had entered into a transaction under which he had got a discharge, and that a reference to his oath was incompetent. The Judge Admiral found "it alleged by the pursuer, and not denied by the defenders, that they are part-owners of the Neptune, on account of which the furnishings are alleged to have been made; repelled the plea of prescription maintained by the defenders, in respect they do not allege that they, or either of them, made payment of the furnishings in question, but found that the offer of the pursuer to prove resting-owing by the oath of the defender Jameson, especially in the particular circumstances in which he stands, is not a competent mode of proof against the defenders; appointed the defenders to give in a minute, and therein to confess or deny whether the furnishings were made or not to the vessel; and if they acknowledge they were made, to state

No. 441.
July 2. 1829.

whether they allege that payment of th
the writings in process." Duncan and
clining either to confess or deny; and de
pronounced against them, with expense
pension, in which they contended, that a
a presumption either that the claim had
now extinguished, and as that presumpti
referring both the constitution and the s
or oath of the party against whom the c
petent to ordain them to confess or deny
other party than themselves. Forbes,
that the plea of prescription necessarily
stitution of the debt, and that the sole p
the debt had been paid or not; but tha
prove both the constitution and subsiste
to refer the libel to the oaths of the par
tion of the debt to Jameson, and its sul
others. In support of this propositior
husband is empowered to enter into
vessel which bind his owners, it was
his oath in a question with his constit
titled to refer to the oath of Jameson,

The case having been reported by th

The LORD PRESIDENT observed that it
matter of a reference, and refer the consti
the subsistence to another.

LORD CRAIGIE.—But there are many
question with a constituent, refer to the
that constituent. Thus, in the instance
who is preposita negotiis domesticis, such
to subjects that fall properly within her
servant having a peculiar department und
may sometimes be competent in regard t
ment entered into with him for behoof of
an old case where a man of high station
of an account for horse-furniture provid
with his master of horse.*

LORD GILLIES.—It admits of no dispu
owners for furnishings to the vessel. An
of others, whether in relation to a ship
ployers. But there is another question
suspenders' plea of prescription; and I

* It is supposed his Lordship referred to Guth
(11101 and 12485,) the title of which is, "an ac
incurred by a nobleman deceased, held to be pre
of horse." It does not appear from the report t

No. 441.
July 2. 1829.

servant, acting for his master, has contracted a debt, upon which prescription has run, it is competent to prove resting-owing by reference to the oath of that servant. In a case in which I was counsel,* it was held incompetent for the pursuer, a grocer, to prove resting-owing of a prescribed account for tea and sugar &c. by the oath of the housekeeper of the party for whom they had been ordered, although the housekeeper was the sister of the party, and had contracted with the grocer. In that case the decision now referred to by Lord Craigie was quoted and founded on, but it was in support of the plea of the defender, who successfully resisted the competency of referring to the housekeeper's oath. In all these questions we must attend to the words of the statute, which makes the only reference that can elide prescription to be to the oath of the 'party.' But the use of that word does not raise any difficulty in the case before us; for Jameson is himself a defender in the action, and, besides being ship's-husband, he is also a joint owner. He is therefore truly a party; and the only difficulty that occurs is, whether his conduct and situation do not disqualify him. But as the account libelled is ex facie prescribed, the interlocutor of the Judge Admiral is erroneous in giving no effect to the plea of prescription, and there should be a remit to recall that judgment, to find the account prescribed, and that resting-owing can only be proved by writ or oath of the suspenders.

The other Judges having acquiesced in this suggestion—

Cuninghame, for the suspenders, moved that the judgment should be so expressed as to remit to refer "both the constitution and the subsistence of the debt," and stated that Jameson was truly no party, because he had been discharged by Forbes, with whom he was acting in collusion.

But the Court observed that the statutory subject of reference was "resting owing," and refused to insert the words in the interlocutor; and that if the suspenders could prove that Jameson was no party, a reference to his oath would no longer be competent; but that point, and the question of alleged collusion, did not call for decision by the Court at this stage.

Their Lordships accordingly 'recalled the interlocutors of the Judge Admiral complained of, and sustained the plea of prescription; but remitted the process to the Judge Admiral to allow the pursuer still to prove resting and owing by a reference to the oaths of all the defenders in common form, and to proceed accordingly; reserving the consideration of the question of expenses incurred before the Court of Admiralty and this Court to the Judge Admiral until the final issue of the cause.'

Suspenders' Authorities.—1579, c. 83; 3. Ersk. 7. 18; Tait's Evid. 58; 1. Bell, 504; Cochran, July 22. 1748, (6018); Paterson, Jan. 23. 1771, (12485); Young &c., Dec. 2. 1802, (12486.)

A. Duff, W. S.—R. White, W. S.—Agents.

* The case alluded to by his Lordship is Gilmour v. Stewart's Representatives, June 20. 1797, (12042.)

No. 442. STEWART JOLLIE, Advocator.—
FRANCIS GRAHAM, Respo

Landlord and Tenant—Interest.—1.—How far for remuneration by a tenant under a clause in his est due on the amount of meliorations stipulated to the date of its expiry.

July 2. 1829.
2D DIVISION.
Ld. Cringletie.
T.

AFTER the judgment pronounced in p. 236, (which see,) the parties stated were satisfied with the proof as to the su farm, and their value, contained in the r already in process. Of these inspector court and straw yard was too small, and be made what it ought to be, without buildings, and rebuilding them accordin other five were agreed that the buildi farm, with the exception of the dwelli which, however, they only considered placed in an inconvenient situation; an wall, which they thought not sufficie The Lord Ordinary decerned in favou of the whole buildings over the original sum of rent due to Graham; and his L expenses to which it is unnecessary to interlocutor Jollie reclaimed, so far as as to the matter of expenses; while Gra rally, but, at the advising, confined his been allowed to Jollie, viz. £43 for the

THE COURT allowed Jollie interest adhered to the Lord Ordinary's interlo

LORD CRINGLETIE.—The claim for inte be allowed; but otherwise the interlocuto to the charge for the garden-wall that it i plea of the landlord having been that the the farm.

The other Judges agreed.

R. BURNETT, W. S.—J.

No. 443. JAMES BURGESS, Advoc
BUCK and COMPANY, Responden

Principal and Agent.—Observed, that an age renders himself personally liable for the price.

No. 443.
July 2. 1829.
2d Division.
Ld. Cringletie.
F.

This was an advocation brought by Burgess of an action against him before the Magistrates of Aberdeen at the instance of Buck and Company, shoemakers there, for payment of an account of shoes said to have been furnished on his order. In defence, Burgess pleaded that the shoes were in fact furnished on an order transmitted to him by one Argo in Nova Scotia, and by him transferred to Buck and Company, who made the furnishings on the faith of Argo alone. The Magistrates, after allowing a proof, decerned against Burgess; and the Lord Ordinary and the Court, being satisfied that his defence was not well founded in point of fact, remitted simpliciter.

Lord Pitmilly observed that, independent of the failure on the part of Burgess to prove the facts averred by him, he, as agent ordering goods for a person abroad, necessarily rendered himself personally liable for the price.

G. Monro, S. S. C.—Gordon and Burnet, W. S.—Agents.

No. 444.

A. Clark, Pursuer.—*D. F. Jeffrey—J. Wilson jun.*
William Mather, Defender.—*P. Robertson.*

Cessio.—1.—Incompetent to recall a decree of cessio in absence, if it has been regularly obtained.—2.—Circumstances under which regular intimation of the lodging of a reclaiming note in a process of cessio was held to be proved.

July 3. 1829.
1st Division.
S.

In May 1828 the Court refused the benefit of the cessio to Clark in hoc statu; and, on the 3d of June 1829, he boxed a reclaiming note, which appeared in the summar roll on the 9th. No appearance being made for the creditors, the Court found Clark entitled to the cessio; and on the 10th he took the oath &c., and decree was pronounced in his favour. In a few days thereafter, Mather, the opposing creditor, presented a reclaiming note to the Court, for the purpose of having the decree recalled as irregularly obtained, and alleged that he had never received intimation of the lodging of Clark's reclaiming note. In support of his note he maintained, that in terms of A. S. Nov. 20. 1740, he should have received at least twenty-two hours notice before the diet of moving the pursuer's note, and that there should have been entered on the pursuer's note, when lodged with the Clerk of Court, a writing, subscribed by the person who alleged that he gave the notice, expressing the time when, and the person to whom he gave it, &c.; that no such notice was on the pursuer's principal note, and as the actual receipt of intimation was positively denied, it at least lay with the other party to prove it, failing which, he was entitled to insist on the recall of the decree as having been improperly obtained. Clark, on the other hand, admitted that there had been no certificate of intimation lodged with his reclaiming note; but he averred that his agent had intimated the lodging of the note, in evidence of which he produced a copy of a card of intimation, dated the 3d of June, by his agent to the agent of Mather, a certificate of its delivery signed both by his agent and by the clerk who delivered it, and

No. 444.
July 3. 1829.

produced his agent's letter-book, where i
amination, that the card of intimation h
date it bore; and he offered to prove by t
the card, and by the oath of his cler
livered it.

The case was thus far proceeded in, w
that the want of the entry on the record
of intimation on the pursuer, the case
the pursuer's agent was ordered to atte
appeared, and stated that he had seen th
of intimation to the defender's agent of
self, on the same day, had booked and c
believed a servant) at the house of the
certificate was a true one. The defend
oaths of both his agent and of his cle
Court, that no such card had been th
the pursuer's agent. But the Court, c
scarcely speak to the clerk's identity, a
of intimation from the apparent regul
statement by the clerk, refused the pray

Pursuer's Authorities.—Smith v. Hart, June
v. Craig and Co., Feb. 1. 1828, (ante, Vol. IV. p.

No. 445.

MRS. I. CAMPBELL OF MACDONALD, MACDONALD'S TRUSTEES, Defenders

Heritable Security—Accession to Trust.—1.—lands, and precept to infeft therein, constitutes a tive words in the bond.—2.—Not to be held acce against the truster, and over the lands in posses them, obtains a decree against them, and charges

July 3. 1829.

2D DIVISION.
Ld. Mackenzie.
F.

THE late Colin Macdonald of Bois with his first wife, settled the estate of riage. On the death of this lady, he Campbell, on whom, by contract of n £50, subsequently increased by him t personal bond of annuity, declaring th able on the heir succeeding to the e Macdonald died, leaving a trust-deed, trustees for various purposes, and, int of such annuity and provisions as I Campbell, my wife, as affecting the sa

The trustees were infeft on this cor ther with Alexander Macdonald, the

No. 445.
July 3. 1829.

heir in the estate of Boisdale, executed a bond of corroboration and annuity, whereby they bound themselves as trustees, and Alexander Macdonald bound himself, his heirs and successors, in further corroboration of the personal bond granted by the deceased, to make payment of the annuity of £150, and to infeft and seise the pursuer in this annuity upliftable out of the lands of Boisdale, and in the lands themselves for her further security. The bond, however, contained no disposition of the lands in security, but merely an obligation to infeft, and a precept of sasine, in virtue of which infeftment was taken in favour of the pursuer in the annuity out of the lands, and in the lands themselves in security.

In 1812 Colin Macdonald's trustees denuded of the trust, and conveyed the estate to Alexander, there being no reservation of the pursuer's annuity inserted in the titles. Alexander Macdonald having contracted considerable debt, and granted some heritable bonds over the property, executed, in 1818, a trust-deed in favour of the defenders for behoof of his creditors. Alexander Macdonald died shortly afterwards; but the defenders were infeft under the trust-conveyance, and the greater part of the creditors, both heritable and moveable, acceded to the trust. The pursuer's annuity not being regularly paid, she raised an action of mails and duties against Alexander's trustees and the tenants, and she also raised a summons of multiplepoinding in name of the tenants. In these processes, defences and objections were given in by the trustees, who pleaded,

1. That the pursuer had acceded to the trust; but of this the only evidence founded on was, that she had claimed payment of the annuity from the trustees, obtained a decree against them, and given them a charge of horning.

2. That the bond in favour of the pursuer, containing no dispositive words, was ineffectual to constitute her a real right.

3. That at all events she could not compete with trustees and heritable creditors infeft, on titles making no mention of her right as a burden on the lands; and,

4. As to the multiplepoinding, that the pursuer had not only no title to raise it, but there was no double distress; and that as the question at issue was in dependence in the action of mails and duties, it was incompetent to bring also a multiplepoinding to try the same matter.

The Lord Ordinary conjoined the processes, repelled the objections to the multiplepoinding, and ordained the pursuer to give in a state of the rents for which he craved decree, adding the subjoined note.*

* "1. It is the past question that an infeftment of an annual rent out of land is a competent and valid conveyance of real right; therefore it could be of no relevancy, even if there were no infeftment in the lands contained in the pursuer's security.

"2. Stair says that precepts 'either simple, or bearing secundum chartam conficiendam, are sufficient, although these charters never be granted'—i. e. sufficient to create right of feudal property; and a fortiori these must be sufficient to convey a real right of annual rent.

No. 445. The trustees reclaimed; but the Cou

July 3. 1829. LORD CRINGLETIE. — There can be noth heritable security. The form is in our style- resignation may be necessary when it is inter when it is intended to be held under the gra we have here; and it is clear that the pursu has acceded. Instead of acceding, she give pay the money.

The other Judges concurred.

RUSSELL and COWAN, W. S.—H. M

No. 446. W. A. FLOWERDEW, Advocator.— MRS. G. BOYACK or FOREMAN, R

July 3. 1829. 2D DIVISION. Ld. Mackenzie. R. *Expenses.*—In an advocation of an account by Flowerdew, a writer, agai denied her employment of him, the L ment proved, and decerned for the amo did not find him entitled to his expens allowed him his expenses, subject to m

RITCHIE and MILLER, S. S. C.—

No. 447. ROBERT THOMAS, Pursuer.- WALKER'S TRUSTEES, Defe

Trust—Factory.—Circumstances under which made by their factor under general powers, of par

July 4. 1829. 1ST DIVISION. Lord Newton. S. THE late William Walker, builde causâ, his estates, heritable and mov more place, to the Rev. John John veyor, and Thomas Corbet, writer, same, publicly or privately, as the price, grant dispositions, &c. They

---

Mere want of formal dispositive words, therefore, ance even of lands having precept of sasine and conveyance of an annual rent out of lands. A annual rents without the use of such words (just isted without question from an ancient period do

"3. The Lord Ordinary does not think enough that this lady acceded to the trust, so as to give into a claim on the trustees. Considering the truster's own maintenance in the first place, and able on the estate, to do this required something to the Lord Ordinary, than her making claims or mitted (as she thought) with the rents out of w trustees themselves seem to have und[illegible]od.- 1827."

No. 447.
July 4. 1829.

a factor, either of their own number, or other fit person, for uplifting the rents of my said subjects, principal sums, and annual rents of the subjects hereby disponed, and whole other subjects of the said trust, and from time to time to employ the same, and the prices and proceeds of the said trust-estate, upon such securities, real or personal, as they shall think fit," &c.; and each trustee was declared liable for his own intromissions only.

The trustees obtained themselves infeft, and granted a factory (Jan. 25. and Feb. 5. 1810) to their co-trustee Corbet, on the narrative that they could not personally manage and execute the trust, with full power to him "to grant, subscribe, and deliver all rights, conveyances, and other deeds necessary and expedient in the course of the management and execution of the said trust, and generally with power to him to transact, and do every thing in relation to the execution of the said trust which we or either of us could do ourselves, if personally present, or that any other factor or commissioner could lawfully do in the premises." Corbet was further empowered to sue for, uplift, and discharge all debts and sums conveyed under the trust; to compound and transact all claims thereanent; and a power was given him "to do, use, and exercise all and sundry other things in relation to the management and full execution of the said trust, which we, as trustees foresaid, could do, if personally present; promising hereby to ratify and confirm all and whatever things the said T. Corbet, as our factor, lawfully does, or causes to be done, in the premises." On the 2d of April 1810, Corbet, "as factor for the trustees," sold the house in Gilmore place to the late Charles Walker, by holograph missives, for £630, in which it was stipulated that the price was to be paid to Corbet as factor, or to the trustees, and the missives to be binding on them. Charles Walker, in 1811, sold the house to the pursuer Robert Thomas, also by holograph missives. In the mean time Corbet prepared a draft of a disposition by the trustees in favour of Charles Walker; but as no disposition had been actually granted, Charles Walker gave a mandate, addressed to Corbet, and which was written by him, authorizing the trustees to execute the disposition of the house in favour of Thomas. The price, it was alleged, had been paid in full by Thomas to Charles Walker, and by him to Corbet, and possession was taken by Thomas; but no disposition was granted to him. A dispute having afterwards occurred between the trustees and Corbet, and they having refused to implement the sale, Thomas brought an action to have them compelled to do so, and to grant a disposition in his favour; or otherwise to repay to him the £630 received by Corbet from Charles Walker, and £104 which he had expended on repairs and expenses. The trustees denied that they or Corbet had received the price of the house—that Corbet had any authority under his factory to sell the house—alleged that Charles Walker was deeply indebted to the estate, and maintained that Thomas, as his assignee,

No. 447.
July 4. 1829.

was liable to the objections pleadable ag
that as they had no funds, no person
them to make payment of any sum.
ferred to an account by Corbet, as fac
had debited himself with the price of th
Walker—maintained that the factory w
the sale, and alleged that the trustees h
bet (in evidence of which he produced
positions of houses which the trustees
narrative of a previous sale by Corbet a
a culpable delay of eight years had take
Corbet to account.

The Lord Ordinary found 'that Mr.
'vested in him to sell the subjects in
'between Mr. Corbet and Mr. Charles
'defenders;' but, before further answer,
'examine the accounts, and to report w
'in question was paid and accounted for

The trustees having reclaimed—

Baird contended that if Corbet sold t
alleged, he had exceeded his powers; tha
special power to sell heritage; that all
Corbet had no power to grant a disposi
pursuer chose to pay the price to him,
disposition, he did so at his own risk, and
a delay, come upon the defenders as pers
had lost all means of effectual relief again
tioned the transaction in question.

Dean of Faculty answered, that the fac
powers. Considering the respective profe
must always have been looked to, and w
the active trustee, and mandatory of the
effect the purposes of the trust, which we
estate into money; and accordingly the de
dispositions in implement of sales by Corb

Lord Gillies doubted whether the factory
Corbet to sell without the concurrence of the
disposed to concur in the Lord Ordinary's findi
that the trustees had recognised other sales
bring him to account, he thought they were
locutor, subject to an explanation, should be a

Lords President and Balgray thought
but as Lord Craigie concurred with Lord Gilli

Recall the Lord Ordinary's interlocutor reclaimed against; find that, in all the circumstances of the case, the sale by Mr. Corbet must be binding on the defenders, and cannot be objected to by the trustees; of new remit to Mr. R. Paul, accountant in Edinburgh, to examine the accounts in process, and to report whether the price of the subjects in question was paid and accounted for to the said Thomas Corbet by the said Charles Walker.'

No. 447.
July 4. 1829.

G. Todd jun.—N. W. Robertson,—Agents.

Alexander Mitchell, Suspender.—*J. Wilson jun.*
Patrick Taylor, Respondent.—*R. Dundas.*

No. 448.

Forgery.—This was a question of a special nature, as to passing a bill of suspension of a charge on a bill alleged to be forged. The Lord Ordinary refused the bill; and the Court, in respect of no caution, adhered.

July 4. 1829.
1st Division.
Lord Fullerton.
H.

D. Thomson jun. W. S.—J. Taylor,—Agents.

Alex. Cooper, Advocator.—*Skene—Cowan.*
Earl of Eglintoun's Trustees, Respondents.—*Jameson.*

No. 449.

Process—Record—Legal Diligence.—1.—A Sheriff Substitute having closed a record on petition and answers, "in respect the parties declined to hold them as their full and final statement of facts," the Court, under the special circumstances of the case, and at the request of both parties, and after obtaining an explanation from the Sheriff Depute, did not quash the proceedings.—2.—A party held barred by his own acts from objecting to the regularity of a warrant of sequestration.

Alexander Cooper of Failford, on the 14th and 16th of September 1826, poinded the effects of John M'Connel, tenant of a farm belonging to the trustees of the Earl of Eglintoun; and, on the 27th, presented a petition to the Sheriff of Ayrshire, praying for a warrant of sale. To this petition the trustees of the Earl of Eglintoun put in answers, stating that they had sequestrated the effects of M'Connel for an arrear of part of the rent of 1824, the whole rent of 1825, and for the current rent of 1826; and they maintained, that unless Cooper paid them the principal, interest, and expenses, so far as these rents were past due, and found caution for those which were current, he could not be permitted to sell under his poinding. Cooper then lodged a bond of caution for the current rent, and consigned the arrears; and, on the 31st of October, the Sheriff, "in respect of the bond of caution and consignation made, in the mean time granted warrant to sell" as much of the poinded effects as would satisfy the preferable rents and debt poinded for, "reserving the pleas and claims of all parties till the issue of this case." On the 21st of November Cooper presented an incidental petition, stating "that he had followed out the above warrant by selling the effects poinded on the 14th current, and, in

July 4. 1829.
1st Division.
Ld. Corehouse.
H.

No. 449.
July 4. 1829.

terms thereof, had reported the procee
Court; and having so satisfied the prop
of Whitsunday next (1827), he is clear
and grass, up to that term, and to cons
and to have the value of the dung whicl
&c.

On advising this petition, with answers
as a poinding creditor, and having paid
up to Whitsunday next, is entitled to s
farm up to that term; granted warrant
ingly, he being always bound to consu
and to implement the whole obligations i
lease;" allowed him accommodation in
der, and for servants to attend to the c
the ground, &c. Under this interlocutor
farm.

At this time the process consisted of th
the incidental petition; and, on the 16t
Substitute ordained parties to say whethe
record; and both parties having stated t
pleadings as containing their full and final
Substitute, on the 6th of February, "in r
their pleadings in this case as containing
of facts," declared the record closed; and
the respondents, as competing with a poi
the arrears of rent for 1824, but only the
rent rent of 1826, ordered the sum consig
1825 to be paid to them, and Cooper's bo
out for execution.

To prevent diligence under the bond,
rent of 1826, under protest that he reser
interlocutor; and he then advocated the
contended, inter alia,

1. That although the parties had declin
containing their full and final statement
closed the record; and therefore, if the wh
to the Sheriff, he was at least entitled to
Court.

2. That the sequestration of the effects f
gular, because it had been executed, not b
messenger at arms, and therefore could n
although this plea was not stated in the Ini
all other pleas, was reserved by the interlo
1826; and it was under this qualification th
farm, and disposed of the effects.

No. 449.
July 4. 1829.

To these reasons it was answered,

1. That the true meaning of the parties' declinature to close the record was merely to throw the burden of doing so upon the Sheriff, who accordingly did so without any objection being made, and that this was agreeable to the practice of his Court; and that, at any rate, if there were any irregularity, it was cured by making up an amended record in this Court, as to the propriety of which both parties were agreed.

2. That a messenger at arms could execute the Sheriff's warrant of sequestration, and that such was the practice of the country; and, at all events, the objection was now too late; and the advocator had himself carried on a sale to satisfy the preferable rents under the landlord's sequestration, and also for his own poinded debt, so that he could not now object to the validity of a sequestration which he had so recognised, and in virtue of the proceedings under which he had been allowed to enter and possess M'Connel's farm till Whitsunday 1827.

The Lord Ordinary, after a new record had been closed on reasons of advocation and answers, remitted simpliciter to the Sheriff, and found the respondents entitled to expenses. His Lordship, at the same time, issued the subjoined note.*

Cooper then reclaimed, and was proceeding to state the merits of his case, when

The Lord President called the attention of the Court to the irregularity in closing the record in the Sheriff Court. Both parties had positively declined to close it, and at that time the case stood upon petition and answers. The Sheriff should therefore have ordered condescendence and answers.

Both the advocator and respondents now stated to the Court, that their declinature to close the record in the Court below had merely been to devolve that duty upon the Sheriff, and that it had been done by him, conform to the practice of his Court—that they had acquiesced—and

* "The advocator, as a poinding creditor, had no right to interfere with the effects sequestrated by the landlord, and to take the management of the sale, unless he had previously satisfied the landlord for the current year's rent, and all arrears; far less was he entitled to enter into possession of the farm, and to consume the grass and fodder. The Sheriff, by granting the prayer of his petition, allowed him to do both, expressly on the ground that he had consigned the arrears, and found caution for the current year's rent. The reservation in the Sheriff's interlocutor of the 31st of October 1826 cannot therefore refer to the validity of the landlord's sequestration, but only to the amount of his claim of rent. The advocator understood the reservation in that sense; for, in his incidental petition of the 21st of November following, he states 'that appearance was made for the trustees of the Earl of Eglintoun, the proprietor, claiming the current rent of the farm, and a large sum of arrears, which the petitioner, in order to get his poinding carried into effect, in the mean time consigned and became bound for, reserving all and every objection to their claim of rent.' In that view, the advocator seems barred, personali exceptione, from pleading now that the landlord's diligence was informal, because it was executed by a messenger at arms, and that the amount of the goods sold did not equal the amount of the rents for which he became liable by his interference. If there was any defect in the mode of closing the record in the Inferior, it has been remedied in this Court."

No. 449.
July 4. 1829.

that, at all events, the record in the case in this Court, so as to remove any origina

LORD PRESIDENT.—The consent of p will not justify this irregularity. If it v supererogation in us to lay down forms o Nor does the Lord Ordinary's note remo a record may be amended here, so as to su to exist after the inferior record has been ability of the practitioners in the Court where so great an irregularity has been co case should be delayed for further consi checked, or slovenliness will get into the Court.

The case was accordingly postponed till pute was ordered to attend at the Bar. Lordships the copy of a letter which he h Substitute, for the express purpose of chec plained of, and assured their Lordships th entirely repressed. With this explanation t

The LORD PRESIDENT then observed, t stances of this case, they were unwilling to stage of it, and they might therefore proce defect in the record could not in future be

On the merits of the case their Lordshi the Lord Ordinary, and adhered.

G. M'CLELLAND, W. S.—TOD and H

No. 450.

JAMES HAMILTON, W. S. Complainer
DAVID TURNBULL, W. S. Respondent

Process—Law Agent.—No ground of complaint agai that he has not furnished the opposite agent with a num site for appending to a reclaiming note for the defender

July 4. 1829.
2D DIVISION.
T.

THIS was a complaint at the instance of ing for an award of damages against Mr. T pursuer in the case mentioned ante, No. 298 for not having furnished him with copies of his reclaiming note, whereby it was refused ble expense incurred in order to be reponed had originally been furnished with six copie Court; but he contended that it was the d furnish copies of the summons &c. for the J under the Act of Sederunt Feb. 7. 1810; a general boxed at the commencement of the nish them for the first reclaiming note. Tur

puting the obligation on the pursuer's agent to box copies for all the Judges, stated that in the present case Hamilton had neglected to furnish him with any copies of the defences; that two days prior to the box-day, when the reclaiming note was due, Hamilton applied to him for copies of the summons; that he declined giving any additional copies till he was furnished with six copies of the defences; and that next day, on receiving the copies of the defences, he gave in return six copies more of the summons, being twelve in all which he had furnished to the complainer.

No. 450.
July 4. 1829.

The Court dismissed the complaint, with expenses.

Lord Cringletie.—The Court have enough to do without such applications as this. The Act of Sederunt orders one copy of the summons to be boxed by the pursuer's agent for the Lord Ordinary who is to hear the cause; but I do not see where he is ordered to box 24 copies. If copies were improperly refused, Mr. Hamilton's business was to print them for his note, and then perhaps he might have claimed the expense from the other party. But what is here applied for is quite extravagant.

The other Judges agreed.

A. Hamilton, W. S.—D. Turnbull, W. S.—Agents.

Edward Robinson, Suspender.—*A. Wood.*
John Mitchell, Charger.—*Whigham.*

No. 451.

Apprentice.—Liberation of an apprentice who had been imprisoned under the 4th Geo. IV. c. 34, and 9th Geo. IV. c. 4, ordered in respect of the gross irregularity of the proceedings,—an objection to the jurisdiction being waived.

July 4. 1829.
2d Division.
Bill-Chamber.
Ld. Moncreiff.

The suspender Robinson was an apprentice with the charger Mitchell, cork-cutter in Glasgow. In April last, Mitchell presented to the ustices of Peace of the county of Lanark a petition, under the 4th eo. IV., which set forth that Robinson had for some time past been in e use of absenting himself from work without leave, refusing to obey rders, and giving insolent language when desired to do his duty, and rayed for infliction of the penalties authorized by the above-mentioned atute, which empowers any Justice of Peace, on complaint upon oath r the master of an apprentice for misconduct, to grant warrant for his prehension, and, on examination &c., to punish him by abatement of ages, and commitment to the house of correction for a period not exeding three months. Mitchell made the necessary oath; and Robinson, ving been brought up for examination, confessed his misconduct as eged by Mitchell, who thereupon consented to suspend judgment; d the Justice accordingly, on the 11th of April, pronounced an interutor suspending judgment for an indefinite period, the day being left nk. On the 5th of June Mitchell gave in a minute, stating that binson had become worse and worse, and had two days previously isted in the army, and been attested by a Justice of the Peace, to om he had stated that he was not an apprentice, and craving warrant apprehension and examination of Robinson, and for his committal to

No. 451.
July 4. 1829.

the house of correction for two years, ur
Act for the year,) which, inter alia, e
bound as an apprentice shall enlist as a s
and shall state to the Justices of the P
shall be carried that he is not an appren
and being thereof duly convicted, shall
subject and liable to be imprisoned in an
kept to hard labour for two years, and
obtaining money under false pretences,"
resumed consideration of this case, wi
granted warrant to apprehend Robinso
ation. Robinson, having been accord
" that since his last examination he l
havèd himself as he should have done
day of June current, he enlisted in the
attested by James Wingate, Esq. Ju
Lanark, on the day following." On t
the same who had attested him) fou
Robinson has admitted that he has ne
enlisted during the currency of his appr
warrant for committing him to Bridwe
was accordingly committed; but he in
pension and liberation, on the ground
on the original complaint, was quite ill
founded on, which only authorized imp
that if the Justice had proceeded on
minute, the whole procedure was gross

The Lord Ordinary having report
objected by Mitchell that the bill was
Session, the warrant under the Muti
warrant.

Lord Justice-Clerk. — It is clear t
are of a criminal nature, but still I think
garding them; and I must say that I nev
lar, and contrary to all justice. It is clea
be brought under this clause in the Muti
the verdict of a Jury, and of stating h
apprentice; for that is the offence, and n
it be incompetent for us here to give r
state my opinion.

Lord Glenlee. — I was disposed to
before us, was under the original petition
judge of it; and then it is clear that th
think we should order liberation.

Whigham, for Mitchell, on hearing the
sent to liberation being granted.

THE COURT, on this, in respect of the objection to the competency being waived, and of consent, ordered liberation, and passed the bill. * No. 451. July 7. 1829.

P. DUDGEON, W. S.—J. MACANDREW, S. S. C.—Agents.

LORD MEDWYN and JOHN CUNINGHAME, Petitioners.—*Jameson—Anderson—Forbes.* No. 452.

DAVID DICKSON, &c. Respondents.—*Sol.-Gen. Hope—Pyper.*

Interim Execution pending Appeal.—Competent to award interim execution as to expenses, which, though found generally due, had neither been taxed nor decerned for prior to appeal.

July 7. 1829. 1ST DIVISION. D.

THE COURT, by their judgment pronounced on the 3d of March last, (see ante, p. 503,) found "the pursuers (Dickson &c.) liable to the defenders (Lord Medwyn &c.) in expenses, appointed accounts thereof to be given in, and remitted the accounts, when lodged, to the Auditor to tax the same, and to report." The accounts were not lodged till after Dickson &c. the pursuers had entered an appeal to the House of Lords; and Lord Medwyn &c. then presented a petition, praying for interim execution as to the expenses, and that for that purpse a remit should be made to the Auditor.

The Solicitor-General, for the Respondents, objected that it was incompetent for the Court to grant the prayer of this petition. The process to which the expenses related, was now in another Court. Unless the sum of expenses has been taxed and decerned for in this Court prior to appeal, it is incompetent, under a petition for interim execution, to move the Court to take any proceedings in the original cause, and pronounce, for the first time, an entirely new decerniture.

Jameson, for the Petitioners, stated that this objection had often been made and overruled. The practice of the Court was clearly with the defenders, in evidence of which he referred to a note to the form of petition in the last edition of the Juridical Styles, Vol. III. p. 881.

Solicitor-General.—The appeal has entirely removed the original process out of this Court. Any subsequent procedure must commence under, and be founded on, the new petition for interim execution. The very term interim execution implies that it extends only to such decrees as would be ready for execution, were it not for the interruption of the appeal. The Court cannot go back and resume an unexhausted part of the original cause.

LORD PRESIDENT.—But were not these expenses decerned for by us prior to appeal?

Solicitor-General.—Not decerned for. There was a general finding that expenses were due, but no decerniture for their amount; and there was

* "Next day, and after this interlocutor was signed, the counsel objected to it in so far as the bill was passed and it was stated that he had waived the objection of competency, but merely consented to liberatin; but the Court, holding that the consent to their ordinary lieration was necessarily a waiver of the objection, refused to allow any alteration.

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nothing extractable by the other party, i
to appeal.

Jameson.—But we now give in our acc
again to remit to the Auditor, and to r
whole of the procedure will thus take
terim execution, and not under the orig

THE COURT, before answer, then rei
his report was moved—

The Solicitor-General repeated the c
and, in support of it, referred to Go
(ante, Vol. I. No. 155); Brown, Dec. 2
and Stephenson's Trustees, July 3. 182

Jameson, on the other hand, conten
overruled by the decision M'Leod v. R

LORD CRAIGIE.—Had it not been fo
a difficulty in the case.

LORD PRESIDENT.—In the case of
had only been found due, subject to r
have the process here, to ascertain the a
could not be, when the process was un
previous judgment finding expenses d
them is our own act; and it is not a
remit was introduced. According to th
when an appeal was entered from a ju
protest for remeid of law to the Scottis
not stay execution; and, with great de
order of the House of Lords in 1709,
them should stop execution till the ap
the powers of that Court at the time,
submitted to. The late act, which pe
interim execution pending appeal, did
its old footing, and enable us to chec
in which the principal object is delay.
this petition.

LORD BALGRAY concurred.

LORD GILLIES observed, that the si
created from not attending to the pr
act not only gave power to this Court
to interim possession or execution," (
of the principal sum or subject in disp
regulate "the payment of costs or exp
to their sound discretion." Here the e
doubt, "already incurred;" and the C
as to their payment.

THE COURT accordingly granted the

CRANSTOUN and ANDERSON, W. S.—W. PATE

CHRISTIAN GILLIES and Others, Petitioners.—*Cuninghame.* No. 453.
D. SCOTT, W. S. Respondent.—*J. Wilson jun.*

Process—Judicial Sale.—1.—A petition under a private Act of Parliament for a warrant on a purchaser at a judicial sale having, with answers, been remitted to the Lord Ordinary to prepare the cause; and having depended before him for more than twelve months, without any step being taken—Held that the process did not fall asleep;—and,—2.—Where authority is granted by a private Act of Parliament to sell an estate for payment of debts, and, on a sufficient sum being realized for payment of the debts, to grant warrant on a purchaser, the Court will not grant it, unless there be clear evidence that there is a sufficient fund to pay all the debts.

July 7. 1829.
1ST DIVISION.
H.

IN 1814, Sir J. Gordon Sinclair of Murkle obtained an Act of Parliament for selling as much of his estate as would discharge the debts incurred by his predecessors before the entail of Murkle was recorded. These debts were ascertained to amount, independently of interest, to £15,987; and three lots were judicially sold for £17,421, two of which were purchased by Scott at the price of £8321, for which he granted a bond to make payment to such creditors as should obtain warrants to that effect from the Court. By the act it was declared, that after so much of the lands was sold as should be sufficient to discharge the debts, the Court should grant their warrant on the purchasers for payment to the creditors; that the purchaser should, under the decree of sale, have as good right to the lands, free of all encumbrances, as the purchaser at any judicial sale can have by the laws of Scotland; and that payment under a warrant of the Court should be an effectual discharge or acquittance to him. Gillies and others, who were creditors to the amount of £6179, then presented a petition to the Court for a warrant on Scott to pay to them as much of the price as would satisfy their debts; and they offered to execute a valid discharge of these debts. Answers were lodged by Scott, who objected that as the lots purchased by him were liable for the whole debts, he might be called on for payment by the other creditors. The petition and answers were remitted to the Lord Ordinary for preparation; and after some procedure before him, he reported the case. No step, however, had been taken for more than twelve months; and when the case came to be advised—

Wilson, for Scott, objected, that as more than twelve months had lapsed since the last step under the remit to the Lord Ordinary had been taken, the process had fallen asleep, and therefore it required to be wakened before further procedure.

But the Court, holding that as this was an Inner House process, and the remit to the Lord Ordinary was merely to prepare the cause, the process could not fall asleep, repelled the objection; and on the merits refused warrant in hoc statu, as there was not satisfactory evidence that there was a sufficient fund to pay all the debts, including interest.

D. DOUGLAS, W. S.—D. SCOTT, W. S.—Agents.

No. 454. CALDER and SONS, Complai
P. BORTHWICK, (for the NATIONAL I

Implied Discharge—Composition Contract.—Alth acceded to a private composition contract, and disc sist against an indorser for payment of a compositio of recovering the full debt.

July 7. 1829.

1ST DIVISION. Lord Newton. H.

CALDER and SONS, having been seque tion-contract with their creditors, under a dividend of 4s. 2d. per pound by th claims made upon their estate was one tional Bank, founded, inter alia, on a pr Company, and indorsed to the Bank by Company also became insolvent, and s private composition of 12s. per pound, charge having been given by the Bank of part of the last instalment, (the previ suspended, alleging that they were ignor hill and Company till recently; and c was liable to them in full payment, and on payment of a composition, no claim the composition, corresponding to the a Caverhill and Company.

To this it was answered, that Calder pany were joint and several debtors, fr entitled to recover the full debt; that t apply; that the two compositions amou and it was absurd to suppose that the charge their claim under the bill aga when they could recover 12s. more fron it was necessarily implied that they sho them.

The Lord Ordinary repelled the reas

G. TODD jun.—A. W. C

No. 455. CLAUD GIRDWOOD and Co., Con
JOHN CAMPBELL, Charger.—*Sc*

Proof—Statute.—Parole proof of usage allowed statute as to levying harbour dues.

July 7. 1829.

1ST DIVISION. Ld. Corehouse. S.

THIS was a question as to the constr ment, dated in 1708, relative to the lev Campbell on vessels entering the harbc to do so, Girdwood and Company pres grounds:—1. That his right to form a

No. 455.
July 7. 1829.

requiring the consent of three Justices of the Peace and the Sheriff; and, 2. That he was not entitled to levy dues on each occasion that a vessel entered the harbour, but only annually. The Court having passed the bill, (ante, Vol. IV. No. 35. p. 124,) and certain old witnesses having under their authority been examined, the Lord Ordinary, 'in respect the 'clause in the Act of Parliament with regard to the amount of the duties 'in question is ambiguously expressed, and may competently be explained 'by usage, and that various aged witnesses have been already examined 'on that subject by the authority of the Court, allows both parties a 'proof of their respective averments as to the possession had by the re- 'spondent and his predecessors of levying the said duties.'

Girdwood and Company reclaimed, and prayed the Court 'to find 'that it is incumbent on the charger, before he can be entitled to levy 'any duties under the Act of Parliament founded on, to prove that its 'conditions have been complied with; and that the harbour or quay in 'respect of which he attempts to levy duties, has been sanctioned by the 'three next Justices of the Peace and the Sheriff Principal of the shire, 'as the act directs; or at least to extend the proof allowed by the Lord 'Ordinary, and to allow to both parties, before answer, a proof of their 'respective allegations regarding the fulfilment or non-fulfilment of the 'foresaid conditions of the Act of Parliament, the state of the harbour 'in times past and at present, and the interruptions of levying or refusal 'to pay duties, and generally of all facts alleged on either side in the 'record.'

But the Court holding that if Campbell could show that he had levied dues for more than 40 years, it would be presumed that the requisite concurrence had been obtained, and that the interlocutor did not exclude a further proof, adhered.

Macmillan and Grant, W. S.—A. Connell, W. S.—Agents.

No. 456.

J. and J. Mitchell, Advocators.—*Sol.-Gen. Hope—Skene.*
Alexander Mein, (Wilson's Trustee,) Respondent.—*Keay—T. Maitland.*

Jurisdiction—Sequestration.—An Inferior Court has no jurisdiction to entertain an action against a trustee on an estate under sequestration for payment of a dividend alleged to be due to a creditor.

July 7. 1829.
1st Division.
Lord Newton.

The estates of John Wilson senior, grocer, Glasgow, were sequestrated in 1825, and Mein appointed trustee. J. and J. Mitchell claimed for two sums, one of £50, under deduction of £21 received to account, and another of £670, making their total claim £699. A scheme of division was made up, and subscribed by the commissioners, on the 7th of August 1825, in which a dividend of 1s. 3d. was allotted to Mitchells on the claim for £699; but the following minute was entered in the sederunt-book:—"The trustee next produced the ranking of Messrs. J. and

No. 456.
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J. Mitchell; and the meeting having exami
bankrupt's family, from which it appears th
threats, after the bankrupt had absconded, a
the creditors' behoof, compelled his daught
£21, are of opinion that the trustee ought
dividend to be paid Messrs. Mitchell."
scribed.

In the letter notifying to Mitchells that a
to them, Mein informed them of the abov
complain of it to the Court of Session, but
amount of their dividend before the Magistr

In defence Mein rested chiefly on the gr
not complained of the above resolution to
thirty days, it was final; and he stated th
balance, which he consigned. The Magist
decerned for the admitted balance, and four
Mitchells advocated; and Mein then conten
no jurisdiction over him in regard to a ques
was amenable only to the Court of Session,
utterly incompetent.

The Lord Ordinary repelled the reason
Mein entitled to expenses.

Mitchells having reclaimed—

Solicitor-General.—The minute by whic
is cut off, is not subscribed by the trustee
scheme of division is duly authenticated,
allotted to us. We are therefore not att
or judgment of the trustee under review,
case as if the deduction from the dividend
act of the trustee.

Lord Balgray. — A creditor has a rig
scheme of division, to recover his divid
clared, by an action against the trustee in

Solicitor-General.—If so, it is unnecess
the sole ground on which the Lord Or
incompetency of this action in the Burgh

Lord Gillies. — Is that point the
by us?

Solicitor-General and *Keay.*—Yes.

Keay, for the Trustee.—The minute f
structing the judicial acting of himself and
the bankrupt estate, is entered in the sec
officer of this Court; and is his method
process of sequestration, which is also a
judicial actings under that process, to be
Court to determine? In a late case, whi

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of pointing to the practice on this subject, (for it cannot be quoted as an authority,) Lord Corehouse dismissed, with expenses, as incompetent, an ordinary action that had been brought before him against a trustee for payment of a dividend; and, in consequence of that judgment, the pursuer has since raised a petition and complaint against the trustee, which is now in dependence.

Lord Gillies.—The sequestration of a bankrupt estate is a process in this Court. The trustee is an officer of this Court; so much so, that he must always have an authenticated copy of his sederunt-book here. I doubt how far he can, as trustee, be amenable to an Inferior Court.

Keay.—The Court will further observe, that under the statute the trustee has a right to obtain his expenses, and so protect the estate from loss in the event of any complaint against him being dismissed. If he be assailable by ordinary action in Inferior Courts, however unfounded, it will depend upon the discretion of the Judges there whether he shall be allowed his expenses.

The Court then ordered the sederunt-book to be produced; and, after taking time to consider—

Lord Balgray observed, that had this been a simple action for a sum of money from the trustee, as the admitted amount due under a dividend regularly declared, and free of all specialties, he would have held it competent before the Inferior Court. Parties were apt to push their argument too far in saying that the bankrupt estate was in custodia of this Court, and the trustee an officer of this Court. Undoubtedly he is summarily amenable to this Court; but he is the officer and the creature of the creditors. From the nature, however, of the pleas respectively maintained here, the trustee insisting on compensation, and founding on the authority of a minute by himself and the commissioners acting in their official capacity, which the other party challenges on the ground of its irregularity, and not being authenticated under the statute, I doubt how far these questions could competently be entertained by the Burgh Court, and therefore I am for adhering.

Lord President.—If the sequestration had been brought to a close, and the trustee discharged by this Court, after which a creditor had discovered that he had still a claim against him for an unpaid dividend, he might have enforced that claim by an ordinary action. But the action in this instance was incompetently brought.

Lord Gillies.—I concur with the Lord President. The trustee, though chosen by the creditors, is summarily amenable to this Court for his actings in relation to those powers with which he is officially vested under the Bankrupt Act. Pending a sequestration, he cannot be called on to answer for his administration of the sequestrated estate in any Court inferior to this. The creditors at large have a strong and just interest to maintain this, because, in complaints under the statute, if these be unfounded, the trustee has a statutory right to his expenses, which would be lost if he could be called to account in this manner in an ordinary action.

The Court adhered.

J. Cullen, W. S.—C. Fisher,—Agents.

No. 457.

HON. HENRY D. ERSKINE and Ot
JOHN FRANCIS MILLER ERSKINE EA

Entail—Provisions to Children.—An heir of en
in shape of annuities, and also principal sums to
entail; and the children having brought an action
the process having been transferred against his su
the bygone annuity and interests, as well as those

July 7. 1829.

1ST DIVISION.
Ld. Newton.
H.

BY the entail of the estate of M
Thomas Lord Erskine, and the other
younger children to reasonable provi
bonds of provision to be granted by th
the other heirs of tailzie above menti
any apprising or adjudication, or any
deduced thereupon, shall only subsist
sums, annual rents, and expenses, but
diligences shall never expire."

On the 11th of May 1816, the lat
heir of entail in possession, executed, i
of provision in favour of the pursuers,
bound himself, and the heirs succeeding
them a certain annuity, and also certa
Whitsunday or Martinmas after his de
Thomas Earl of Mar, against whom th
stituting the provisions. No adjudicati
taken, to make them real on the estate
process the Earl died, and was succeed
defender, against whom the action was
the provisions did not exceed three y
that the Earl died insolvent.

The Lord Ordinary having decern
expenses, the defender reclaimed.

Murray for the Defender. — The
either of the preceding Earls, except
never made real against the estate; s
liable in payment of the annuities from
session, he cannot be found liable for
bygone interest.

Rutherfurd for the Pursuers. — T
power in the entail. They are theref
debts, and every heir who succeeds is
the succession. He is in a position s
beneficio, and must be liable for the by
sides, this action was raised against
against the present defender.

[illegible] adhered.

CAPTAIN J. MACDONELL, Pursuer.—*Keay.* No. 458.
MRS. HELEN RANKIN, Defender.—*Jameson—Macdonald.*

Cautioner.—Process against a principal and his cautioner sisted till the principal against whom decree in absence had been pronounced was discussed; and, on his being charged, decree given against the cautioner.

ACTION by Captain Macdonell against Donald Rankin as principal, and Mrs. Rankin as representing her deceased husband Angus Rankin, Donald's brother, as cautioner, for payment of sums advanced by Captain Macdonell to Donald Rankin, on the guarantee of Angus. No appearance was made for Donald Rankin, and the Lord Ordinary accordingly decerned against him in absence; and thereafter, on hearing parties, likewise decerned against Mrs. Rankin. She having reclaimed, the Court sisted procedure till Donald should be discussed; and he having been charged accordingly, the Court refused her reclaiming note.

July 7. 1829.
2D DIVISION.
Lord Medwyn.
F.

D. STEWART,—COLL M'DONALD, W. S.—Agents.

SIR WILLIAM F. ELIOTT, Pursuer.—*Keay—R. Bell.* No. 459.
EARL of MINTO, Defender.—*Sol.-Gen. Hope—Cockburn—Whigham.*

Testament—Clause—Legacy.—A party having executed an entail, and a relative trust-deed for payment of his debts, declaring that his heirs and executors should be liable to relieve the heir of entail of debts; and having, in a supplementary trust, excepted his funds and estate in England from the operation of the trust, and declared an intention that the debts should be paid out of the rents of the entailed estate and funds falling under the trust; and having thereafter, by an English will, among certain special legacies, left to an individual "all my books, and whatever other property and effects I may die possessed of in England"—Held that this individual was entitled to take the effects falling under this bequest, without relieving the heir of entail.

THE late Right Hon. William Eliott of Wells executed, in 1806, an entail of his whole estates in Scotland, containing, inter alia, this clause:—"I hereby bind and oblige me and my heirs at law, and my executors and successors, to free and relieve the said lands, and the heirs of tailzie who shall succeed thereto, of all debts to which I shall be liable at the time of my death." A power of revocation was also reserved to the entailer, but "only by an express writing under his hand." Of the same date Mr. Eliott executed a trust-conveyance of the entailed lands, and of all his other property and funds wherever situated, in favour of certain trustees; the object of which was to pay off the debts affecting the lands he had entailed, gradually, by the appropriation of the rents, without selling any part of them. This, however, the trustees were empowered to do, if they found that the debts could not be paid off by the surplus rents. In 1809 Mr. Eliott executed a supplementary trust-deed, which, after repeating "his most anxious wish and desire" that the debts and legacies might be gradually "satisfied and extinguished out of the rents and profits of my said entailed estate, and any other funds falling under

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2D DIVISION.
Lord Medwyn.
F.

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the said trust," without a sale of any par
be avoided, he proceeds :—" And where
and effects situated in England, which l
English form, therefore I do hereby dec
by me, and unrevoked at my death, sha
and effects situated in England, so far
bequeathed; and the same shall not be h
my foresaid trust-deed." Accordingly, i
was executed by Mr. Eliott, in which,
china, pictures, &c. there follows this cla
soever other property and effects I ma
give and bequeath unto the Right Hon
dition of paying certain legacies; " ar
Gilbert Earl of Minto, and Ambrose (
will and testament; and I also confirm
already made of my Scotch estate, and
Great Britain called Scotland."

In virtue of this bequest, Lord Mint
Mr. Eliott's house in England, said by
£7000,—and also some money in his ba
cient to pay the special legacies with
His Lordship also contended that he
quest, to a sum of £15,000, being par
Scotland, included in the entail, which
self, who caused the part of the price al
to London for the purpose of paying
Scotch estate, but who had died before
rise to a litigation between Lord Minto
entitled to succeed to the entailed estat
successful, (see ante, Vol. II. No. 166,
Vol. I. p. 678); and Sir William now
present action, to have it found that Lo
the universitas of the English estate, wa
to the extent of the succession, of all del
virtue of the clause in the entail whereb
executors generally to free and relieve
entail of all his debts; and he contende
decided in the former case by the absolv
clusions of his Lordship's summons.

In defence against this action, Lord

1. That, by the supplementary trust
liable to relieve the entailed estate were
property was expressly excepted from t

2. That the bequest in the English
the gift of an universitas; and that the

affirmed in the House of Lords, did not proceed on the assumption that he was a residuary legatee, liable to relieve the heir of entail. No. 459. July 7, 1829.

The Lord Ordinary having reported the cause on Cases, the Court assoilzied Lord Minto.

Lord Cringletie.—I do not entertain a doubt that the question in the former case was quite different from this. It is true that, under Mr. Eliott's two first deeds, the personalty was made the principal debtor; and had these remained unaltered, this question could not have arisen. But Mr. Eliott executed a supplementary deed in 1809, which is of the utmost importance. As the second purpose of this supplementary trust, Mr. Eliott expresses his will that the debts be discharged by the surplus rents, if possible, and out of the *other funds of the trust*. Then it is necessary to see what are the funds under the trust; and nothing can be more explicit, than that he meant to withdraw the English funds from the trust, and that they were not to be applied to payment of the debts. Then comes the will, in which he conveys these effects to Lord Minto. We cannot, in this question inter hæredes, hold that these funds are applicable to the payment of the debts on the entailed estate, so long as the rents of the estate are available. I am therefore for assoilzieing Lord Minto in so far as applies to these funds.

Lord Justice-Clerk.—I have formed as clear and decided an opinion as in the former litigation; and I am satisfied that the pursuer here is contending for what is as contrary to the true intention of Mr. Eliott's will, as Lord Minto was in the former case. It is attempted to be maintained that the former case decides this. But that decision was limited to the £15,000, and proceeded on its own particular circumstances, steering clear of any question involved here. The cases are toto cœlo different. I find from my notes that the leading ground of my own opinion was, that the intention of Mr Eliott demonstrated that he never meant the £15,000 to form part of the legacy to Lord Minto. There are certain expressions in the Faculty report, as if we indicated an opinion that Sir William Eliott was entitled to the universitas of the English funds. But, taken along with the context, it amounts to no such meaning; and if we decided here in favour of Sir William, we would be going directly contrary to the will of Mr. Eliott, as evinced by the different deeds; and I hold the enixa voluntas of Mr. Eliott was, that Lord Minto was to get all the effects bonâ fide falling under the will, subject only to the special burden which formed the condition of the bequest.

Lord Glenlee.—I am not going to say what might have been the effect, if large sums had accumulated in England; for it is clear, as far as concerns the money, that it is already more than exhausted by the legacies burdening this bequest; and then the question is, whether Lord Minto is to account for the books and furniture, &c.? Now it is plain that these subjects were given as a special legacy. It is clearly a special legacy with a certain burden; and the idea that Lord Minto is bound to apply it to payment of the debts, is quite ludicrous.

Lord Pitmilly.—I am of the same opinion. The pursuer founds on the opinions given in the previous case. There are two different answers:—1. These were given with reference to the peculiar case before us; and, 2. We

No. 459.
July 7. 1829.

must now be guided by the principles of
and I cannot hesitate in concurring with yo
be quite as hostile to the enixa voluntas of
here, as it would have been to have decid

W. Bell, W. S.—Tod and Ro

No. 460.

Mrs. Bethia Carrick or Wa

Pupil—Factor loco Tutoris.—The Court ref
a factor loco tutoris to renounce a lease belongin
till an action of declarator should be brought.

July 7. 1829.
2d Division.
T.

Petition by Mrs. Bethia Carrick c
John Warden, and factrix loco tutoris
that the boy had succeeded, on his f
property burdened with a liferent in
all the executry left by the deceased
ren; that, by the leases above menti
to the landlord for payment of the
assigned; that the stipulated rent was
some years ago, verbally granted a re
(the landlord affirmed) that the lands s
subsetting or assigning, (which could
tenant still continued liable for the re
managing the farm to advantage, but
accept a renunciation, making payme
all the years of the lease still to run,
take effect from the separation of the
and Whitsunday next as to the house
vantageous by certain farmers, and th
consented to the application. The pe
thority to renounce the lease on the
urgency of the case was a sufficient re
marily by the exercise of their nobile
somewhat similar cases, particularly
VI. No. 380. p. 1018,) instead of oblig
of a process of declarator, the necessar
trate the intended arrangement altoge

The Court, however, refused to gr
seded the petition till a declarator sho

Petitioner's Authorities.—Meikle, March
Cockburn, March 10. 1825, (ante, Vol. III. No.
Vol. VI. No. 380. p. 1018.)

J. Stewar

LADY ASHBURTON and G. SUTHERLAND, Complainers.—*D. F. Jeffrey —Brown.* No. 461.

MURDO MACKENZIE, Respondent.—*Sol.-Gen. Hope—Buchanan.*

Fishing—Brevi Manu.—Held that a party is not entitled brevi manu to seize on a boat, the property of another alleged to be fishing in a river belonging to the party making the seizure.

July 8. 1829.

1ST DIVISION.
Ld. Mackenzie.
F.

THIS was a question arising out of the judgment pronounced between these parties, reported ante, Vol. IV. No. 186, and affirmed by the House of Lords, (see 2. Wilson and Shaw, p. 158.)

Lady Ashburton and her tenant Sutherland had right to fish in the river Cassley, which flows at right angles into the Oykel on the south, but had no right in the Oykel; and they maintained that by the above judgment they had been found entitled to shoot their nets from the south side of certain islands situated at the confluence of the two rivers. On the other hand, Mackenzie (who had the exclusive right of fishing in the Oykel) contended that it was impossible they could so shoot their nets without fishing in the Oykel, and that the meaning of the judgment was, that if they could fish in the Cassley from that side of the islands, they might do so. Sutherland having thrown his nets from that side, Mackenzie's servants, on the footing that he was fishing in the Oykel, cut them, and laid hold of a coble or fishing-boat belonging to Sutherland. Lady Ashburton and Sutherland then presented a bill of suspension and interdict, setting forth that the seizure had been made in a most violent and reckless manner, and praying that "the said Murdo Mackenzie, and his fishermen, servants and labourers, or any person or persons acting under his authority, or for his behoof, ought and should be interdicted, prohibited, and discharged from all further troubling or molesting either of the complainers in the lawful occupation of their fishing in the river Cassley, in terms of the before-recited judgments of our said Lords; and in particular they ought and should be interdicted, prohibited, and discharged from interfering or intermeddling in any shape with the boats, oars, nets, or fishing apparatus, of whatever description, belonging to either of the complainers, or from attacking or assaulting in any shape the complainer George Sutherland, or any of his servants, when fishing in the said river Cassley, in terms of the judgments of our said Lords." They did not, however, allege that Mackenzie had seized the boat with the intention of violating the judgment of the Court. The bill having been passed, Mackenzie admitted that he had seized or poinded the boat, but denied the assault, and maintained that he was entitled to defend his fishings by resisting the encroachments of the complainers. The Lord Ordinary found 'that the complainers are not entitled to claim an interdict against violation of their right, under the judgment of this Court, respecting the fishings in the river Cassley, unless they aver that there has been a violation or intention to violate that right;—that it was expressly referred by the respondent Mr. Mackenzie, and this averment not con-

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'tradicted by the complainers, that the interru
'of was interruption to fishing in the Kyle of
'fishing in the river Cassley, and therefore, w
'not a violation of any right under the judg
'that there is no where any averment by the
'lation, or intention to violate their right to
'therefore refused the interdict, and found t
'penses,' &c. His Lordship also issued the

The complainers having reclaimed to the ships remitted the case to the First, as it in prior judgment of that Division.

The Dean of Faculty, for the Complainer to dispute the principle of the Lord Ordina neous assumption of facts on which it p had expressly averred, and were ready to in question were within the Cassley; that fished by drawing all round these two isl fishing within the Cassley, and exercising t possessory judgment affirmed in the Hou had been brevi manu interrupted by Mac

Solicitor-General, for the Respondent.—' kenzie from molesting the complainers in e a judgment of this Court. But, both in of Lords, it was expressly held that that ever to fish in any part of the Oykel. O ments of Sutherland that he was interru south side of the westmost island, and co duced, it proves Mackenzie's averment t ing his nets into the Oykel.

Lord President.—We cannot kno island the sweep of Sutherland's nets r plan that it must have been in the Oyke vestigation, otherwise we shall have no of these parties. We might supersed brought to have the limits of the respec confluence ascertained, or remit to an e

Solicitor-General.—We are ready to an engineer.

Dean of Faculty.—But we wish th prayer for interdict. An engineer may

* "The Lord Ordinary certainly thinks it woul been brought before the First Division of the C judgment. But he is quite satisfied that neithe any intention of deciding, or have decided, any thi He thinks what they found was, that the compl point in these islands, even on the south sides, i in the Oykel from any point, either in these isla

graphical report as to the point of confluence of these streams; but still, whatever view his chart may give, if we could prove possession ab antiquo of our fishing off the southern shore of these islands, we might insist on our right to continue to do so. No. 461. July 8. 1829.

Lord Balgray.——I confess, according to the interpretation I put on our former possessory judgment, the Court did allow Sutherland to shoot his nets from the southern shore of these islands; and this, I think, was understood by all parties at the time. But Lady Ashburton and Sutherland were never found to have any right to fish in the Oykel; and the effect of the possessory judgment cannot be extended, so as to permit the shooting of Sutherland's nets into the Oykel. We might grant the interdict, so far as consistent with these views.

Lord President.—But even, after these findings, we should not practically put an end to the disputes of these parties, who would still take their own views of the respective limits of the two streams, and the position of the point of confluence.

Lord Craigie.—Where a party has a right of fishing, I conceive he is entitled to shoot his nets quite across the river; and that it is an accessory of this right, that he may draw his nets on the lands ex adverso of those from which he has the right to fish.

Lord President.—True, where there are two parties having a right to fish the river together. But here two rivers meet; and Mackenzie has the exclusive right to fish one of these, and Sutherland's right is entirely limited to the other. His own title, on the face of it, excludes him from fishing in the Oykel; and possession could not confer a right upon him in opposition to that.

Lord Gillies.—I agree with Lord Balgray as to the interpretation of our former possessory judgment. Sutherland, under it, may shoot his nets round the islands, so far as is necessary to enable him to fish the Cassley; but he has no right under that judgment to fish any part of the Oykel. In taking the sweep to the south side of the island, so far as appears, he may have been doing precisely what he was entitled to do under our judgment; but if it be otherwise,—if he passed into the Oykel in that sweep, this was certainly wrong; but Mackenzie's remedy lay in presenting a bill of suspension and interdict against the wrong. Instead of this, he proceeds brevi manu to seize forcibly the net and coble, and takes the law into his own hands. When this violence is complained of, is it possible for us to refuse to grant an interdict against it? I apprehend that we must grant this interdict; not to the effect of finding that Sutherland may fish any part of the Oykel, but merely that, in fishing round these islands, he must not be interrupted brevi manu by Mackenzie.

Lord President.—If the party demands such an interdict, I accede to the propriety of granting it; but I fear that the practical effect of our judgment, which does not define the limits of the respective streams, may not be to put an end to these disputes.

The Court accordingly pronounced this interlocutor:—Grant inter-

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'dict prohibiting Mr. Mackenzie of Ardross to interfere by any violent 'means, or via facti, with Lady Ashburton or her fishers, while fishing 'from the islands marked on the plan A. and B. in the said river Cassley; 'but without prejudice to the interdict already obtained by Mr. Mac. 'kenzie of Ardross against Lady Ashburton or her tenants and servants 'fishing in the Kyle of Oykell."

MOWBRAY and HOWDEN, W. S.—H. MACQUEEN, W. S.—Agents.

No. 462.

JOHN BAIRD, Advocator.—*J. Wilson jun.*
WILLIAM OFFICER, Respondent.—*Cowan.*

Process.—Although a record has been closed in the Inferior Court, it is incompetent to pronounce judgment on the merits in an advocation, without also closing a record in this Court.

July 8. 1829. 1st DIVISION. Lord Newton. D.

OFFICER having raised a summary action against Baird in the Sheriff Court of Ayr, and a record being closed in that Court, Baird brought an advocation under the 40th section of the late Judicature Act. This being passed, and the cause having came before Lord Newton upon reasons and answers, his Lordship, without closing the record in this Court, 'repelled the reasons of advocation, and remitted the cause 'simpliciter to the Sheriff, and found the advocator liable in expenses.' Against this interlocutor Baird reclaimed; and, besides the usual prayer to alter the interlocutor, he also prayed the Court "to find that it was incompetent for the Lord Ordinary to pronounce judgment on the reasons of advocation, without making up and closing a record thereon in terms of the late statute; and to remit to his Lordship to make up a record in the cause, and thereafter to proceed as he shall see cause; and to find the complainer entitled to the expense of the present note," &c.

When the case was moved in the single bills—

The LORD PRESIDENT observed that it was quite irregular to dispose of the merits of the case without a closed record in this Court, and proposed that a remit should be made to the Lord Ordinary to make up the record, and thereafter proceed as he should see cause.

The other Judges having assented, a remit was made accordingly.

W. MERCER, W. S.—G. M'CLELLAND, W. S.—Agents.

No. 463.

EARL of STRATHMORE, Pursuer.
BRUCE'S TRUSTEES, Defenders.—*Sol.-Gen. Hope.*

Palace—Usury.—1.—Held, (by the Jury Court) incompetent to attach furniture alleged to belong to a subject situated within the Palace of Holyrood.—2.—Absolvitor (in absence) from an action of usury in respect of a verdict for the defenders under a judicial agreement containing stipulations in favour of the pursuer, but which he did not implement.

July 8. 1829. 1st DIVISION. H.

IN an action on the head of usury at the instance of the Earl of Strathmore against the representatives of the late William Bruce, upholsterer in Edinburgh, the following issues were sent to a Jury:—"being admitted that, on the 2d of July 1818, the pursuer executed

deed or writing, (No. 3 of process,) bearing to be a sale and assignation of certain furniture and books, then the property of the pursuer, to the late William Bruce, for the sum of £499 sterling; and that, on the said day, the said sum was paid by the said William Bruce to the pursuer: It being also admitted that, on the 10th of July 1818, the pursuer, by a letter, (No. 6 of process,) agreed to hire from the said William Bruce the said furniture and books on the terms stated in an offer by the said William Bruce, prefixed to the said letter: Whether it was intended and understood by the parties to the said assignment and agreement that the sum of £499, in the said assignment mentioned, was to have been lent to the pursuer by the said William Bruce; and whether it was usuriously stipulated between the pursuer and the said William Bruce that the said William Bruce should receive at the rate of more than five per cent. by the year on the £100, for forbearance of payment of the sum of £499 in the said assignment mentioned?" A minute was then entered into by the parties, that the verdict should go for the defenders; that the furniture and books should be inventoried by persons named by the respective counsel; and that if the price and interest were not paid within a month, the effects should be sold at the sight of persons named by the counsel, and the price paid out of the proceeds to the defenders, on which all claim at their instance should cease. On the 21st of May 1828, a verdict was accordingly returned for the defenders. Inventories were then made up, and the month having elapsed without an offer of redemption, the counsel named two parties at whose sight the sale of the inventoried effects should proceed. On the 28th of May 1829, the authority of the Jury Court was interponed to the agreement, and the sale of effects ordered to proceed, if payment were not made on or before the 10th of June. On the 5th of that month, a motion by the pursuer to have that order recalled was refused, with expenses. The effects were situated in Holyrood house; and, on the 12th, a messenger at arms, in virtue of a warrant of the Jury Court, passed to the palace; but being refused access to them, he returned an execution of deforcement against a person acting on behalf of Lady Strathmore. When a motion, founded on the alleged deforcement, brought the situation of the furniture, as within the palace, before the view of the Jury Court, their Lordships ordered intimation to be made to the Officers of State,—and also to the alleged deforcer who was ordained to lodge a minute, stating what had passed between the messenger and himself. He stated that he had acted under the authority of Lady Strathmore, who claimed right to the effects, and who had transmitted to him the royal warrant in his favour for enjoying the exclusive possession of the apartments, and which warrant he had exhibited to the messenger. The Lord Advocate appeared for the Crown; and, on the 30th of June, the Jury Court pronounced the following interlocutor:—'In respect that 'it is admitted, and now appears to the Court, that the goods in ques-'tion are situated within the Palace of Holyrood, and are thereby

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'protected from the diligence of the law, as
'Earl or Countess of Strathmore, and
'made by the Lord Advocate, in his charac
'that he was bound to protect the prerogati
'extent of the law, it is ordered that this
'further, it is ordered that this cause be tran
'of Session to apply the verdict.'

When the case came before the Court, no a pursuer; but counsel was in attendance; and, b *General* for whom they appeared, they made Court on his motion applied the verdict, as granted interdict against removal of the furni

CAMPBELL and MACK, W. S.—J. and A. HAM

No. 464. ARTHUR GIFFORD, Esq. and Others, (Lan of Supply in Zetland,) Pursuers.—*D. Hope—Jeffrey—G. Napier.*

WILLIAM TRAIL, Esq. and Others, (Co Freeholders in Orkney,) Defenders.—*Ful*

Process—Declarator—Jurisdiction.—1.—An action o without any consequent right, is incompetent.—2.—The declare primâ instantiâ that parties have right to vote of Parliament; nor that all the steps taken by Comm valuation; are per aversionem inept nor that a valuatio one part of a shire, or any other to be produced in proc to ordain that the election of members of Parliament s places;—and,—3.—Incompetent to amend a libel by a

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1ST DIVISION.

Lord Eldin.

S.

GIFFORD and others, designing themselv and Commissioners of Supply in that par and Zetland called the lordship of Zetland Trail and others, as "Commissioners of S ney," and certain other gentlemen, as " ting forth that in 1469 Orkney and Zetl Norway to the King of Scotland, and there different Acts of Parliament;—that they h dom, with the exception of part of Orkney that, in 1653, a valuation-roll of Orkney h 9: 1⅓ Scots, but that there was no valuati be discovered, relative to Zetland;—that, ment had been repeatedly elected for the occasions the landholders of Zetland had ders had been more than once given by Par roll of Zetland, but had never been execu by act 1669, c. 13, Orkney and Zetland annexed to the Crown, and constit

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provided that the annexation should be without prejudice of the rights "of his Majesty's vassals within the said isles, of their liberty and privilege to have and send Commissioners to Parliament to represent them in the same manner as they did or might have done formerly;"—that accordingly several members were frequently sent by the stewartry to Parliament, and their commissions sustained;—that although no valuation had ever been made for Zetland, yet it had been assessed at one third of the valuation of Orkney;—that, by a decree of the Court of Session in 1779, it had been declared that the landholders of Zetland were Crown vassals; and they had frequently applied to Parliament to have a valuation made, as in connexion with Orkney, so as to exercise the right of electing and being elected knights of the shire, but that they had been successfully opposed by the freeholders of Orkney, who denied that they had right to vote along with them, and contended that they ought to apply to a Court of Law to have their rights ascertained. They then stated, that they had "oft and divers times desired and required the following persons &c. to establish a proper valuation-roll for the whole stewartry of Orkney and Zetland, or to concur with them in the requisite measures for including Zetland in that valuation;" and had "also desired and required the persons following, freeholders in Orkney &c., to admit them to the roll of persons entitled to elect or be elected knights of the shire to serve in Parliament; yet they refuse, or at least postpone so to do, unless compelled." They therefore concluded, "that it ought and should be found and declared, by decreet of our Lords of Council and Session, 1. That the whole lands and islands of Orkney and Zetland have, ever since they were annexed to Scotland, formed only one stewartry, shire, foudrie, admiralty, and jurisdiction, (with the exception of the sheriffship over the bishopric during the subsistence of Episcopacy); and that, as in time past, they now constitute, and in all time coming should be held in law to constitute, only one stewartry or county, unless separated or altered by authority of Parliament. 2. That previous to, at the date of, and subsequently to the passing of the Act of the Scottish Parliament 1669, the landholders of Zetland, feuars, udallers, and others, vassals of the Crown, had a right, and did exercise the privilege of freeholders, in the election of the members to serve in Parliament for the stewartry or shire of Orkney and Zetland; and that they still have a good right and title to be enrolled as freeholders of the said stewartry or shire, and to elect or be elected knights of the shire to serve in Parliament. 3. That the valuation by heritors in Orkney in 1653 was an incomplete valuation for the stewartry, inasmuch as it did not include the lordship of Zetland; but that, whether right or wrong, that valuation, in so far as regards Orkney, must be held as the only legal valuation of that district, until rectified by Act of Parliament; and that all the steps which have since been taken by the Commissioners of Supply in Orkney, under the pretence of rectifying it, have been unauthorized, illegal, and inept. 4. That a valu-

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ation-roll, to be made by the Commissioners docqueted and authenticated by them, and other valuation-roll to be made up under the of Council and Session, shall be deemed and lordship of Zetland, as part of the stewart Zetland, to all intents and purposes, until al rity. 5. That one copy of the roll, to be sc Exchequer, and another with the clerk of t in the lordship of Zetland, as an authentic r part of the stewartry—as the basis of any p sioners for dividing or uniting particular h for levying the proportions of cess payable for all other purposes which valued rent is the law of Scotland. 6. That, in particul other legal title to enrolment, a certificate, tal missioners and the Clerk of Supply; importi other heritor in Zetland therein named ar under us or our royal successors, and por required by law, shall entitle the person sc legal requisites, to be put upon the roll of head court or meeting, for the election o the stewartry of Orkney and Zetland; a and should be decerned and ordained to accordingly. 7. That the election of sucl stewartry of Orkney and Zetland should land alternately, or in such other order, Lords shall appoint; and all this, or an declared, our said Lords ought and sho ingly."

The Officers of State were called as pearance. Defences were lodged by s Supply and Freeholders of Orkney, in "the avowed object of this action was t land a participation, along with the fre of electing and being elected members and to have the election to take place a land, it was incompetent—

"1. Because the Court of Session is judgment in such an action, which see which Parliament alone can confer, an not confer, without a breach of the A Scotland; for,

"2. The heritors of Shetland had n in this action, previous to the act 166 into a stewartry, nor previous to the A

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these statutes from acquiring any rights of the nature of those now concluded for, which they did not enjoy previous to these periods.

"3. The freeholders of Orkney have, from the earliest period at which Commissioners sat in the Parliaments of Scotland and Great Britain, exclusively and uniformly enjoyed and exercised the right of electing and being elected Commissioners and Members of Parliament for the sheriffdom of Orkney, and for the stewartry of Orkney and Shetland; and that right is now as much and as exclusively vested in them, as their rights to their lands."

The case was then debated before the Lord Ordinary; and the pursuers, in consequence (as they stated) of a suggestion by his Lordship, lodged this minute on 16th June 1825:—"In obedience to the Lord Ordinary's suggestion, when the interlocutor ordering a condescendence was pronounced, the pursuers would humbly submit that his Lordship should now find and declare substantially to the following effect:—1. That the whole lands and islands of Orkney and Zetland constitute only one shire, sheriffdom, or stewartry, and that they have done so without interruption from a period long prior to the passing of the act 1669, c. 13, suppressing the ancient sheriffdom, and annexing them de novo to the Crown, and in particular from the date of the previous Act of Annexation, Oct. 23. 1612, c. 15, with the exception only of the bishopric during the subsistence of Episcopacy, as stated in the conclusions of the summons. 2. That there is nothing, either in the terms of the act 1669, c. 13, or in the Articles of Union, or in the alleged disuse of the right of voting at elections for members of Parliament by the heritors or freeholders of Zetland, which can debar such of them as have obtained, or may hereafter obtain, a qualification in terms of law, from exercising that privilege along with the freeholders of Orkney. 3. That the cumulo valuation of Orkney is sufficiently established to be now, and to have been since, or previous to 1667, £56,551 : 9 : 1⅓ Scots; that the cumulo valuation of Zetland is, in like manner, £28,280 : 14 : 6 Scots; and that the cumulo valuation of the whole stewartry is £84,832 : 3 : 7½ Scots. 4. That the Commissioners of Supply, who are named in the subsisting act (1. and 2. Geo. IV. c. 123.) from among the landholders of that part of the stewartry called Zetland, are entitled to concur and act with the Commissioners named in the statute for the other part of the stewartry called Orkney, in all things committed or intrusted to them by that and the preceding statutes; and in particular that the Commissioners for the said whole stewartry are bound to subdivide the above cumulo valuation of £28,280. 14s. 6d. Scots among the different landholders of Zetland, at the suit of the pursuers, or any other party having interest; and they should be decerned and ordained to do so accordingly. 5. That the entry and recording in the books or rolls of the said Commissioners of Supply for the stewartry of such an apportionment or subdivision of the said cumulo valuation of £28,280 : 14 : 6 Scots among the heritors of Zetland shall be deemed and held a legal valuation of the lordship of Zetland, as part

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of the stewartry or shire of Orkney and purposes, until altered by Legislative auth the roll to be so made up shall be ordaine another with the clerk of the Commissioners Orkney, and another with the clerk of the the lordship of Orkney, as an authentic re part of the stewartry, as the basis of any sioners for dividing or uniting particular for levying the proportions of cess payabl for all other purposes to which valued rent the law of Scotland. 6. That in particu other legal title to enrolment, a certificate Commissioners and the Clerk of Supply, i ler, or other heritor in Zetland, therein na lands in capite of the King, and possesses by law, shall entitle the person so certified quisites, to be put upon the roll of freehol Court or Meeting for the election of a stewartry of Orkney and Zetland; and t as defenders in this action, should be de such person to the roll accordingly. An warrantable opposition which has been gi have ventured to lodge defences out of a and twice that number of Commissioner should find those of the defenders who the pursuers in full expenses. "It wa no other points except these had been pl to prevent any misunderstanding, or an part of the defenders, for the pursuers hereby done, that for the present they libel to what is contained in this minute."

A record was then made up and close arising from the discovery of certain Act supposed to be lost; in one of which, J temporary valuation had been made of £90,980 Scots.

The Lord Ordinary having reporte Court having suggested that the conclu tent, the defenders were allowed to lodg

"1. The summons is incompetent, in to make up, or to sanction the making of Shetland; which lordship, according summons itself, has never had any valu

"2. It is incompetent to alter a summ only be made by an amendment of the

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he pursuers does not merely restrict the conclusions of the summons—it ubstantially alters the grounds upon which those conclusions rest.

"3. The statement contained in the minute of 16th June 1825, and the leas in law applicable to the assumption that there is at present, or has een, an actual cumulo valuation of the lordship of Shetland, are inadissible under the present summons, which proceeds upon the express ecital that no valuation of Shetland ever existed, and concludes that a aluation ought now, for the first time, to be made up under the authoity of the Court.

"4. The action is directed substantially to the establishment of the onclusions, that a certain valuation shall be held to be the true cumulo aluation of Shetland; and that a certificate, attesting the possession of nds which, upon a division of that cumulo, may be rated at the amount quired by law, shall "entitle the person so certified, possessing the other gal requisites, to be put upon the roll of freeholders." The action is erefore incompetent, inasmuch as it demands the Court to fix, in the st instance and prospectively, the decision to be pronounced by the ommissioners of Supply and the Court of Freeholders upon matters hich have never been brought before them, and of which they have, in e first instance at least, the exclusive cognizance."

Cases were then ordered on the question of competency; and on adsing them, the Court delivered the following opinions:—

Lord President.—In stating my opinion, I wish to bring your Lordships' ention to the point upon which it appears to me that this case hinges. We are re called upon to decide upon the question now before us, as it is contained in is summons. And the question is not, what we might do under another sumons framed in different terms, and having different conclusions; but the question what we can do under the present summons, in terms of the conclusions of which are called to declare. Now I apprehend that the competency of any summons not to be judged of from the narrative, from the subsumption, from the facts erred, or inferences stated in the course of the narrative or subsumption. The mpetency of any action can be judged of only, and, as we have been told over l over again by the House of Lords in animadverting on the judgments of this urt, (not, as we may think, in the most polite terms,) by the conclusions of the mmons, and by these conclusions alone. Now, following out this principle, ich I consider to be a right one—that we can only decide and judge so as to et these conclusions, it does appear to me that there are strong objections to giving judgment as craved by the pursuers. I apprehend that if a party has ight an action founded upon a certain narrative, and containing certain statents, which, whatever conclusions might be deduced from them, and had these clusions been stated in the summons, yet we cannot decide, if the conclusions he summons do not warrant us to do so. It is by the conclusions alone, and eference to them alone, that our judgment must be regulated. That is a prine which I hold to be unquestionable, and it is according to that principle that ave formed my opinion in this case. I agree with what was stated by the sel for the pursuers, that when a summons with competent conclusions is ght into Court, we are entitled and can repel every plea against them that

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may be stated by the defenders. I have no doubt called on to find in terms of any particular conclu thing which is out of the conclusions of the summ I consider to be completely established. Now th hend it, what can we do under this summons of It is true that a person may bring a declarator con some of which are competent, and some of them in that some of them are incompetent; but that doe upon those which are competent. That is a po doubt can be entertained. Now, look at what th for the pursuers went through these several concl sected them; but it was with a very gentle hand his patient, for he touched very gently upon thos when I go to examine them, it appears to me th competent, but excessively absurd. Here is the f lands and islands of Orkney and Zetland have, Scotland, formed only one stewartry or shire, an stitute, and in all time coming should be held to county." Now that, I think, it is perfectly cor pay cess, are Commissioners of Supply, and as us to declare that Shetland and Orkney form or extent it may be competent. But I think it a who ever doubted that these two, Orkney an When I was Sheriff, I should have had no hesi granted a warrant to apprehend an individual i declare in terms of this conclusion; but what i next conclusion is, "that previous to, at the da ing of the act of the Scottish Parliament 1669, udallers, and others, vassals of the Crown, had lege of freeholders in the election of members artry or shire of Orkney or Zetland, and that to be enrolled as freeholders of the said stew elected knights of the shire to serve in Parli the first part of this conclusion, that previous 1669, the landholders of Zetland did exercis election of members of Parliament for the st land; that properly is a conclusion, not of ri cised this privilege. We might just as well other fact. [LORD GILLIES.—We might j to declare that Queen Elizabeth died in the part of this conclusion, it is perfectly in power to declare generally who are entit I recollect of having been counsel in a c where Lord Daer claimed the privelege o eldest son of a peer. But did he begi by a declarator to have it found that a be members of Parliament? He did no could your Lordships have for

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prehend you could not, as being utterly beyond your jurisdiction. Then the third conclusion is, "that the valuation by the heritors in Orkney in 1653 was an incomplete valuation for the stewartry, inasmuch as it did not include the lordship of Zetland." Who disputes that? It is incomplete as to Zetland, and never was intended to be a valuation of Zetland. That is obvious. Nobody ever asked them to make a valuation for Zetland, and no valuation was ever made. We may declare this; but cui bono if we do so? What benefit can the parties obtain by our declaring this, which, by the bye, is a fact? I can see none. Then comes the latter part of the conclusion, the most extraordinary and absurd that I can conceive—"That all the steps which have since been taken by the Commissioners of Supply in Orkney, under the pretext of rectifying it, have been unauthorized, illegal, and inept." Did ever any mortal hear of such a conclusion?—it is perfectly ridiculous and absurd. They may have done a hundred things that are perfectly regular and legal; but we are called upon to declare all of these to have been unauthorized, illegal, and inept, although, for any thing we know, they have been done under the authority of this Court. In short, we are called upon here to declare—what no Court can declare—that all the proceedings, no matter under what authority, and without specifying one of them, are absolute nullities. Was such a declarator ever before heard of? Then what have we next? Why, that a valuation-roll to be made by the Commissioners of Supply in Zetland, and docqueted and authenticated by them—a roll to be made up by the Commissioners of Supply for Zetland, without the concurrence of the Orkney people at all—or any other valuation-roll to be made up under the authority of this Court, shall be deemed and held a legal valuation of the lordship of Zetland, &c. Now, supposing we were to authorize these gentlemen to make up a valuation-roll, we would just be declaring ab ante that it is a regular valuation before we had seen it, or know any thing about the manner in which it was made up, were we to declare in terms of this conclusion. It would just be as if we were to say, that a valuation to be made by the Commissioners of Supply in Arran, which we never saw, and of which we knew nothing, would be a legal valuation for Bute,—but that, nevertheless, we ought to declare that to be a good valuation. Such a demand is perfectly preposterous. The fifth conclusion is, "that one copy of the roll, to be so approved of, be lodged in Exchequer, and another with the Clerk of the Commissioners of Supply in the lordship of Zetland, as an authentic record of the valuation of that part of the stewartry—as the basis of any process before the Commissioners for dividing or uniting particular heritors' valuations—as a rule for levying the proportions of cess payable from the several lands, and for all other purposes which valued rent is applicable to in any case by the law of Scotland." Now this must just follow the fate of the fourth conclusion; for, until a legal valuation is made up, we cannot declare in terms of this conclusion. Let us first see a legal valuation, and when that is produced to us, we will dispose of the case accordingly. Then, with regard to the sixth conclusion, it must just follow the fate of the others, and in particular, "without prejudice to any other legal title to enrolment, a certificate taken from said roll by two Commissioners and the Clerk of Supply, importing that any feuar, udaller, or other heritor in Zetland, therein named and designed, who holds lands in capite of the King, and possesses a valuation to the extent required by law, shall entitle the person so certified, and possessing the other legal requisites, to be put on the roll of freeholders at any Michaelmas Head

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Court or Meeting for the election of a member (Orkney and Zetland; and the said freeholders, n decerned and ordained to admit such person to t just follow the fate of the other conclusions. T the whole—"That the election of such membe of Orkney and Zetland should take place in Ork such other order, and in such places, as our said is such nonsense, that I am surprised that it eve any summons. Did any counsel see this summ scarcely think it possible. For who does not k must take place in the head burgh of the count alter that statutory appointment. In short, as I are so extraordinarily ridiculous and absurd, th one moment listen to them.

Now let us go to the minute which has been the matter better. I understand, and have s only be restricted in one or other of the follow of defenders called, you may restrict, by a min of them, as, for example, if A. B. and C. are (to A. B. or vice versa; or if a summons conc claim to £100. If the summons includes a nu the conclusions to one or more; or where the you may restrict it to a smaller. But when the only competent mode, according to what law, can only be in the form of an amendmen action. A minute is out of the question; y minute, although you may restrict them. I let us look to the minute, which, it is said, i have been stated for the defenders. The fir and is nearly the same with, the first cc as to the next, (I beg pardon,) but I see I h 'nonsense,'—"That there is nothing either er in the articles of the Union, or in the all elections for members of Parliament by her can debar such of them as have obtained, c in terms of law, from exercising that privile ney." To be sure, who ever doubted it? tain a qualification in terms of law, are enti what have we next?—that "the cumul established to be now, and to have been sinc Scots; that the cumulo valuation of Zetla Scots; that the cumulo valuation of the whc Now I think it quite competent for us to d whole stewartry is £84,832:3:7⅓ Scots. But how are we to come at the other co Zetland is £28,280:14:6 Scots? How that it may be ascertained by the payment according to such valuation. We are told ation has been made, or on which cess has

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paid according to that valuation. Now this may be all true, but it does not favour the case of the pursuers.

But all the length which we ever have gone is, to find that payment of cess for particular lands fixes the valuation where it has not been divided, but stands in the books a cumulo valuation. But we have never gone further that I am aware of, and we follow the principle only for the purpose of dividing the valuation. But the misfortune here is, that there is no valuation at all. There are no valuation-books, and there are no data upon which we can discover that there ever was a valuation. They say, no doubt, they have paid cess, and it would appear that they do pay it according to a certain rate. But that does not better the matter. They may have paid it in proportion to the merk lands, of which there are a great many in Zetland; and after all it may happen that they have not paid according to the valued rent at all. Suppose, for example, that there are 10,000 merk lands in Zetland, you might arrive at the valuation in this way—as so many merk lands are to £100 Scots, so is the valuation of such and such lands belonging to A. B.

But there is another thing which ought to be attended to, and which, in my mind, throws great doubts as to the power of this Court to decide any thing regarding the valuation claimed. What I allude to is this—that we find that Queen Mary issued a warrant in 1548 to certain Commissioners, for the purpose of ascertaining the valuation of the lands generally within Scotland. They did not apply to this Court, but it was a direct warrant from the Crown to Commissioners for that particular purpose. And there is an unprinted Act of Parament in the year 1581, in which there is a warrant from the Crown to certain commissioners to rectify the valuation that had been previously made; so that have great doubts whether this Court can interfere at all in the matter now before your Lordships.

Then the fourth conclusion of the minute is, "that the Commissioners of apply, who are named in the subsisting act (1st and 2d Geo. IV. c. 123) from among the landholders of that part of the stewartry called Zetland, are entitled concur and act with the Commissioners named in the statute for the other part of the stewartry called Orkney, in all things committed or intrusted to them that or the preceding statute," &c. In one sense, no doubt, they are entitled act, if they are provided with the proper qualification. But then they act periculo, and if they cannot produce evidence of being possessed of £100 ots valuation, they have no right to act at all; so it is just assuming the very estion which we are called upon to determine, and which, I think, we cannot ide when we are asked to give decree in terms of this conclusion.

Then, with regard to the 5th and 6th, they must just follow the fate of the ers. I give no opinion whether a relevant summons might not be framed so to enable us to entertain the question started. Upon that I give no opinion. t I think I could have framed a much better one than this; and I think I the way in which a good summons might be framed. That, however, is not ore us.

With regard to this case, therefore, and the conclusions of this summons, I k we must dismiss them altogether. With the exception of the first conion, they appear to me utterly incompetent. I am not sure that even the conclusion, that Orkney and Shetland form the same county, forms an

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exception. But as to that, I have no objection however, go no further.

Lord Balgray.—If the third conclusion in a different manner, I think it might have done; had belonged to one proprietor who was in p would be entitled to come here for the purpose the cumulo valuation be such as is here stated, to which the valuation applies. I think he w to get it declared that there was a valuation o that property; and having it found that there on it as he can, and follow out the measures t benefit of such qualification. But unfortunat want to be declared in this case. What they the cumulo valuation of Orkney is sufficiently been since, or previous to 1667, £56,551: 9 ation of Zetland is in like manner £28,280: valuation of the whole stewartry is £84,83 your Lordships' opinion is the right one—th clusions of the summons, and that you cann nute. You may restrict them, but I do not t I am afraid this action will not do.

Lord Craigie.—What strikes me as a d are not called. This is a question affectin Orkney, and I have great doubts whether w their rights are involved, unless they are ca see that we are in a shape to determine the

With regard to Orkney and Zetland b pretty clear that they are contained within day, yet we are all very well acquainted wi different and separate counties. Of that where is the law declaring that the privile gether the same? I know of no such law may be perfectly different. They are call I believe your Lordship is quite right a extends over the whole of both counties; stitutes, their appointment extends only t

Lord Gillies.—The opinion which I that your Lordship has stated so ably fr renders it unnecessary for me to go over t go over the different conclusions in deta doubts of the competency of every one o narrow or limit, or in any respect restrai clarator. It is a process most valuable, upon such a form of action. But while to entitle a party to bring an action co upon your Lordships to declare so an terest—not a visionary interest. [illegible] further that it mu

the right to judge. It is not enough for a man to bring an action containing declaratory conclusions; he must also show a substantial interest in having them declared, and they must be conclusions which this Court can entertain, and have an original jurisdiction to determine in the first instance. Now I apprehend that we have no original jurisdiction to entertain, in the first instance, the conclusions of this summons. Perhaps the first conclusion may be competent; but as to all the subsequent conclusions, every one of them embraces matter of which we are not entitled in the first instance to judge. They contain points which are only competent before the Court of Freeholders, or the Court of Commissioners of Supply. In them the original and radical jurisdiction is vested; the freeholders is a Court possessed of jurisdiction; and the Commissioners of Supply have also a Court and a jurisdiction in many most important particulars connected with this case. What is more, they have an original and exclusive jurisdiction with which we cannot interfere, except when their judgments are brought before us for review. It is said that the Freeholders and Commissioners have no right to determine where the particular lands lie which belong to the pursuers. I differ entirely from this doctrine. I think they have a right to determine this point; for are they not entitled, upon an application made to them, to say, These lands do not lie in the county, and we cannot entertain your claim? I apprehend they have a right to do so, and are bound to do so; and it is to them only that it is competent to go in the first instance. It appears to me that the Court of Commissioners have jurisdiction in regard to every point which we are called on to decide. But, besides, observe the nature of the action, and some of its conclusions. It is not a demand upon us merely to find that the Court of Commissioners and Freeholders are bound to do their duty, but we are asked to find in this declarator that the Commissioners and Freeholders are bound to act in a particular way—that a valuation to be made up shall entitle these parties to vote, and give them the privileges they claim, when they may choose to go to the Commissioners or Freeholders. Now it appears to me that this is really and truly, in point of substantial effect, neither more nor less than calling on us to find that they are the proper Judges in the first instance, before whom it is alone competent to go; and that the pursuers are asking us to determine, before these Judges have been applied to, how they ought to act, and what judgment they are bound to pronounce. It appears to me, with great deference, that they have altogether lost sight of the principle on which jurisdiction of Judges rests in all countries. Stair says, "that every Court possesses the power necessary to enable them to explicate their own jurisdiction." The Commissioners have the power necessary to enable them to exercise their jurisdiction, and are entitled to determine all questions necessary to explicate that jurisdiction. If a claim were made by a person who was the eldest son of a peer, they could decide, in a question of enrolment, whether the claimant was a peer's son or not. Of this there can be no doubt—that they are entitled, with a view of explicating their jurisdiction, to decide any question that may incidentally come before them, and which is necessary to be determined for the explication of their authority and power. And, in reference to this case, I think they have complete power, as well as that they are alone competent to the questions raised in this summons. In short, it appears to me that they can

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decide, and have authority to decide upon every called upon to determine, and which it is the ob ator to get your Lordships to declare. If they perfectly competent to come here, and we shall But I apprehend it to be utterly incompetent t known whether they will do their duty or no Commissioners, it appears to me we have no Let them go to the Commissioners first, and i may come to this Court, and we will put the enrolment made to the Court of Freeholders o lands lie locally within another, it is quite cle would be entitled to try where the lands were In the same way, if a man makes a claim to have a valuation of his lands divided—as for Supply for Berwickshire, and they say, No, these lands, for they do not lie in the county burgh or Northumberland, or any where else entitled to determine that question; and if come here for redress. But could he bring and call upon your Lordships to determine I apprehend that he could not. Besides, th of private parties against those who are Ju decide in the first instance on the claims upon to tell them, or rather to instruct the an action seems to me utterly untenable.

LORD PRESIDENT.—There is a good Craigie, that all the parties have not been

Jeffrey.—I do not think there is much cess of declarator is only good and effe defenders, and it does not operate at al But we have called all the Freeholders ar

LORD GILLIES.—Then what is the us the interests of any of the Freeholders, have called.

*Dean of Faculty Moncreiff.**—In no against the parties called. But there is say a single word: They deny that Orkn —that is contained both in their defenc deny that we are in the same county at a judgment on that point.

LORD GILLIES.—It is very true; would be the result in whatever way th true that the defenders certainly deny

LORD PRESIDENT.—Well, let this it further. In the mean time it is t

* This discussion took place before the Bench.

other conclusions of this summons will not do, and that we must dismiss them as incompetent. No. 464. July 8. 1829.

Fullerton.—I submit that we are entitled to expenses here. Your Lordships have unanimously dismissed the summons, so far as regards the only conclusions of any consequence.

Lord President.—I do not think you should ask expenses.

Lord Gillies.—(With whom the other Judges concurred.)—This is not a case for expenses being given.

The Court pronounced the following interlocutor:—"The Lords supersede consideration of that clause of the summons of declarator which concludes that the islands of Orkney and those of Zetland should be declared constituent parts of one sheriffdom, but dismiss the remaining conclusions of the summons as incompetent, assoilzie the defenders therefrom, and decern; but find no expenses due to either party."

When the case was afterwards resumed, their Lordships pronounced this order:—'The Lords direct sets of the printed papers in the present cause to 'be circulated amongst the Judges of the Second Division and the Permanent 'Lords Ordinary; and referring to the summons in the case, and to the relative minute of date 16th June 1825, their Lordships are informed that the 'Judges of the First Division are unanimously of opinion that the said minute 'is not competent, in respect that it is not a restriction of the libel, but contains sundry conclusions which could have been competently introduced only 'by a supplementary summons, or an amendment of the original libel; and 'also that the Judges of the First Division have unanimously found that all 'the conclusions of the summons are incompetent, except the first; and being 'equally divided in opinion as to the competency of the said first conclusion, 'the Lords of the Second Division and the Permanent Lords Ordinary are requested to give their opinions in writing, whether it be competent to entertain the first conclusion of the summons per se, after all the other conclusions 'have been dismissed.'

In consequence of this remit,

Lords Justice-Clerk, Glenlee, Pitmilly, Cringletie, Meadowbank, Mackenzie, Medwyn, Corehouse, and Newton, delivered this opinion:—From the form in which this case is sent to us for our opinions, we must consider the competency of the summons, on the footing that it contains no conclusion but simply to have it found and declared that the lands of Orkney and Zetland form one undivided stewartry or shire. In this shape we do not think the action can be entertained. It is the proper business of a Court of Justice to determine the rights of parties. In doing so, they must ascertain the facts on which the rights depend, and it is perfectly competent for a pursuer to conclude to have such facts declared, as a step towards a further conclusion declaratory of his rights. But without this further conclusion, and where no right is pointed out as that which the pursuer wishes to establish, an action to declare what must then be an abstract fact appears to us incompetent. No instance in practice of such a declarator has been pointed out. It may be true that there are various patrimonial rights which may depend on the fact, whether certain lands are or are not situated in a particular county. But it is only as it respects the existence or non-existence of these

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rights, that the fact becomes the proper subject o ingly, unless these, which form the primary object sought to be declared, it is plainly defective. T to decide upon the means when the end is left al gate an abstract fact, because it may possibly affe brought under discussion. Indeed, without a con the pursuers set forth no interest which can enti tained.

THE COURT, agreeably to these opinions,

Pursuers' Authorities.—(Competency.)—4. Stair, (13527); Sir L. Dundas, Feb. 3. 1779, (15103); B p. 603); Mag. of Rothsay, June 22. 1820, (F. C.); Mag. IV. p. 319); T. of Edinburgh, Nov. 24. 1666, (1898); Com. of Edinburgh, Dec. 14. 1747, (7558); Gordon, Dec. 6. 1780, (8677); Agnew, Feb. 21. 1758, (13074); son, Feb. 17. 1749, (1842); T. of Aberbrothwick, J 1767, (Wight, p. 155); Fraser, July 1. 1800, (No. 5.

Defenders' Authorities.—Earl of Fife, July 8. 17 (ante, Vol. III. No. 314.)

G. and W. NAPIER, W. S.—DALLAS a

No. 465.

D. CORMACK, (GARDNER'S TRUSTEE, *Greenshiel*

MRS. M. ANDERSON and Others, D

Bankrupt—1696, *c.* 5.—*Novum Debitum*—*Deliv* an heritable bond not executed for two months after taken for five years thereafter, held to be a novum 1696.—2.—Deliverance on a petition for sequestra ment on a previous bond being thereafter taken, a quent infeftment of the trustee under his adjudica no fraud, does not afford a personal exception aga with other creditors;—and,—4.—Delivery not party was bound to grant in consequence of previ

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2D DIVISION.

Lord Newton.

F.

THE late Alexander Gardner was p Craig, of a property called Roxburgh were taken in name of Mr. Gibson-C 1818 Mr. Gardner died, leaving a tru his property in trust for certain purp (his widow), Mr. Gibson-Craig, and William Gardner, W. S., son of the and in 1822 they, along with Mr. G the property of Roxburgh Park for course to be paid to Mr. Gibson-Cra the meeting of trustees (held May was made, Mr. William Gardner wa follows:—"Mr. Gardner, by his tru and dispose of his whole property. of the whole property at Roxburgh

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to sell his half at £8000; and if the trustees approved of selling their half at the same rate, Mr. William Gardner was willing to purchase the whole at £16,000. The trustees agreed to sell their half at the same rate of £8000, which Mr. Gibson had agreed to take for his half. Mr. William Gardner proposed that a disposition of the property should be granted by Mr. Gibson, with consent of the trustees, to him; that, for the purpose of paying Mr. Gibson the £8000 due to him, Mr. Gardner should be allowed to grant a preferable heritable bond over the property for £5000; and that, in order to pay Mr. Gibson the balance of his £8000, the trustees should convey two heritable bonds held by them for £1000 each, a debt on Earlshall for £500, and should pay Mr. Gibson £500 in money. The trustees would then be creditors of Mr. William Gardner for £11,000, for which he should grant them an heritable bond over Roxburgh Park. Mr. Gardner submitted that this would be a very desirable transaction for the family, both as securing them an excellent price for the property, and five per cent. for the trust-funds, and as being an object, in a professional point of view, for himself. Of all which the trustees approve, and desire that the transaction may be forthwith completed, and the security for the £11,000 prepared."

A disposition of the property was accordingly executed by Mr. Gibson-Craig, in favour of William Gardner, on the 14th of September 1822, the narrative of which bore that £8000 of the price "has instantly been advanced and paid to me the said James Gibson, and the remaining sum of £8000 has been paid, or security granted, to the trustees of the deceased Alexander Gardner." Of the £8000, of which receipt was acknowledged by Mr. Gibson-Craig, £5000 were borrowed on heritable bonds over the lands; £2500 consisted of bonds handed over by the trustees to William Gardner, who uplifted the same, and paid the amount to Mr. Gibson-Craig; and the remaining £500 were allowed credit for in an account between that gentleman and the trustees. Although the disposition bore that security had been granted to the trustees for the £8000 of the price due to them, no security had been actually executed at the date of the disposition; but, on the 19th of December thereafter, William Gardner, having been in the mean time infeft on Mr. Gibson-Craig's disposition, executed an heritable bond over Roxburgh Park for £11,000, in terms of the minute of the meeting of trustees above mentioned. It was averred by the trustees that this bond had been delivered to Mr. Gibson-Craig, and then returned to Mr. Gardner, to be held by him as their factor and agent; but of this there was no proof, while it was denied on the other side; and the bond was in the possession of Mr. Gardner at the date of his bankruptcy, which happened in 1827. No infeftment had been taken on the bond in question; but Mr. Gardner having been sequestrated as a builder on the 25th of September of that year, infeftment was taken on the bond on the 29th of the same month, and immediately recorded. The pursuer Cormack was subsequently appointed trustee on his estate, and obtained decree of adjudication, dated the

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24th, (recorded the 31st of October); and he question on the 14th of December. Theres action, concluding for reduction of the bond to his father's trustees, and the infeftment foll by the act 1696, and as not delivered till af least to have it found that, under the bankr was not preferable to the creditors under the

The Lord Ordinary ordered Cases.

Pleaded for the Pursuer—

1. The bond was not delivered till afte bankrupt thereafter could not do any act ditors.

2. The infeftment is struck at by the act a prior agreement to grant an heritable sec the operation of the statute in several ca ditors v. Duncan; Jollie v. Spankie and 1179); and M'Lean v. Primrose, Nov. 1(bond in question cannot be considered as which it was granted having been incurr date of the bond, and five years prior to t tion under the act 1696, must be held th which time it remained personal.

3. The defenders are barred, personal their delay to take infeftment, from plea ence to creditors who contracted with th being no encumbrance on his property ;

4. The effect of the adjudication on t the date of the first deliverance on the must be preferred to the infeftment on the adjudication, was subsequent to the

Pleaded for the Defenders—

1. The bond was held by the bank trustees, for their behoof; and at any being in implement of a previous mut

2. It is settled law that the act 16 The bond in question, however, must the defenders never having trusted to bankrupt, but agreed to sell the prop heritable security, and the transact they obtained that security; and so of the Bank of Scotland v. Stewar where this point was in terminis dec

3. Unless there be fraud, delay to rity can never be pleaded as a perso it; and,

4. The adjudication in the seque

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first deliverance; but a mere decree of adjudication can never compete with a subsequent infeftment on a prior deed, if prior to the infeftment on the adjudication.

The Lord Ordinary assoilzied the defenders on the grounds stated in the subjoined note*, and the Court adhered.

Lord Glenlee.—I cannot entertain any doubt of the interlocutor. The only thing requiring consideration is, whether this is really a novum debitum. As to the others, I have no hesitation. 1. It is said the bond was not delivered. That may be of consequence as to voluntary deeds; but this is not a deed of that kind, but one which, by action of exhibition and delivery, the bankrupt might have been compelled to deliver. 2. As to the act 1696, if the bond be a novum debitum, it is a settled point in law that it is not struck at, though not completed till within sixty days. 3. As to the personal exception, unless there has been fraud, the notion that not taking infeftment is any bar is quite exploded. 4. In regard to the plea on the Bankrupt Act, it is not necessary to recur to the decision in the case of Kelty; for it is quite manifest that the act declares the trustee shall be entitled to rank for the general body of creditors on the heritable estate, as the first effectual adjudication. But, in a question with creditors infeft, it is never to have the effect of cutting down a sasine on a prior disposition, though the sasine be posterior to the first effectual adjudication; and so the only question is, whether this be really and truly a novum debitum? This must depend on the precise circumstances of each particular case. It is plain we have never deviated from this rule, that if there was no completed transaction on which the creditor relied for security till the bond was granted, it is

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* "The Lord Ordinary thinks there is sufficient evidence that the loan by the defenders to Mr. Gardner was made under the express condition that they were to receive heritable security; and that although the disposition in their favour was not executed for some weeks after Mr. Gardner got a conveyance to the lands, it is still to be considered as granted for a novum debitum; Bank of Scotland v. Stewart and Ross, Feb. 7. 1811.

"As to the delivery, assuming that no proof can be brought of its being made to Mr. Gibson-Craig, the Lord Ordinary would have felt considerable doubt whether, considering that Mr. Gardner was the granter of the deed, his being also factor or commissioner for the defenders would of itself be sufficient to imply delivery by him in the one character to himself in the other. But he is disposed to think the defenders well founded in maintaining that in this case delivery was not necessary to render the deed effectual.

"The delay in taking infeftment where the security is granted for a novum debitum has not, since the decision in the case of Johnston, reported by Lord Kilkerran, been held to bring the case within the operation of the act 1696. Here there has been a delay, no doubt, for nearly five years; but in the case of Mitchell v. Finlay, Nov. 12. 1799, there had been one of two years which was disregarded; and indeed the Lord Ordinary cannot well see how, on the principle that the act 1696 does not apply to cases of nova debita, any length of delay in taking infeftment can bring them within its operation.

"The only remaining plea of the pursuer is, that his adjudication being, by virtue of the bankrupt statute, drawn back to the date of the first deliverance in the sequestration, must be preferable to the defenders' infeftment, which was not taken till four days afterwards; and that as the terms of the enactment are absolute, the infeftment cannot operate as a mid impediment to prevent their retrospective effect. But it is not necessary for the defenders to plead a mid impediment; they have no occasion to dispute that the pursuer holds a decree of adjudication as of the date of the first deliverance, because such decree cannot of itself compete with their infeftment, which, though posterior, was taken on a prior heritable security, to which no legal objection can be made."

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to be considered a novum debitum. That here we of the 2d of May, by which the whole is settled, transaction. It was a necessary part of the arrang by Gardner should be free of all burdens, that he heritable security for the £5000 which he was to l Craig. That was done as soon as could be expect able, this heritable security was granted, Till the never was completed. If ever there was in any ca debitum, it is in this one.

The other Judges concurred.

Pursuer's Authorities.—(2.)—Eccles v. Merchiston's (Brough's Creditors v. Duncan and Jollie, and v. Spankie an 1179); M'Lean v. Primrose, Nov. 16. 1799, (Bell's Com.)—(

Defender's Authorities.—(1.)—Stair, 1. 7. 14; Ersk. 3. 3 of Scotland v. Stewart and Ross, Feb. 7. 1811, (F. C.); M (App. Bankrupt, 1.) —(4.)—1. Bell, 23; Buchan v. Farq 2. Bell, 239.

J. Forrester, W. S.—J. Balfour, W.

No. 466.

Mrs. Dorothea C. Thomas, Pursuer
D. F. Jeffrey—Jardin

Major John Gordon, Defender and Respon
Robertson.

Marriage.—Circumstances not sufficient to infer marria that, in the proof of such marriage, the evidence of the frie of life is chiefly to be considered.

July 8. 1829.

2d Division. Bill-Chamber. Consistorial.

Advocation of an action of declarator of Mrs. Dorothea Thomas against the respond on alleged habit and repute. It appeared fro first became acquainted in Demarara, where previously living with another man, resided w tress. She followed him to this country, and Gordon, which was given her by the defend was never heard to speak of her as his wife; the landlady of a lodging-house where the called her 'your wife,' he immediately answer got no wife.' They frequently lived togeth the keepers of these lodgings deponed that married persons; but she was never seen by quaintances when calling on him, or dining w understood by them to be an unmarried n about to be married to another woman, a c to a settlement proposed to be made on h peared that she did not consider herself as in this arrangement as to have the d mately refused to sign them.

The Commissaries assoilzied the defender; and the Court refused a bill of advocation against their judgment. No. 466. July 8. 1829.

Lord Justice-Clerk.—Giving all credit to the pursuer's witnesses, I do not think it amounts to that habit and repute required by the law of Scotland. There are only two people acquainted with her—two keepers of lodgings; and, even by their testimony, this woman only went under the name of Mrs. Gordon. They never heard this man call her his wife, or any thing which could lead them to hold he meant to call her his wife. In no case where this language was not used has the marriage been sustained; and in one instance here, when the landlady said 'your wife,' he immediately answered, he had no wife; and she was uniformly kept out of sight when his friends or strangers visited him. I have no difficulty in saying that there is not sufficient proof here to sustain the marriage by the law of Scotland. Then, on the other hand, his friends never suspected that he was a married person. The sort of evidence which we are to look to in cases of this kind, is that of the friends, relations, and families of the parties. The general reputation among these must be looked to; and if we have it not, there is no ground for establishing the marriage. If any thing was wanted to complete the case, it is the written evidence which clearly proves the nature of the connexion. The pursuer went so far in an arrangement, prior to the defender marrying another woman, as to have the deeds prepared. All this demonstrates that there is no foundation for the action.

The other Judges concurred.

W. Patrick, W. S.—D. Gray, S. S. C.—Agents.

Archibald Campbell, Complainer.—*Sol.-Gen. Hope—Forsyth.*
John Dixon, Respondent.—*Jameson—Ivory.* No. 467.

Freehold Qualification.—1.—Circumstances held sufficient to show that a party claiming enrolment as a freeholder was possessed of the whole property appearing as a cumulo valuation in the cess-books.—2.—Where the disposition and sasine differ from the charter of confirmation, the latter must be taken as the rule.—3.—Freeholders are not obliged to hear counsel in support of an objection to a claim for enrolment;—and,—4.—A disposition being granted, making a considerable proportion of the price a real burden, and the purchaser having further granted a disposition redeemable on paying up that part of the price within a certain period, but on the lapse of which the disposition was to become absolute—held not to be such a defeasible right as to be incapable of affording a freehold qualification.

The respondent Dixon purchased the lands of Daldowie, holding of the Crown, and the superiority of Whiteinch, both in the county of Lanark, for the sum of £24,000, of which £18,000 were made a real burden in the infeftment. This sum was to be paid up by instalments of £3000 at Whitsunday 1826, £3000 at Candlemas 1827, and £12,000 at Whitsunday 1830. Dixon further granted to the sellers an heritable bond and disposition of the property, under redemption at Whitsunday 1830; but declaring, that if at that date any part of the price and interest should remain due, "the clause of redemption above written shall eo ipso, and without any declarator or order of law, cease and come void and null." Dixon failed to pay the £3000 due at Candle- July 9. 1829. 2d Division. R.

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mas 1827, and subsequently conveyed all his p
powers of sale. At a meeting of the freeholders
for election of a member to serve in Parliament
tober 1827, Dixon claimed to be enrolled as a f
titles to these lands; and to show that they a
fication, he founded on two entries in the cess-b
Whiteinch, as valued at £116. 7s.; and, 2. Of
entered thus—"Part of Daldowie sold to Jame
ing parts belonging to George Brown, (Dixon's
these 'remaining parts' being said to be the fan
ing in all a valuation of £427: 13: 8. His c
c mplainer Mr. Campbell of Blythswood, a fre
allowed to be heard by counsel in support of
holders refused this, and enrolled Dixon. Cam
a complaint, praying to have Dixon's name stru
lowing grounds:—

1. In the Crown charter of confirmation of
these lands are stated as a forty shilling land,
rate parcels, two portions of which parcels,
each, are excepted from the conveyance to Di
possess the whole of the lands of Whiteinch
ation of £116. 7s. applies.

2. In the disposition of Daldowie, there are
lands described with reference to a plan; and
these parcels form the portion of Daldowie,
vided, as belonging to Mr. M'Nair; so that th
this as to Whiteinch.

3. The claimant's titles do not afford him
perty, but merely a conditional right, absolut
cumstances, the seller not being truly diveste

4. The freeholders were bound to have hea
sel.

To this it was answered—

1. In the disposition to Whiteinch, and in
of Whiteinch are not stated to comprehend
set forth of which the excepted lands form par
subject, these parcels being additional and un
it is owing to a mistake in the charter that th
comprehended in Whiteinch; and further, al
rately valued, of the same date with the entry
in 1720; but, at any rate, the excepted lands
included in the cumulo valuation, are also sep
books at £15: 12: 4; and deducting that from
sufficient to afford a freehold qualification.

2. The original valuation of Daldowie, st
£321: 6: 8. Various parcels were sold by

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whom the claimant acquired the lands); and when he sold the remainder to Brown, the cumulo valuation was divided,—the parts sold, now belonging to Mr. M'Nair, being valued at £10, and the remaining parts sold to Mr. Brown at £311 : 6 : 8. The claimant acquired these from Mr. Brown, and has therefore right to the whole lands included in that last valuation.

3. The claimant's situation is just the same with a party who has borrowed money on an heritable bond and disposition, under redemption within a time certain; and,

4. Freeholders are not only under no obligation to hear counsel, but by the act 1621, c. 21, it is declared that the Court-room "shall be patent to them, *and all others removed but whom they call.*"

The Court, on advising Cases, repelled the objections, and dismissed the complaint, but without expenses.

Lord Justice-Clerk.—There are four objections. I shall begin with the last—that the complainer was not allowed to be heard by counsel. This is a new objection. Even in support of claims, I know of nothing in the election laws making it imperative to hear counsel. But here it is, that the complainer, a member of the Court, objects to his not being so heard in support of an objection. The hearing of counsel is just matter of discretion, which in practice is exercised when for the advantage of the majority; but the refusal to hear counsel is no ground of complaint. 2. I cannot arrive at the conclusion that this is a redeemable right—at least it is not that sort of redeemable right contemplated by the statute; and I cannot sustain the objection founded on that. 3. As to the valuation of Daldowie, if there was nothing in the cess-books showing a division of the valuation after the sale of the excepted parcels, the objection would have been good; but that is not the case. These separate parcels are averred to be those held by Mr. M'Nair, and to form the article of £10 in the valuation-books; and I cannot say, in these circumstances, when it is not undertaken to be proved on the other side that the excepted parcels are not those so entered, that there is sufficient to warrant us to sustain the objection. 4. As to Whiteinch, though I am satisfied the objection is not good, I put it on entirely different grounds from the respondent, for it is clear he can come to the Court of Freeholders in right of the Crown charter only, and by the terms of it alone must the matter be judged. We cannot listen to the statement that its terms are erroneous. But we have evidence of £116 being the valuation of Whiteinch in 1720. Then the different parcels besides are separately valued in the cess-books, and the exception in the titles is only of articles as to the valuation of which we have complete evidence; and so, even holding these to be comprehended in the 40s. land of Whiteinch, when we take off £15 : 12 : 4 as the valuation of these two parcels, we have a valuation of £100 : 14 : 8, as it only goes to strike off the £15 : 12 : 4, which, with £311 of Daldowie, still gives a sufficient valuation for a vote.

Lords Glenlee and Pitmilly were of the same opinion.

Lord Cringletie took a somewhat different view of the objection regarding Whiteinch, but came to the same result, and in general concurred as to the

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other matters, observing only, on the objection as t
—"The only doubt I have is, whether the right
12th Queen Anne. It is stated that Dixon did not
due at Candlemas 1827, whereby the creditor ha
the right may be considered defeasible. That is

LOCKHART and SWAN, W. S.—GIBSON-CRAIGS and

No. 468.

JOHN GRAHAM, W. S. Pursuer.—
RIGHT HON. W. DUNDAS and Others, Def
Cockburn.

Reparation—Execution pending Appeal.—Circumsta
for injury sustained through judicial procedure was dism
trimonial loss consequent on execution pending appeal

July 9. 1829.

2D DIVISION.
Ld. Mackenzie.
R.

IN 1821 an action of declarator and in
pursuer Mr. Graham, W. S., at the instar
the Signet, the Deputy Keeper, Commis
ers of the Society of Writers to the Signe
tain regulations of the Society, relative to
letters, alleged to have been violated by G
that he, as a member, was bound to give
sentences of the Commissioners, fining h
were legal and proper; and that, in the
opposition to these regulations, the Socie
or deprive him of his office as a Writer
he should be ordained to pay to the tr
as above mentioned.

In defence against this action, Gral
pursuers had no title, in respect the
corporate body. This defence was re
decerned and declared in terms of the

Against this judgment Graham er
present defenders presented a petitio
fine decerned for, and the expenses of
prohibiting and discharging Graham
way complained of in their summons,
him, or deprive him of his office, in
opposition to the regulations of the S
should appoint. On this petition th
pronounced the following interlocuto
'right and duty of this Court to su
'every Member of the College of

Feb. 18. 1829, (a

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'spective functions under them, and to restrain and correct any malver-
'sations which they may discover by any individual, either directly
'brought before them by petition and complaint, or incidentally disco-
'vered in a process pending before them;—that this superintending
'power cannot be suspended or impeded by appeal to the House of
'Lords against the judgments of this Court in any such principal pro-
'cess;—therefore, and also in terms of the prayer of this petition to
'regulate interim possession in the principal cause between the parties,
'the Lords prohibit, discharge, and interdict the respondent John
'Graham from subscribing any Signet letters not drawn or written by
'himself, or his actual clerks and apprentices by his directions, (under
'the usual exceptions,) and also from subscribing any Signet letters for
'fees less than those established by law; with certification to the said
'John Graham, that if he shall offend in the premises, the Court will
'proceed against him with the utmost severity; and further grant war-
'rant for immediate execution at the instance of the treasurer of the
'Society, so as to enforce payment of the sum of £5, being the amount
'of the fine awarded against the said John Graham, and of the expenses
'found due, upon the said treasurer's granting a bond, with a sufficient
'cautioner, for repetition of the sums to be paid, with interest upon the
'same, in case of a reversal of the decree of the Court by the House of
'Lords.' *

For payment of these expenses and the fine Graham was charged, and put to the horn; on which he took refuge in the Abbey of Holyrood, where he remained for six months. Graham having persisted in acting in opposition to the prohibition contained in the above interlocutor, the defenders presented a petition and complaint for breach of interdict; on advising which, the Court, on the 9th of July 1824,† suspended him from his office for twelve months; but he was subsequently reponed (Feb. 10, 1825,) on his own petition, wherein he stated 'his contrite feelings for the irregularities he has committed.'

On the 21st of June 1825, the House of Lords reversed the judgment of this Court in the principal cause, and assoilzied Graham, on the ground chiefly, that whether the Society of Writers to the Signet were a corporate body or not, they had not sued in their corporate capacity.‡

Graham now brought the present action against the defenders, concluding for damages,—1. In consequence of the patrimonial loss arising from the prohibition, under the execution pending appeal, to carry on his business in a particular way, and from his temporary suspension from office; and, 2. As a solatium for the injury suffered by him by detention in the Abbey, and otherwise.

In his summons he set forth generally the whole proceedings; but, in the course of the process, he stated that his claims were rested on the procedure following on the decree of the Court in the principal cause.

* Ante, Vol. II. No. 699. † Vol. III. No. 181. ‡ 1. Wilson and Shaw, p. 538.

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The cause, having been remitted to the Ju
to this Court to determine the relevancy of t

The Lord Ordinary reported the cause on

Pleaded for the Pursuer—

1. Parties are undoubtedly liable in da
others by legal proceedings on their part
adopt, or which were vitiated by irregularit
no right to adopt the extrajudicial proceedi
they did, and no title to enforce them in a
so, therefore, without a title, constitutes a
sufficient to subject them in damages for th
have occasioned; and,

2. So far as regards the patrimonial loss
cution pending appeal, the defenders are
same way as they would be to repeat ex
warrant for interim execution; and thou
caution to be found as to that matter, th
from the obligation itself to place the pur
in the situation in which he would have
been granted.

To this it was answered for the defend

1. Every person is entitled to have estal
what he conceives to be his legal rights,
when so established; nor can he be liabl
by legal procedure, though the decree
versed, unless he have proceeded fro
cause, or unless there have been such i
decree which he has enforced. Here th
want of probable cause; and though
mately reversed, it, and every thing w
valid and regular; it being absurd
Appeal have held that there is a def
Court had sustained, the parties were
enforce their decree in legal form.

2. The Court of Session have by
the regulation of interim possession
they may deem consistent with the in
redress competent is that provided t
terim execution.

The Court having ordered the Cas
for their opinion—

Lords President, Craigie, Bal
kenzie, Medwyn, Corehouse, and N
—In this case the summons concludes
proceedings instituted against the purs
regulations of the Society of Writers to

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all the proceedings against him, both the private ones intra familiam of the Society, and the judicial ones before the Court; and he founds his claim of damages on them *all* without distinction. But in his Case, pages 8 and 9, he states that he does *not* claim damages,—1. For the proceedings in the Society; 2. Nor for the declarator; 3. Nor for the bill of suspension and interdict; but that he founds his claim on the subsequent proceedings; therefore it is necessary to ascertain exactly what these are, as set forth by himself.

1. The petition of 10th February 1824, praying the Court to regulate the interim possession.

2. The interlocutor thereon of 9th March, prohibiting him from certain acts, and awarding interim execution as to expenses pending the appeal which he had taken to the House of Lords.

3. The taking out diligence against him on this interim decree, whereby he states that he was compelled to fly to the Sanctuary, where he remained seven months.

4. For the petition and complaint for breach of interdict, and the interlocutor of the Court thereon of 9th July, suspending him for one year, against which he was reponed on 10th February, on his own humble petition.

We are clearly of opinion that his action and conclusion for damages on those grounds are irrelevant, and ought not to be sent to a Jury.

When he himself admits (what indeed it was impossible to dispute) that there is not any relevancy in the instituting the declarator and bill of suspension and interdict, we think that he cuts the branch on which he rests; for he does not pretend that there was any unfairness in the proceedings following upon these. Now, if the Writers to the Signet were entitled to raise a declarator for ascertaining what they conceived to be their just civil rights, it appears to us manifestly to follow as a necessary consequence that they were entitled to demand and obtain (if they could by fair procedure) decree in terms of that declarator. And if they have a right to obtain decree, they must also be entitled to enforce that decree by the forms and executorials allowed by law; for to say that a man has a right to raise an action for declaring a right or recovering a subject, but that he cannot avail himself of that right when declared, or recover the subject to which he is found entitled without being liable in damages, does appear to us to be an absolute solecism. Now, in enforcing a decree, a pursuer may either proceed to execution before appeal to the House of Lords, at common law, or after appeal under the late statute allowing interim execution pending an appeal.

In the first case, suppose a pursuer has proceeded to execution against the person or estate of the defender, and that thereafter, on appeal, the judgment of this Court is reversed, it never was heard of that the defender, besides restitution, was entitled to claim damages from the pursuer for having done diligence on his decree, when the effect of his reversal was not to show that the decree had been unfairly obtained. But now, under the late statute, the right of a pursuer to proceed to execution pending an appeal is as broad as it was before appeal at common law, with this difference, that this right does not depend on his own will, but can be exercised only in virtue of a new decree of this Court, which has a discretionary power to grant or refuse it on cause shown, and according to the nature of the case.

In this case Graham did attempt to show cause why interim execution should not be granted, but failed; and therefore the granting of interim execution must be held to be a proceeding in the exercise of the sound discretion of the Court.

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Besides, when the appeal was heard, w
stated to the House of Lords that it
awarded, and have moved that most h
cause, to find what should be the cons
one. Many similar cases may occur.
member of Parliament is unsuccessf
distance of months, is declared to be
has been imprisoned for debt; it is
action of damages. In all these pr
is alleged, or that there was any in
Society had not probable cause for
to ascertain and enforce their righ
The only other ground is the p
it appears to us that this is the
Whether this Court did right or
obey the order of the Court in
Court in not doing so. Besides,
but, in his petition to be repo
point was well considered and
gow, in which, although the C
they refused as to this, and for
of the proceedings. On the
action is not relevant, and ou

Lord Cringletie.—I
damages on account of th
Commissioners of the Soci
raised in the Court of Sessi
to avoid payment of the e
breach of interdict; but
of his patrimonial loss by
way during the dependen

Mr. Graham had beer
titioners of the law, an
clerks nor apprentices t
been in the habit of re
tions of the Society of
by-laws of the Society,
missioners, who fined l
persisted in the practi

The Keeper and
clarator in this Cour
of the Society were
was bound to give
Commissioners, infli
that he ought to b
for behoof of the p
plained of, they
the libel conclud

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After some procedure, the First Division, after advising informations, deemed and declared in terms of the conclusions of the libel, and awarded to the pursuers the expenses of process, which were afterwards modified to £224:7:3, besides the expense of extract, amounting to £4:3:2½.

Against this judgment an appeal having been entered by Mr. Graham, and the orders thereon served on the pursuers, they, in terms of the 17th section of 48th Geo. III. c. 151, applied to the Court for interim execution of their decree; and their Lordships did accordingly "prohibit, discharge, and interdict the respondent John Graham from subscribing any Signet letters not drawn or written by himself, or his actual clerks or apprentices by his directions (under the usual exceptions,) and also from subscribing any Signet letters for less fees than those established by law; with certification to the said John Graham, that if he shall offend in the premises, the Court will proceed against him with the utmost severity." The Court further authorized execution to pass for payment of the fine of £5, and afterwards for the costs, the amount already mentioned.

The authority under which this was done is the 17th section of 48th Geo. III. c. 151, in which the power given to the Court is to "regulate all matters relative to interim possession or execution, and payment of costs and expenses already incurred, according to their sound discretion, having a just regard to the interests of the parties, as they may be affected by the affirmance or reversal of the judgment or decree appealed from."

Now the interest of Mr. Graham, if the decree should be reversed, was, that he was at liberty to "subscribe Signet letters not drawn nor written by himself, or his actual clerks and apprentices by his directions; and also to subscribe Signet letters for fees less than those established by the rules of the Society. The decree prohibiting this was reversed; and it appears to me to be a direct consequence of this, that Mr. Graham is equally well entitled to be indemnified for the loss he sustained from the interruption of his business, as he would have been to recover again the costs of suit, if he had paid them in terms of the decree. Indeed, if this shall not be allowed, it seems to me to follow that the interim execution was awarded without any regard at all, instead of the just regard ordered by the statute, to the interests of the parties as they might be affected by the reversal. The point at issue was, whether the appellant was entitled to conduct his business in a particular manner. The decree prohibited him from doing so; it was reversed; and the consequence appears to me to be, that as he had a right to conduct his business in his own way, he is entitled to be indemnified for the interruption, and to be placed in the same situation as if interim execution had not been granted. As I think that he is entitled to recover his patrimonial loss, I do not consider it to be necessary for him to libel that the Society was actuated by malice.

The cause having thereafter been put out for decision—

Lord Pitmilly declined, as being related to one of the defenders.

Lord Cringletie retained his opinion as formerly returned.

Lord Justice-Clerk.—I concur with the majority, although I think the only difficulty rests where Lord Cringletie has put it, as to the claim for repetition of actual loss occasioned by the execution pending appeal; and it did appear

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to me to deserve attention. But it is material to lo
Court on the application for execution; for great st
the Court to control the exercise of the functions of
lege of Justice, and that this is not suspended by
do so and so. 'In so far as the order rested on the
tending power of the Court, there is no relevancy in
as to interim execution, if the fine and expenses had
must have been restitutio in integrum; but they we
ultra, the question is fairly put, why did not the p
of Lords immediate restitution? These meet even
tion of loss; and as to the claim for solatium, ther
for it.

LORD GLENLEE.—I am of opinion with the maj

THE COURT accordingly assoilzied the defend

Pursuer's Authorities.—(1.)—Fullerton v. Lord Kilmarn
derson v. Ormiston and Lorraine, Jan. 3. 1750, (13949);
11749); Donald v. Robertson, Reid, &c., Dec. 5. 1822,
v. Gordon, (3. Murray, 515); Gordon v. Royal Bank, Dec.
—(2.)—Earl of Mansfield v. Henderson, Mar. 2. 1815, (
1823, (ante, Vol. II. No. 259.)

Defenders' Authorities.—(1.)—Cooper v. Campbell, Ma
Guthrie v. Brown, May 18. 1821, (ante, Vol. I. No. 17);
(ante, Vol. IV. No. 16); Gordon v. Royal Bank, Dec. 1
Dick v. Fleshers of Stirling, Feb. 1. 1827, (ante, Vol. V. N
lor, (3. Dow, 160.)

D. FISHER, S. S. C.—J. and C. NAIRNE.

No. 469. C. MACKINTOSH, Pursuer.—*D. F. Jeffrey*
MARJORY MACQUEEN and TUTOR AD LITEM
—*Jameson.*

Process—Annus Deliberandi.—1.—Summons against
charge, may be raised and executed within the annus del
charge may be executed simul ac semel, and the inducia
and,—3.—Irrelevant to allege that the days of charge ha
pearance in the summons, provided the summons be not

July 9. 1829.

2D DIVISION. Lord Medwyn. R.

THE late Captain Donald Macqueen, eld
queen of Corrybrough, and father of the d
died in India on the 7th of December 18
ceased him some time. The pursuer Mac
Captain Macqueen's death, raised an action
persons, as trustees of or representing the la
and it now became necessary to make Marj
queen's only child, a party to the cause b
Accordingly, on the 26th of November
against her letters of general charge to ent
the 3d of December, he executed
heir to her grandfather; and, of

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also executed a supplementary summons, concluding against her for payment of a certain sum, as representing both her father and her grandfather. The day of compearance mentioned in the summons was the 4th of January 1828. The induciæ of the charge to enter heir to her father expired on the 5th, those of the charge to enter to her grandfather on the 12th, and the summons was called in Court on the 24th of January.

No further procedure took place till February 1829, when defences were given in, pleading that the action was incompetent, on the following grounds:—

1. The summons could not competently be executed intra annum deliberandi, under A. S. June 1613.

2. So far as the defender was called, as representing her grandfather, the summons could not competently be executed simul ac semel with the charge; but the charge ought to have preceded the summons.

3. The induciæ of the charges ought to have expired before the day of compearance, and the induciæ of the charge and the summons could not run together; but the induciæ of the latter could only begin to run on the expiry of the days of the charge.

To these objections it was answered,

1. The A. S. 1613 is not violated, unless the action be 'intented' as well as raised within the year; and it has been long settled to be a sufficient compliance therewith to make the day of compearance beyond the ear, as was the case here.

2. and 3. Although it is true that, in adjudications proceeding on a *special* charge, the days of charge must expire before raising the summons, because this is a statutory diligence, the provisions regarding which ust be strictly followed in order to its validity; yet this does not hold as ordinary summonses proceeding on *general* charges, in regard to which has been fixed in practice that they may be executed simul ac semel; d that the induciæ of both may run together, provided the days of arge be expired before the summons is called in Court.

The Lord Ordinary repelled 'the plea that the charge did not precede the summons, in so far as the defender is called as representing er grandfather, in respect of the practice authorizing the general harge, and the summons founded thereon, to be executed simul ac emel; and also the plea that both the charges and the summons were xecuted within the annus deliberandi, in respect that although the ummons was executed within the annus deliberandi, it was not called Court till the 24th of January, which is even more than forty days bsequent to the expiry of the annus deliberandi;' and his Lordship led the subjoined note,*

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* "The parties have pleaded the first preliminary defence so anxiously, that the Lord Ordinary will state, but as briefly as possible, the grounds of his judgment.

1. Although, no doubt, the days of the general charge must have expired before it was

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LORD GLENLEE.—I confess I can see no groun nothing to do with the matter of special charges fo special property. The provisions of the statute as t lents, as the adjudication proceeds on a fictio juri complied with. The general charge is different. ficient countenance to executing summons within compearance beyond it. Before it is violated, t be raised, but action intented;—i. e. some judicia summons. The day of compearance was 4th Janr take place; and before any judicial step was tak but the days of charge, expired. It is quite sufficie ral, and the action an ordinary action on the pa taken till the expiry of the annus, and of the days

LORD CRINGLETIE.—There is a great deal of re to be raised within the year, though it cannot proc year and days of charge are expired. That was t was not called till then.

LORD PITMILLY.—I am of the same opinion.

LORD JUSTICE-CLERK.—I am satisfied that I rect; and the authorities which appear to milita ment related to the case of special charge, and a regulation is secured by not calling till after expi nion that the interlocutor is right.

Pursuer's Authorities.—(1.)—Fanside, Nov. 17. 160 (6868); Devan, June 26. 1667, (2171); Lockhart, Dec 112. 857; 3. Erskine, 8. 54; Lady Rattar, Dec. 13. 1734 3. Bankton, 5. 113; 3. Jurid. Styles, 380; Biggar v. Wal M'Culloch, June 19. 1628, (2168); Sinclair, Nov. 10. 17 tives, July 9. 1752, (267); 2. Erskine, 12. 15; Bell's Law

competent to raise a summons against a defender as char style is still used, practice seems to have long sanctione summons simul et semel; Bank. 3. 3. 113; Biggar, Ju 29. 1710, p. 6879; 2. Beveridge, 456.

"2. The heir-apparent, having the privilege of the ann to enter till after it expired. This was innovated on, a year, provided no summons was raised, or action inte liberandi; Fansyde, Nov. 17. 1609; A. S. Jan. 18. 16 and execute the summons within the year, provided t Bank. 3. 5. 112; Lockhart, Dec. 21. 1708, p. 6878; Rattar, Dec. 10. 1734; Elchies, No. 1. Heir App. and

"Further, it seems not to be necessary, in an ordina the summons should be exclusive of the days of the ch together, Ersk. 3. 12. 15; M'Culloch, June 19. 1628 very instructive as to the history of the general charge; Nov. 30. 1703, p. 6852.

"In the present case, the charge and summons are The annus deliberandi did not expire till the 7th of J charge expired on the 12th of January 1828. The day 4th of January 1828; but it is not called till the 24th 6th of February 1829; and so action has not been in nor even within the days of the charge."

Defenders' Authorities.—(1.)—1540, c. 106, Mackenzie's Obs. thereon; Spottiswoode, 135-7; A. S. June 1613; 3. Stair, 5. 22; 2. Erskine's Prin. 12. 5, and 2. Instit. 12. 15; 3. Jurid. Styles, 55. 261. 350; Fansides, Nov. 17. 1609, (6868); M'Culloch, June 29. 1700, (6879); Stewart v. Anderson, Feb. 25. 1749, (6881); Fergusson v. M'Gachen, March 11. 1829, (ante, No. 290. p. 560.)—(2. and 3.)—3. Bank. 4. 112; 3. Jurid. Styles, 350; 2. Beveridge, 456. No. 469. July 2. 1829.

J. FORMAN, W. S.—J. SHAND, W. S.—Agents.

A. SMITH, Suspender.—*Skene.*
LIEUT. SELBY, Charger.—*Jameson—Neaves.* No. 470.

Summary Diligence—Husband and Wife.—Summary diligence of a bill in favour of a woman who afterwards marries, and by whom it is not indorsed, is incompetent at the instance of her husband.

ON the 18th of August 1820, Smith granted a promissory note for £350, payable four years after date to his sister or order. She married Selby in November thereafter, but did not indorse the bill to him. A separation afterwards took place, and Smith paid £127 for her support. When the bill fell due, Selby protested it at his own instance, and raised diligence upon it against Smith. Of this Smith brought a suspension, on the ground, inter alia, that the charge was incompetent. Selby then raised an ordinary action founding on the bill, in which he obtained decree, under deduction of the £127. After this he insisted in the process of suspension; and the Lord Ordinary having found the letters orderly proceeded, under deduction of the £127, Smith reclaimed. July 10. 1829. 1ST DIVISION. Lord Meadowbank. D.

Skene proceeded to state the case for him, when he was stopped by the Court, who called on the opposite counsel to show cause why the interlocutor should not be altered.

Jameson.—The marriage took place during the currency of the bill. By the mere act of the marriage, the husband got the full right to the document and its contents, without any special assignation from the wife, which indeed, after the marriage, would have been a mere nullity,—the wife being already, vi legis, divested in favour of her husband. An indorsation by the wife before marriage to any third party could not have carried this more effectually than the marriage does to the husband. The husband was therefore the party entitled to protest the bill.

LORD GILLIES.—The protest should have been in name of both.

Jameson.—After the marriage, the wife has no right remaining in her; the bill then belongs to the husband, and he is the proper party to recover payment. It has been so held in England. In a case reported, 1. Barn. and Ald. 218, "When a bill of exchange was payable to a femme sole, who intermarried before the same was due, it was holden that the husband might sue in his own name without joining the wife, although the latter had not indorsed the bill." The marriage being an onerous indorsation of itself, there is no reason why the husband should not protest the bill in his own name. If the husband can himself effectually indorse away the bill, why cannot he protest it? and if he can protest it, he has got full warrant to proceed with the ulterior steps of diligence.

No. 470.

July 10. 1829.

LORD BALGRAY.—I fully assent to the doctrine that ation in favour of the husband; but how does it appear band? Any other assignee who is not, ex facie of the is payable, must protest, not in his own name, but in husband has good right to bring an ordinary action in the right which he has acquired by the marriage; but any other assignee, to protest the bill, and raise sum name alone.

LORD GILLIES.—I was much struck at first by th ferred to; but I apprehend that there is a distinctior gland and Scotland, which we must attend to. A b merely founds an action against the debtor, and marriag to the husband. But, in disposing of this case, w rules of diligence prescribed by the law of Scotland a fictitious decree is instantly obtained on the bill, ar summary diligence. The whole grounds and warr be entire, and must be apparently and manifestly en who wishes to protest, if he be not, ex facie of the bill duce evidence of his connexion with the party in who In an ordinary action, the husband specially sets fo clusions, that he is the husband; and in the course o it is admitted, so as to warrant decree in his favour. own name, as in this case, without adducing any e depends his right to use the bill and exact the debt, i recourse to summary diligence.

LORD CRAIGIE having concurred *—

THE COURT altered the interlocutor, suspende found the suspender entitled to his expenses.

MACMILLAN and GRANT, W.S.—T. DEU

No. 471.

MUIR, Pursuer.—*A. M*

HIS CREDITORS, Defenders.—

Cessio.—Incompetent, after a summons of cessio has b to call as defenders, in virtue of it, creditors who were om supplementary summons.

July 10. 1829.

1ST DIVISION.

MONTEITH objected to the statement of this were not called. With a view to supply an tors, the pursuer, after his summons had be pend in Court, caused them to be cited, as in that writ, without raising any supplementary The Court sustained the objection.

* The Lord President was absent on this a

FERGUSON'S TRUSTEE, Pursuer.—*Cuninghame—A. Dunlop.*
MACKECHNIE'S TRUSTEES, Defenders.—*Sol.-Gen. Hope—Baird.*

No. 472.

Heritable Creditor—Sequestration—Process.—1.—A creditor with an heritable security er part of a sequestrated estate, who had no power of sale, and who purchased the property a public sale by the trustee, and retained the price in extinction pro tanto of his debt, found ible in payment of the expenses of the sale, and in relief of the prior feu-duties.—2.—Ob- tion to the competency of a reclaiming note, that the interlocutor closing the record was t printed, stated, but withdrawn,—the Court being disposed to repel it.

July 10. 1829.

1ST DIVISION.

Ld. Corehouse.

THE late John Mackechnie sold the villa of Glen near Greenock, in 313, to Dugald Ferguson; and £1000 of the price was declared a real irden in the disposition and infeftment. For this sum Ferguson further anted his personal bond. No power of sale was bestowed on Mac- chnie, who soon thereafter died, having conveyed his property in trust the defenders. In June 1817, the estates of Ferguson were seques- ated under the Bankrupt Act. At this time there were arrears of u-duties owing to the superior, amounting to about £40. On the th of October 1817, the trustee, under the authority of the Commis- ners, exposed the villa to public sale at £1000 under articles of roup, which it was, inter alia, declared that the purchaser should receive a lid disposition, freeing him of all prior feu-duties, obtain possession from e date of the sale, and pay the price at the first term thereafter. No ers were made, and the sale was adjourned till the 17th of December. the 11th of November, the agent for the trustee wrote to the defend- a letter in these terms:—"The villa of Glen, over which you have a ferable security of £1000, was lately exposed to sale, along with the er parts of Mr. Dugald Ferguson's property, by the trustee on his ate, at the upset price of £1000; but no offerers appeared. Under se circumstances, the trustee and commissioners are willing to abandon property in favour of Mr. Mackechnie's estate, on the same being epted in full of the claim on Mr. D. Ferguson." The trustee alleged t this proposition was agreed to; but this was denied, and no evidence taken as to the fact. On the 17th of December, (being the day to ch the roup had been adjourned,) the villa was again exposed at £900; no offerers appeared, and the sale was adjourned to January 1818. On occasion the villa was purchased by the defenders at the upset price, be- £700. Before the disposition was granted, the trustee made a claim he defenders for the expenses of the sale, and the bygone feu-duties. s was resisted by them; but their agent wrote to the trustee that he ld "hold that your delivering the disposition and titles in terms of rticles of roup shall not prejudge you from afterwards insisting for a ement of any claim you may think you have a title to bring forward nst Mr. Mackechnie's trustee." A disposition was thereupon grant- n which, after narrating that the £700 were to be put to the credit e debt for £1000, and the defenders were to rank on the estate for balance, the trustee disponed the property, assigned the rents and es, and obliged the creditors "to free and relieve the said trust-

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disponees and their foresaids of all feu-duties said subjects at and preceding the said term of

The trustee thereafter brought an action payment of the expenses of the sale, on the g beneficial to them alone, the whole price of the imputed by the said trustees towards paymen said Dugald Ferguson to them, while no ben therefrom by the general body of the creditors thier, to repay to him the prior feu-duties, wh them to the superior, in respect that these feu the debt of the defenders, and the price had in other words, imputed towards payment of t

In defence it was maintained—

1. That as the defenders stood in the positi could, consistently with the articles of roup, for the expenses of the sale, or for the bygone

2. That neither could any claim be made ditors, seeing that the sale had taken place, n that of the creditors, and for their behoof; been paid to the superior, and no assignation were extinguished.

The record was closed on the summons a Ordinary pronounced this interlocutor:—'In 'the price of the subject in question in the ' 'ditors on the bankrupt estate, and that it is 'creditor had an interest in the sale, or took 'liable for the amount of the account incur 'agents, and also the sum paid by the pursu 'est on both as libelled, and decerns;' and expenses.

The defenders having reclaimed—

Cuninghame, for the Trustee, objected the record had not been printed; and that, burn, which had been decided a few days note was incompetent.

The Court superseded the case, to inqui and having ascertained that the reclaiming respects irregular, and being satisfied that a reclaiming note incompetent in respect of locutor closing the record, (although it is t and for omitting which he may be fined,) repel the objection, when it was withdraw

In regard to the merits—

LORD CRAIGIE was understood to the interlocutor.

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Lord Balgray observed, that the question as to the liability of an heritable creditor for the expenses of a sale under a sequestration had been several times before the Court. In the case of Goodwin, Feb. 1. 1815, the Court had altered the Lord Ordinary's interlocutor finding an heritable creditor liable; and the same rule was observed by this Court in Cuthbertson against Gardner, Nov. 13. 1819. That case was appealed; and when the authority of Goodwin's case was relied on, great doubt was entertained of that decision; and it was stated from the Woolsack as one which, on a fit occasion, would deserve very grave reconsideration. (See Shaw's Ap. Cases, p. 291.) The case before the House was disposed of on its special circumstances. In Mr. Bell's last edition (Vol. II. p. 425), the subsequent cases, as well as the prior ones, are noticed and commented on; and the rule seems now fixed, that the heritable creditor deriving benefit from the sale is liable for the expenses of it.

Lord Gillies.—This case seems to me as clear as day. The trustee, at an early period of the sequestration, offered to renounce this heritable subject to Mackechnie's trustees in extinction of their debt. This offer they declined—and what was to be done? The property must be sold, and at whose expense is this procedure to take place? At the expense of the personal creditors who have no interest, and get no benefit from it—or at the expense of those heritable creditors who derive the sole advantage? Mackechnie's trustees possessed no powers of sale themselves, and an adjudication by them would have cost three times as much as the account now rendered to them. By every principle of law and equity, they are liable for the necessary expense of selling his subject.

The Court accordingly adhered.

J. Patten, W. S.—J. Court, W. S.—Agents.

No. 473.

Lord Melville, Pursuer.—*Sol.-Gen. Hope—Robertson.*
J. Wilson and Others, Defenders.—*D. F. Jeffrey—Cockburn—Skene—More.*

Excambion.—Condescendence before answer ordered, as to whether certain roads were included in lands excambed.

July 10. 1829.

1st Division.

By the judgment of the Court on the 12th of December last, relative to a claim by the pursuer to a piece of ground in the neighbourhood of Melville Castle, on which a distillery had been erected by the defenders, who alleged they had right to it under an excambion, (ante, No. 86. p. 186,) their Lordships 'opened up the record declared to be closed by the Lord Ordinary; and, before answer, remitted to his Lordship to order a pointed condescendence to be given in by the defenders of their averments, and what they will undertake to prove in regard to the extent of the excambion founded on.' A condescendence was accordingly lodged, which his Lordship ordered to be withdrawn, as not in terms of the order of Court; and the defenders having reclaimed, and the Court considering their interlocutor not sufficiently explicit, 'Recalled the interlocutor complained of, and found that the object of the remit was not

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'to discover the exact quantity of ground mu
'parties hinc inde, but to fix and ascertain the
'of the defenders, how far the ground over
'encroachment had been made, and particular
'were or were not comprehended under the
'defenders were willing to undertake to prove t
'of new, before answer, remitted to the Lord
'specific condescendence in common form.'

A. Wishart, W. S.—Greig and Morton, W. S.—

No. 474.

A. Campbell, Complainer.—*Sol.-Gen*
Hon. C. A. Murray, Respondent.—*D.*

Process—Summary Complaint—Public Records.—Petitio petent mode of procedure against a private party alleged order to obtain an extract given out of Chancery, as of a ret of what was in truth a copy of an entry in an unauthenticate Register-House, he not having yet made use of it by clai Freeholders.—2.—Circumstances in which a complaint as laid against the office-bearers in Chancery.

July 10. 1829. 2d Division. Ld. Moncreiff. R.

The respondent, the Hon. Mr. Murray, he freeholder of the county of Lanark at the last as infeft in the liferent superiority of certain la Gerviestoun and Urkilliswood, said all togethe books at £419 Scots, the complainer Mr. Ca of the freeholders, presented a complaint ag ground that he had no right to found on a necessary to make up his vote. Answers were by Mr. Murray, stating that he had "exec liferent superiority of all the lands on which exception of Gerviestoun and Urkilliswood, w land of old extent;" and that as he "has it i claim enrolment on his 40s. land of old extent prayer of the petition being granted, in so f expunge his name from the roll of freeholders plaint was accordingly granted, and Mr. Mu expunged from the roll by a judgment of th March last. Four days thereafter, a second presented by Mr. Campbell, arising out of the In the General Register-House there is pre ing of about fifty leaves of a book, containi proceedings of the Sheriff Court at Hamilto has lain there for a long period, without a to be deposited, and which has no title, seal, mark of authentication. Among other ent services, one of which is a service of an Al

ther Robert Baillie, in the forty shilling land of Gerviestoun and Urkillis- No. 474.
ood. An extract of this entry was obtained by Mr. Murray from the July 10. 1829.
eeper of the Records. This extract was then carried to the Chancery-
fice, and given in to the clerks there, who inserted it in the record of spe-
al services or retour-book in Chancery, and then gave out a formal ex-
act from the retour-book, bearing the usual docquet—" Hæc est vera
pia principalis retornatûs super præmissis Cancellariæ S. D. R. Regis,
manen.," &c. With reference to these proceedings, Mr. Campbell pre-
nted the complaint above mentioned, directed against Mr. Murray, and
so against the Keepers of the Records, the Director of Chancery and
s clerks, and particularly the clerk who signed the extract, praying the
ourt, 1. To find that the fragment of the book above mentioned, or
y extract therefrom, ought not to be inserted in the records of Chan-
cy, at least without proof of its authenticity made before the Court,
d authority granted by them. 2. To grant warrant for removing the
ok into process, for the purpose of being examined by the Court; and,
To ordain Mr. Murray to lodge in process the extract obtained by
n from Chancery, and to grant interdict against any further extracts
ng given out from this book, and recorded in the books of Chancery.
appearance was made by the Keepers of the Records, or Officers in
ancery; but answers were given in by Mr. Murray, objecting to the
mpetency of the complaint, that until a claim for enrolment, founded
this retour, was actually made, there was no room for a complaint
ler the Election Statutes; and that at common law it was incompetent
nstitute any proceedings such as the present, which, quoad him, were
the nature of an action of exhibition and delivery in the form of a
mmary complaint, he not being a public officer, or otherwise under
immediate control of the Court. On the other hand, it was con-
ded for Mr. Campbell, that as this extract was avowedly to be used
the purpose of obtaining enrolment, he, as a freeholder, had the same
to challenge it, as to challenge a decree of division of valuation,
ch it was quite competent for a freeholder to do before any claim was
ually made; that the Court were the proper guardians of the purity
he public records, and entitled to interfere, on the summary applica-
of any party interested, to prevent any thing being done to corrupt
records; that Mr. Murray was a party, along with the officers, to
proceedings complained of; and that, in similar circumstances, the
rt had proceeded against a private party on a summary application,
ie case of Hamilton M'Gill, Dec. 17. 1761, reported in the Acts of
:runt; and besides, that though the former petition and complaint
been dismissed before the present was given in, still the proceedings
plained of were by a litigant with reference to a pending litigation;
that in this character Mr. Murray was liable to be summarily com-
ned of to the Court.

he Lord Ordinary having reported this preliminary objection to the
t on Cases, their Lordships sustained it, and dismissed the complaint
to, with expenses.

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LORD JUSTICE-CLERK.—I certainly t
subject of the former complaint was at an
tifies the complainer in saying that any th
plaint proceeds on the allegation that some
never recognised as a ground of complaint
ground of complaint can arise. Mr. Mur
to raise a vote on this claim, is quite conclu
against the office-bearers in the Register-of
in. I certainly do not think there is any
against them. There is no charge of malv
But whilst I say this, I give no opinion on
a question not now before us.

LORD CRINGLETIE.—I think this is s
the country. If an extract is to be given o
the history, by certain officers, then recei
part of the record—this might be destruct
to Mr. Murray, the petition seems to me
spoke of, I do not know whether it is a p
Campbell; but if it be so, I think there is

LORD PITMILLY.—I think a petition
sue the office-bearers of Chancery; but t
plaint against them. They are merely n
complaint against Mr. Murray, and ther
them. I do not think we can consider thi
are not properly parties to it. There is r
against Mr. Murray.

LORD GLENLEE.—I agree with the m

LOCKHART and SWAN, W. S.—YOUNGS, AY

No. 475.

ELIOTT'S TRUSTEES, Raisers.—
SIR W. F. ELIOTT, Clai

July 10. 1829.

2D DIVISION.
Lord Medwyn.
F.

Trust.—This was a repetition of
mentioned ante, Vol. VI. No. 406.
being still in such a situation that th
pronounce decree of exoneration in
refused.

TOD and ROMANES, W. S.—

No. 476.

G. S. ELIOTT, Su
MRS. SARAH ESPLIN and Other
A. Mur

July 10. 1829.

2D DIVISION.

BILL of suspension of a charge o
which time had been allowed to en

JOHN BELL, Pursuer.—*Sol.-Gen. Hope—Marshall.* No. 477.
SYME'S TRUSTEES, Defenders.—*D. F. Jeffrey—Rutherfurd.*

Reference to Oath.—The Court refused to allow an oath on reference to be taken, to lie in retentis, pending a discussion on the competency of the reference.

July 10. 1829.
2D DIVISION.
Lord Medwyn.
T.

A reference to the oath of one of the defenders in this case having been made by the pursuer, the Lord Ordinary reported it to the Court on an objection which was taken to its competency. The Court, considering the question attended with difficulty, ordered Cases, whereupon the pursuer craved, that as the defender to whom the reference was proposed to be made was in a very precarious state of health, the oath should be allowed to be taken to lie in retentis till the question of competency should be decided. This, however, the Court refused.

W. STEWART, W. S.—RENNY and HUNTER, W. S.—Agents.

J. KER and Others, (for the LEITH BANK,) Petitioners.—*Greenshields.* No. 478.
ARCHIBALD SCOT, Respondent.—*Robertson.*

Bankrupt—Sequestration.—When a party had entered an appeal against a sequestration of his estates, and the election of an interim factor under the Bankrupt Act, the Court superseded consideration of a petition for interim execution, reserving to the factor to apply during vacation to the Lord Ordinary on the Bills.

July 11. 1829.
1ST DIVISION.
D.

THE Leith Bank having charged Scot, formerly their agent at Langholm, for payment of an alleged balance due by him, he presented a bill of suspension, which was refused. Against this Scot appealed. The Bank then applied for a sequestration of his estates under the Bankrupt Act, which was awarded by the Court on the 20th of February last, and the creditors appointed to meet at Langholm on the 10th of March, to elect an interim factor. Against this judgment Scot, on the 4th of March, also appealed; and the meeting of the creditors was, in consequence, postponed. On the 13th, the Bank, with certain other creditors, applied to the Lord Ordinary on the Bills, under the 67th section of the Bankrupt Act, to order such measures to be taken as might be necessary to prevent the estate from being embezzled or dilapidated pending the appeal. An order for answers was granted on the 13th, which were lodged by Scot. The process having been laid before Lord Pitmilly late on a Saturday afternoon, and when his powers as Ordinary on the Bills had expired, Scot called on him, got the process on a representation that he had just left it for the purpose of being advised, and carried it off. An application was then made to Lord Gillies, the next succeeding Ordinary, who, on the 27th of March, granted warrant for Scot's apprehension and restitution of the process, and in the mean time allowed the sequestration to proceed so far as to elect an interim factor; and for that purpose appointed the creditors to meet on the 3d day of April. Scot was afterwards apprehended; and having been brought before Lord Cringletie, the succeeding Ordinary, he re-

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stored the process. He then presented a petiti
to recall the order of Lord Gillies; or at lea
prohibit it from being carried into execution,
His Lordship, on the 1st of April, refused this
tent, and as unfounded on the merits. Scot, h
petition of appeal, and having got a warrant
the agent of the Bank at the meeting held for
factor. The meeting nevertheless made ch
but, under the circumstances, recommended
to approve of the appointment. He according
as Ordinary on the Bills, confirmed his nomin
authorized him to proceed with the executio
the 67th section of the statute, "to the effec
the debtor from being embezzled, secreted,
and required him to find caution "that no
shall be done by him as interim factor, whi
jurious to the interest of the said Archibald
he adhered on the 18th.

In the mean while the Bank and the othe
House of Lords to dismiss the appeals agai
27th of March by Lord Gillies as incompet
the proceedings directed to be taken by th
67th section of the Bankrupt Act for Sc
notwithstanding the appeal, without prejuc
ing these proceedings, if he thinks it, afte
tion shall have been disposed of."

The House of Lords, on the 20th of
ceedings under the two interlocutors of
of March and 27th of March 1829 appea
Court of Session, or the Lord Ordinary
preventing the estate of the debtor, the a
secreted, damaged, or dilapidated, while
carried on under the direction of the C
appeal."

Thereafter the interim factor repeated
in order that measures might be taken
not having complied with those requisi
creditors presented a petition to the Co
Bankrupt Act, but founding on the 48
to interim execution pending appeal.
the House of Lords, and their prayer
execution pending the said appeals, in
owing—namely, to authorize the cr
place as your Lordships may direct.

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and pronounce the usual interlocutor; to authorize the trustee, so to be elected, to proceed with the judicial examinations of the said Archibald Scot, or any of his family, or others connected with his business—all in terms of and under the sanctions contained in the statute; to empower the trustee to call for and take into his custody all books, accounts, vouchers of debt, securities, and other documents relative to the estate, or the affairs of the said Archibald Scot, and likewise to take such legal steps as may be effectual for securing the said examinations, and obtaining possession of the estate, real and personal; to recover all debts due to the said Archibald Scot; to sell and dispose of his moveable estate; and in general to take all steps necessary for recovering, preserving, or preventing embezzlement of the said estate; and to find the petitioners entitled to expenses; or to give such other relief, or pronounce such other interlocutor in the premises, as to your Lordships, in the whole circumstances of the case, shall seem just."

On the case coming to be advised—

Greenshields, for the Petitioners, stated, that the interim factor had already done all that was in his power to prevent the dilapidation of Scot's effects, and to accomplish the discovery of his estate. His powers do not go beyond these objects; and there was no other resource than to make this application for interim execution pending appeal, by the Court appointing a trustee. The words of the 48th Geo. III. c. 151. § 17, allowing such interim execution, are perfectly general, and reach to every description of judgment appealed from. Here the prayer is, that such limited powers may be given to the trustee as are necessary to save the property from being dilapidated, and to enforce the discovery of the bankrupt's funds in a manner more effectual than it has hitherto been able to do. No powers are asked to sell the estate, still less the real estate of the bankrupt, or to make any distribution among his creditors.

Robertson for the Respondent.—The prayer of the petition goes a great deal further than this. It prays that the trustee be empowered to examine the bankrupt and his family under the statute, and to sell and dispose of his moveable estate. But this application is improperly made under the 48th Geo. III. There is a section of the Bankrupt Statute which was meant to regulate such questions as this; and there is appended to the answers an order of the House of Lords, dated 20th April 1829, which was made in relation to the proceedings of the Court of Session pending the appeals in this very case. It is upon these that the petitioners should alone have founded in bringing the present application; and they do not permit the granting of powers so extensive as are here prayed for, which indeed, if they were awarded and exercised, would be equal, not to interim, but to final execution of the judgments already pronounced. I object, therefore, to the competency of this application, founded as it is solely on the 48th Geo. III. Sequestration is in itself a species of diligence or execution; and but for the 67th section of

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the Bankrupt Act, which is not founded on by have been impossible for this Court to have tak tration, while not only the legality of the seq the subsistence of the debt on which it proceed

Greenshields.—The clause in the Bankrup into them long before the 48th Geo. III. was statute are perfectly general, so as to reach enlarge the powers of the Court in disposing

Lord Balgray.—From the complexion we ought to proceed with much circumspe There are three appeals appended to this pe last two that we ought to pay any regard— the judgment of the Court awarding sequest the Lord Ordinary's interlocutor appointin choose an interim factor. But besides fu these appeals, the petitioners ought to have order of the House of Lords, made in relati is printed along with the answers. The sa that order to prevent embezzlement &c., a Bankrupt Statute, in regard to the appeal Court awarding sequestration. Keeping to us our functions and duty in this case, best means of our discharging these? W as are proper to produce the discovery these may be; and when these are disco they be safely placed within the protecti prayer of this petition craves the requis for granting it, but no further; and it a of doing this is to allow the creditors to appointment of an interim factor is of a are comparatively limited; and as his only person who can officially come in we ought to limit the powers with whic

Lord Gillies.—I took at first tl would plainly satisfy substantial justic mitting the creditors to elect a statutor moment of his appointment by them, Act. I fear that we cannot give su powers in the person of the trustee, follow out certain steps for the purpc I would wish to delay this case until President. But it is quite clear tha pendently of 48th Geo. III., and of the 67th section of the Bankrupt Sts be more important still. It empo direct such proceedings, as shall app

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estate of the debtor from being embezzled, secreted, damaged, or dilapidated, while the appeal is pendent; and every step may in the mean time be taken in the recovery of the bankrupt's estate, and the distribution thereof, that is not repugnant or injurious to the interest which the party appealing by the appeal insists upon." Now, although I doubt whether we can limit the powers of a trustee, we are most clearly entitled to extend those of a factor. It therefore occurs to me that we should appoint the creditors to meet and name a factor, on whom we shall devolve such powers as are requisite to effect these objects of the section quoted from the Bankrupt Act. Such a factor, in the event of his requiring any special power in order to effect these objects—to force disclosure of the estate, to have an examination of the bankrupt &c.—might either apply to the Court in time of session, or to the Lord Ordinary on the Bills during vacation, who, I have no doubt, has authority to grant the power, so far as he shall see cause.

Robertson.—Does your Lordship mean the general statutory examination?

Lord Gillies.—I do not; but such an examination as the Court or the Lord Ordinary may see cause to authorize, under all the circumstances of the application.

Lord Balgray.—Perhaps the Sheriff-clerk is the proper factor to whom we should give these powers.

Lord Gillies.—The creditors have already chosen a factor. Is he now acting?

Greenshields.—He is.

Lord Gillies.—Then why not confer on him the powers that are desired?

Lord Craigie.—The powers which we can confer on the factor, seem to me to be such as are specified in the order of the House of Lords. To what extent we may enlarge the powers of the present factor.

Lord Gillies.—I certainly would not award those powers under the 48th Geo. III.

Robertson.—Allow me again to remind the Court, that this petition is solely founded on that statute, and I have all along objected to its being entertained on that ground.

Lord Gillies.—You will not easily, on a point of form, defeat a petition whose object is so urgent and important as this. The requisite section of the Bankrupt Act is set forth in the petition; and the prayer, besides its special tenor, craves "such other relief" &c. as the Court shall see meet to grant.

Their Lordships then superseded the petition till this day, when—the Lord President being still absent—

Greenshields stated, that unless a trustee be named, the creditors cannot protect their interests. Even if an interim factor were named by the Court, with unusual powers, such as to examine the bankrupt on oath, and to get from him a state of all his intromissions, yet this might be a

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defective remedy; for if Scot should refuse
the border to escape from imprisonment for
Court, what becomes of the estate in the
dated by the bankrupt, in despite of any
factor.

Robertson.—We shall find security against

Lord Balgray.—But that is not enough
stantly to trace out all the proceedings of
evidence of the present situation of his estate

Lord Gillies.—We are all satisfied of
trustee to manage this sequestrated estate;
which the petitioner should speak—I mean
appointment.

Greenshields.—In awarding interim exec
have the power to grant the whole, or only
vileges to the trustee, as they shall deem
interests of all parties. But if this be tru
expediency of having a trustee instead of a
argument.

Robertson.—It is at any rate impossib
to-day, because there is no Court; there

Lord Gillies.—And even if there we
sustain an application for interim executio
here regards the appointment of a truste
his appointment, the whole statutory po
with these powers certain duties also.
preservation of the bankrupt estate; a
statutory penalties, if he should waive
assigned to him by the statute, even th
tions. It appears to me that a factor
vested with such ample powers as may e
in the spirit of the 67th section of the
I apprehend that we cannot grant the

The Court then 'superseded con
'present, without prejudice to the inte
'from time to time, as he shall see p
'Bills during the ensuing vacation.'*

J. Bisset, S. S. C.—T. Johnstone,

* An application was made to the Lord Ord which Scot has reclaimed.

HON. MRS. MACKENZIE and Others, Complainers.—*Sol.-Gen. Hope—Skene—Cuninghame.* No. 479.
MAGISTRATES of DINGWALL and Others, Respondents.—*D. F. Jeffrey—Robertson.*

Breach of Interdict. — Question, whether a party had been guilty of breach of interdict, remitted to the Jury Court.

July 11. 1829.
1ST DIVISION.
D.

IN an action of declarator at the instance of the complainers against the respondents to have it found that the complainers had the exclusive right of fishing salmon in the river Conon, Lord Corehouse, on the 11th of March 1828, by an incidental order, interdicted the respondents and their tenants 'from fishing or killing salmon in any part of the river 'Conon above the line delineated, on the plan in process, as the march 'between Balblair and Breakanord; but in respect that the defenders '(respondents) do not admit that the said line is accurately laid down in 'the plan, without prejudice to the parties to ascertain the exact march 'between Balblair and Breakanord, before the interdict is declared per-'petual.' Thereafter his Lordship found that the respondents had right to the fishings in the Conon from the march of Breakanord down to the sea; but, in respect parties were not agreed as to the march between the lands of Balblair and Breakanord, appointed the complainers to put in a condescendence, specifying what they aver to be the situation of the march, and in the mean time continued the interdict; and to this judgment the Court adhered. (See ante, Vol. VI. No. 320.) A dispute then arose as to the actual position of the line referred to on the plan,—the complainers alleging that it was so situated as to include under the interdict two pools called Pool Oure and Pool Breakanord; while the respondents alleged that they were not within the interdicted ground, and on this footing they fished there. The complainers then presented a petition and complaint to have the respondents found guilty of breach of interdict and contempt of Court, and subjected to punishment and damages.

The Court at first remitted to a surveyor; but his report being unsatisfactory, they of new interdicted the respondents from fishing in these pools; and, with this finding and direction, remitted the case to the Jury Court.

A. MACQUEEN, W. S.—HORNE and ROSE, W. S.—Agents.

RODERICK MACKENZIE and MANDATORY, Petitioners.—*Shaw.* No. 480.
ALEXANDER CAMPBELL, Respondent.—*A. Wood.*

Arrestment—Jurisdiction—Expenses.—1.—The Court of Session has no jurisdiction to recall arrestments laid on a vessel in virtue of letters of arrestment issuing from that Court, but executed with concurrence of the Judge Admiral.—2.—Expenses refused to the respondent, in respect the objection was not taken by him.

July 11. 1829.
2D DIVISION.
R.

ON the dependence of an action before the Water Bailie of the Clyde, at the instance of the respondent Campbell, against Hugh Mackenzie as master and owner of a sloop lying at the port of Oban, Campbell raised letters of arrestment issuing from the Court of Session; and having obtained

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the concurrence of the Judge Admiral, he caus
For recall of this arrestment, a petition was pre
Mackenzie, Hugh's brother, on the allegation
him, and not to Hugh. When the petition ca
swers, an objection to its competency was st
had not been adverted to by the responden
time question; and that the arrestment havi
the Judge Admiral's concurrence, it could n
of Session. With reference to this objection-

Shaw, for the Petitioner, contended—Th
by virtue of the warrant of the Admiral. I
Court that the diligence is issued, and the co
obtained, merely because the subject arreste
tory. The warrant of arrestment being gr
entitled to come here to get it recalled.

Wood for the Respondent.—The proper w
was arrested, was the concurrence of the A
warrant to arrest a ship.

LORD CRINGLETIE.—The general warrant f
any thing on the sea. It was the Admiral's
warrant. This application, therefore, must b
The other Judges concurring—

THE COURT dismissed the petition, in r
on the concurrence of the Judge Adn
fused to allow the respondent the ex
this plea had not been stated by him.

BOWIE and CAMPBELL, W. S.—A. C

No. 481.

WILLIAM MAXWELL, Suspe
JOHN CUMMING, Cha

Submission — Interest. — Observed, that where certain sum, under deduction of counter claims, inte

July 11. 1829.
2D DIVISION.
Bill-Chamber.
Ld. Moncreiff.
T.

BILL of suspension of a charge procee deduction of certain counter claims fou same decree. The Lord Ordinary havi reclaimed, and contended that deductio (as to which the decreet-arbitral was si in the charge. The Court refused the ever, that interest was unquestionabl ducted; and if it was not allowed b peril.

JOHN BAIRD, W. S.—ROD. M

J. P. SHARPE, Suspender.—*Jameson.*
A. SIMPSON and A. KING, Chargers.—*Sol.-Gen. Hope—Maconochie.*

No. 482.

July 11. 1828. 2d Division. Chamber. Moncreiff. Ld. T.

Discharge—Bill of Exchange.—A bill having been indorsed by a party in his individual character, and by two companies of which he was a partner; and a discharge having been granted by the holder to one of the companies, who paid a composition, and to the individual partners, including this party—Held that he was not thereby relieved from liability as an individual indorser or partner of the other company, who had also indorsed the bill.

THE chargers Simpson and King held a promissory note for £200, granted by John Spalding and Company, of which the suspender Sharpe was a partner, to the order of John Hart and Company, the suspender being a partner of this company also. The note was indorsed by several parties, and in particular by John Hart and Company, and by the suspender himself individually; and finally it was indorsed by the chargers to the Bank of Scotland, by whom it was protested for non-payment when it fell due. The concern of John Hart and Company having in the mean time become bankrupt, they offered to their creditors a composition of 10s. in the pound, of which 2s. were to be advanced from the private funds of John Hart, one of the partners,—the remaining 8s. being all the dividend which the company funds could afford to pay. Mr. Aitken, the Bank of Scotland's agent in Glasgow, who held at the time the note above mentioned, along with others in which the company were obligants, acceded to this offer; and on receiving bills for the composition from John Hart and his cautioners, he signed, on the 13th of May last, along with the other creditors, a deed of discharge, (under this qualification attached to his subscription, "reserving all securities held by the Bank of Scotland,") whereby he and the other creditors (described as creditors of John Hart and Company, merchants in Glasgow, and John Hart, Thomas Peat Sharpe, and Robert Cruickshanks, individual partners of the said company,) discharged the company, and these persons "the individual partners of the said company, of all debts and sums of money due to us and our constituents against the said John Hart and Company, or against the said individual partners of that company, (excepting always our claims against the said John Hart and his cautioner for the said composition,") &c.

On the same day the amount of this note being paid to the Bank by the chargers, they received it up, with the protest, duly receipted; and thereon charged the suspender Sharpe for payment of the same, under deduction, in the mean time, of the amount for which the composition-bills had been granted, effeiring to this note. Sharpe thereupon brought a suspension, on the ground that the discharge by Mr. Aitken imported a discharge of him individually. To this it was answered, that the discharge was merely of the company of John Hart and Company, and of him as an individual partner of that company; but that it could not relieve him of his obligation as a partner of Spalding and Company, who had granted the note, or as an individual in respect of his own indivi-

No. 482
July 11. 1829.

dual indorsation of it, on principles whic
case of Melliss v. the Royal Bank, June

The Lord Ordinary found 'that the d
'Aitken, as manager for the Bank of Sc
'John Hart and Company, merchants in
'Peat Sharpe, and Robert Cruickshank
'company, upon receiving certain com
'John Hart and Company, and the said
'and Robert Cruickshanks, 'the individ
"of all debts and sums of money due t
"the said John Hart and Company, or
"ners of that company, (excepting alw
"John Hart and his cautioner for the
'held to import a discharge of any debt
'scribing creditors against the company
'as acceptors of the bill charged on, or
'dual partners of that company for d
'therefore cannot import a discharge of
'as an acceptor of the said bill in his
'Spalding and Company; therefore,
'offer to prove, by the oath of the cl
'made to account of the bill beyond th
'the charge, refused the bill, and foun

His Lordship added this note:—"
the debt of Spalding and Company w
which was indorsed by Hart and C
the complainer cannot maintain that h
the debts of Spalding and Company, if
sons who signed the discharge as credit

Sharpe reclaimed; but the Court a
ference to oath as to partial payments a
other obligants.

MACLEAN and GIFFEN, W. S.—D.

No. 483.

A. MEIN, (NEILSON'S TRUST
MISS M. TOWERS, Respondent.—*So*

Bankrupt—Reference to Oath.—Reference to
niece, refused to be allowed in a question with the

July 11. 1829.

2D DIVISION.
Ld. Cringletie.
T.

ANDREW NEILSON, who resided in
brother in a mercantile concern in Gl
1824, an eighth of a lottery ticket (N
where it was registered in his name. I
his brother absconded, carrying off co

No. 483.
July 11. 1829.

month. The ticket, of which the eighth had been purchased by Neilson, was drawn, on the 22d of May, a prize of £20,000 three per cent. consols. On the 1st of June, Neilson, in an examination under the sequestration statute, stated in substance that this ticket had been purchased by him for his niece, the respondent Miss Towers, who resided with him, and who had given him money to purchase the same; and he delivered it up to the trustee (the advocator Mein) to be negotiated, but on this condition, "that the proceeds be immediately deposited by him in the Royal Bank of Scotland at Glasgow, to be specially and distinctly held by him, subject to the future orders of Court, and under the reservation of the rights of all parties, as accords." Thereafter Miss Towers raised an action against the trustee before the Magistrates of Glasgow, concluding to have him ordained to deliver up to her the ticket; or, on failure, to make payment of the amount due on it, in name of damages. The Magistrates allowed Miss Towers a proof of her averments that her uncle had bought the ticket for her by her mandate, and with money given to him by her for that purpose; that, prior to his bankruptcy, he had delivered the ticket to her; and that she had afterwards intrusted it to him, to inquire whether it came up a prize. She accordingly adduced several witnesses, whose testimony went chiefly to establish that the ticket had been seen in her possession on the 1st of April and afterwards, and that she had repeatedly stated that it had been bought by Neilson for her. On advising the proof, the Magistrates found the libel sufficiently instructed, and decerned in terms of the alternative conclusions. Mein, on this, brought an advocation, in which, after the record was made up, the respondent, with permission of the Lord Ordinary, gave in a minute, referring to Neilson's oath "in supplement of the proof already adduced in causa,"—"Whether the respondent did not, previously to his sequestration and bankruptcy, desire him to purchase for her an eighth share of a lottery ticket? Whether he did not, in consequence, purchase the eighth share, now in dispute, of the ticket No. 17745, and, previously to his said bankruptcy, deliver the same to her as her property? Whether she did not afterwards intrust him with the said eighth, with a view to inquire if it had come up a prize; and if so, to uplift and receive the proceeds of such prize on her account? And generally, whether, prior to and at the time of his sequestration, the said eighth was not the bonâ fide property of the respondent? And whether, in so far as the same was then or afterwards in his possession, he did not hold the same merely in trust, and as acting for behoof of the respondent?"

The Lord Ordinary having sustained this reference, the trustee reclaimed; and the Court, considering the question raised to be attended with difficulty, ordered Cases.

Pleaded for the Trustee.—The question here is between Miss Towers and her uncle's other creditors, and she proposes to establish her claim by his oath; but, quoad them and their interests, he is a witness, and so incompetent to give evidence for his own niece. Again, if it be consider-

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ed purely as an oath of reference, the bankrupt ing the sole interest; to the extent of his reven may bind himself by his own oath; but, quoad the only parties having such an interest as to competent; and although reference to a bank instances been allowed, that is confined, as stat cases where his evidence is not objectionable on or interest." Accordingly, in the late case of Vol. IV. p. 536,) the Court refused to sustain a bankrupt who had been rendered infamous, ciple that such reference is incompetent in al would not be a competent witness against the

Pleaded for Miss Towers.—A party is al case by reference to the oath of his opponent in a different situation from special assigne affected by the oath of a cedent who has general creditors come into the place of thei qualifications which affected his right. Acc reference to the oath of a bankrupt to prove ditors and a claimant was not allowed, yet it be suspicious circumstances, or unless his the party referring, as where success would division. Here, however, the success of the diminish the funds, and mere relationship ground of suspicion as to warrant the rejec in the late case of Ritchie v. Mackay, the reference to a bankrupt by his brother, d that the bankrupt had been rendered infa and were agreed that the relationship alo cient bar.

Lord Pitmilly.—I have had great diffic its never being distinctly stated in what char amined. Now it is necessary to decide this from seeing so much argument on the proof examined on a reference, it is of no conseq the only case where we should have to do w were to be taken in supplement. But it is in this way, and it is not now asked at the to examining him as a witness; nor could he of his own niece. The question therefore n can be examined on reference; and I take sive on the whole cause. Now I own th practice on this subject. Certainly no ma his own cause; and reference to oath must our law holds a bankrupt so little of a pe witness; and so much so, that reference

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something anomalous here; and I think the English practice better, where he is only admissible as a witness. It is established, however, that a bankrupt may be examined on reference to oath. But a doubt arises here, as there are certainly exceptions to the rule; and the question is, whether this case does not form an exception; and I entertain considerable doubts. We found one exception lately in the case of Ritchie and Mackay, where we held infamia juris a sufficient objection; and which case receives a sort of confirmation from the case of Moonie against Bloomfield. Mr. Bell, Vol. I. p. 253, mentions the exceptions of relationship or interest; and he has another passage to the same effect, Vol. II. p. 484, which applies very strongly to this case. On these grounds, I have some doubt; for when the party is bankrupt, and in circumstances of suspicion from relationship, and the real question being with the creditors, I have very great doubt of admitting the oath; but I have not formed a decided opinion.

Lord Alloway.—I agree that this is a case of extreme difficulty. It is clear that we can only consider this as an oath on reference. Supposing, before this man became bankrupt, the respondent had offered to refer, the competency could not have been doubted. Then what alteration does bankruptcy effect? At one period it was found, when a man became bankrupt, that there could be no reference to his oath, as he was held to be totally divested, as in the case of Gilchrist against Morton. But, early in the 18th century, great doubts were entertained on the subject; and at last, in the case of Blair against Balfour, it was found competent for any creditor claiming to be ranked, to refer to the bankrupt's oath; and that is now completely settled; and the reason is sound, that he has an interest to diminish the debts, and increase the funds. But I admit there may be exceptions; and if it could be shown that the bankrupt had an interest, or that there was the slightest collusion, it is clear such reference could not be admitted, and all interest to authorize reference would be at an end by collusion. The case of Ritchie against Mackay (though I differed in opinion) fixes that there can be no reference, if the bankrupt be infamous; but it does not apply to the present case, where there is no infamy whatever. If the bankrupt had emitted any declaration showing collusion, it might have afforded grounds for refusing the reference; but nothing of this kind appears, and I do not see any ground to differ from the Lord Ordinary. This man's interest is to increase the fund of division among the creditors. Then as to suspicion, I see no ground for it; and the proof rather contradicts any idea of collusion; for there is clear evidence that, on the 23d of March, the ticket was bought, and that it had been delivered to the lady before the 1st of April. Then the only other point is the relationship; and I cannot conceive how it should bar the reference, as, in the case of Ritchie against Mackay, we conceived the relationship of itself not sufficient. In the law of England there is no such thing as an oath of reference, so that the practice of England is not applicable; and therefore I think the Lord Ordinary's interlocutor well founded.

Lord Glenlee.—I have not formed any decided opinion. I am somewhat moved by the recollection which I have, that in some of the first instances where the oath of the bankrupt was admitted, it was held to be competent, and that it would bind him; but that in a question with creditors, who were not, in

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the same sense with him, parties, its effect w
fact of the bankrupt deponing so and so wa
consideration with others; so that if the c
show that the oath was false, it was not to l
rather as the evidence of a witness. That
when it first admitted the bankrupt's oath
there are no suspicions, it is binding, I thin
be open for consideration as to its effect.
trustee, and the law always supposes there
the oath would be binding on the bankrupt;
the oath therefore is admissible on principle
posing this had been a whole ticket, which
the respondent not have insisted on a refe
to find the reference incompetent; but, on
consider if it is equally binding on the cre
reference, I should have very great doub
ship here is so near, that the bankrupt co
This is too broad, as where there is proper
the peculiar conduct of the parties, such r
the natural course of such a transaction, a
another, is not to enter it in books, or prese
satisfied that the penuria is not of such nec
his examination as a witness. But I should
be taken, so as to be binding fully on the c
to let the oath be taken, reserving its effect.

Lord Justice-Clerk.—There has sel
for decision. I am clearly of opinion that t
plement; and I am driven, therefore, to th
the pursuer to refer entirely to the oath of
his oath; and at present I cannot think tha
oath in causa, reserving consideration of its
proof. This is just examining in supplem
consider it a reference out and out in the ca
with great difficulty on this, whether or no
tion, as showing strong grounds of suspicion
stance of relationship, per se, a bar; but th
not know if I am in order to look at the p
ations, which last we certainly must look
me, in regard to this transaction, as of a s
cannot say there are not strong circumstanc
the reference, which I conceive would be c

The Court ordered a hearing in presence
delivered their opinions as follows:—

Lord Pitmilly.—The proposal now sim
It is no wonder that there was a want of pr
this oath was proposed; for there is the s
ported cases. It is therefore necessary to
between the oath of a witness and the oath o

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forms the ground of exclusion; whereas, in reference to oath, interest is the ground on which it rests. It is obvious that interest being the only requisite to reference, relationship cannot, in the general case, exclude it. But the difficulty here arises from the bankruptcy; because, in consequence of this, the real interest is not in the bankrupt, but in the creditors. As to examining a bankrupt as a witness, we have the same rule as in England—that the bankrupt may be examined to diminish the fund—not to increase it. This was slowly introduced by successive decisions. The first distinct account of its admission is in Blair v. Balfour, where Lord Kames reports Elchies' opinion. Mr. Bell brings out the result of all the decisions very distinctly in the passages quoted in the papers. But I ask—Is it not plain that an anomaly has thus been introduced into our law by allowing the oath, as on reference, to be judged of along with other circumstances, and not as conclusive of the case. Tait, p. 276, states this as law. This is just reducing the oath to the examination of a common witness, though it may be called an oath of reference; for you admit relationship as a bar to it; and moreover, when taken, it is not conclusive. This anomalous state of our law requires reconsideration. I would reject the oath of reference, so far as it is to affect the interest of the creditors; but would sustain it as to any reversion. Suppose, here, there had been a whole ticket £20,000, and that £5000 would have paid the creditors: There would have been no objection to the reference as to the £15,000 of reversion; but as to the £5000, which was not the bankrupt's, but his creditors, it would be impossible to admit it. Or suppose a case of hopeless bankruptcy, is it possible to admit an oath to determine whether the sum in dispute belongs to the creditors or not? I cannot concur in all the reasoning of the Bar on either side. Mr. Skene founded on relationship, which has nothing to do with a reference to oath; and, on the other hand, the Solicitor-General seemed to argue that the right to refer was a privilege to which any person was entitled; but whenever the interest of a party ceases, the power to refer to that party ceases, as in the case of assignation. See Erskine, who corrects Stair as to oath by correi debendi, and states that reference to the oath of an executor is not admissible to affect the interest of the widow.

Lord Cringletie.—If it is to be held that the moment a man becomes bankrupt, reference to his oath is incompetent, it will make great changes in our law. Bills may prescribe, unless oath can be had within a certain period, the power of doing which would thus be cut off; and so of all trusts. Bell and Tait state that the oath of the bankrupt is admissible, unless there be suspicious circumstances. There is, no doubt, relationship here; and I would not admit the oath without collateral evidence, just as I would have done in the case of the bankrupt's bond to a conjunct person. In the case of Mackay v. Ritchie in the House of Lords, the Lord Chancellor seems to have looked into the circumstances, and refused the oath; but I have not yet seen his Lordship's judgment. I see great difficulty in laying down any general position that we are never to admit the bankrupt's oath.

Lord Glenlee.—I always understood that an oath of reference has effect only to the extent of the party's interest; and I agree very much with Lord Pitmilly. But, at the same time, I have often heard it laid down from the Bench that the oath on reference might be admitted, reserving the question as to

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its effect, although, no doubt, there are som it proper to exclude it altogether.

Lord Justice-Clerk.—The admissibili Cases on a variety of grounds, and the Solic upon the proof, and will take judgment upo stances we are called upon to decide the look to the shape of the case. Miss Towe as sole defender, to deliver over the ticke it is plain that there is no reversion here. the funds of the creditors out of the hands been paid, she might have asked repetition. living in his family. Now, taking these ge is there any case upon the books, in which stances at all similar? The general feeli is not to create a labes realis absolutely ins carry it that length, and with Lord Cring but we must be very vigilant in cases of thi the general features of this case, I cannot however, be considered as laying it down cases of bankruptcy.

The Court altered the interlocutor 'that the proposed reference to th 'competent.'

Advocator's Authorities.—1. Bell, 253, (4th edi (ante, Vol. IV. No. 349. p. 534.)

Respondent's Authorities.—Blair v. Balfour, July (12473); Sinclair, Nov. 7. 1749, (12475); Mooni Nairne v. Ogilvy, Dec. 2. 1713, (12468); Dicta in Vol. IV. No. 349. p. 534.)

A. Tawse, W. S.—D. Fishe

ERRATA.

P. 46. Second line from foot, after *presenting* delete *and*.

P. 344. No. 169. For the line of heading, for *dominant* read *servient*; and eighth line, for *servient* read *dominant*.

P. 316. Heading of No. 151. third line, for *has projected* read *had projected*.

APPENDIX.

OPINIONS OF THE JUDGES IN MAULE *v.* MAULE.

Lord President.

My Lords—This is a very important case to the parties immediately interested, and to the law of the country. It is deserving of most mature consideration, not only as regulating the rights of the present parties, but as the decision upon the points now brought under your Lordships' consideration may affect many other cases. The case is important, as involving the doctrine of prescription on the one hand, and the plea of minority upon the other. I have prepared very full notes on the case, which I have read over again and again, and given the subject every attention in my power; and, with your Lordships' permission, I shall now read these notes, as containing my deliberate opinion upon this important question.

Lord Panmure was forfeited in the year 1715, and his estate was purchased by the York Buildings Company. That company granted tacks of the houses and parks of Panmure and Brechin as follows:—In 1724 they granted the tack of Panmure for ninety-nine years, at a rent of £100, to the Countess and her assignees. On 15th June 1724 the Countess assigned this tack of Panmure to Harry Maule and the heirs-male of his body in fee-simple, reserving her own liferent. On 2d and 3d October 1730 the Countess and Harry Maule assigned this tack of Panmure to William Maule, afterwards Earl of Panmure, and to the same series of heirs on whom he had entailed the estate of Kelly. To this assignation he adjected the fetters of a strict entail. Under this destination the pursuer is heir.

As to Brechin, the Countess had a liferent infeftment over the house and parks. But, of the same date with the other lease in 1724, the York Buildings Company granted a tack of these subjects of Brechin to Harry Maule for ninety-nine years, (after the Countess's death,) and to assignees, for a rent of £50.

On 6th June 1730 Harry Maule assigned his tack of Brechin to his son William, and the heirs-male of his body; whom failing, to his other son John, afterwards Baron Maule, and the heirs-male of his body; whom failing, to heirs whatsoever. But only two days after, viz. on 8th June 1730, Harry executed a new assignation of this tack of Brechin to his son William; whom failing, to the same heirs on whom he had entailed his estate of Kelly. This tack he also attempted to fence with the fetters of a strict entail. Under this destination the pursuer Mr. Maule is also heir. This assignation, however, contains a power to alter.

On 20th July 1730 he recorded the two fee-simple assignations he had obtained in 1724 in the books of Session. In this situation these tacks stood at the death of the Countess in 1731, and of Harry Maule in 1734.

William, afterwards Lord Panmure, succeeded. He made up titles to the estate of Kelly under the old investiture in fee-simple, disregarding the entail of it executed by his father Harry Maule. He never completed the entail of Ballumbie, and he continued to hold these estates on these fee-simple titles till his death in 1781. He entered into immediate possession of all the subjects con-

tained in the above tacks. As he disregarded that he should intend to possess under the limi clearly intended to be supplementary to that e of 1730 contained power to Harry Maule to al registered the fee-simple assignation of 1724, 1730, William might naturally consider that th last. He expede a general and special service : them mentioned these tacks, though they und been necessary. But at the time of his succes to mark under what title he meant to posse recorded assignation in fee-simple of 1724, or t so Earl William continued to possess the subjec

It is expressly stated in the pursuer's Case, both that of Kelly and the assignation, was i to his son John, (afterwards Baron Maule,) fo substitutes; and that they so remained in his weeks before the Earl." This is a very impor it in the question of prescription.

In 1705 and 1779 the Earl purchased frou estates of Panmure and Brechin, including the finally fixed by a decision of the House of Lo estates of Kelly &c. is cut off by the positive House of Lords has found that his claim is stil now comes for determination exactly as if we v the interlocutor in March 1782.

The defender's plea is, that the pursuer's cl ation 1730 is cut off by prescription, and I cle

It is absurd, in the first place, to call these them the rules of prescription, or any other ru so called. These assignations are just assigna with a prohibition to alter, but never can be 1685. They are sufficient, however, to carry nothing more in the case.

But, secondly, Earl William had two titles simple assignation in 1724, and the limited titles in him to the estate of Kelly; the one h and the personal right under the tailzie 1730 : Under which of the two titles did he possess

The pursuer argues that Earl William coul because it was revoked or superseded by the yet if in point of fact he did possess under facie title of prescription—it bore no vitium every question of prescription presupposes t having been followed by forty years possess is the ordinary case. But when a man has 1. On which, in dubio, is he to be presumed in point of fact, did he possess? I am quite presumed to possess on a fee-simple title, for to do what is most for his own interest.

The Solicitor-General argued that the pre a man must be presumed to possess on the obligation, he ought to possess, independent he has two titles both equally beneficial to h the scales of presumption. He cannot be pu on the one more than on the other, and there that which he was bound to do. On this pri

Bogle v. Gray, 30th June 1752; Durham, 24th November 1802; and Snodgrass, 16th December 1806.

But, e contra, when one title gives the proprietor a more beneficial interest in the estate than the other, his possession in dubio must be ascribed to the most beneficial one. Here law only follows the presumptions of common sense, and the propensities of human nature. This was unquestionably the principle which ruled the decision of 10th July 1740, M'Dougal of Mackerston. This is clear from what Kilkerran says—'This question is resolved by the distinction that one 'is limited, and the other unlimited; for if both were unlimited, then there could 'be no prescription of the one against the other;' and, agreeably to this, the Court soon after decided the case of Bogle v. Gray, and this has been held to be undoubted law ever since.

I am not fond of nice criticism, and dissection of an old decision, to endeavour to discover something in it contrary to the broad sense in which it has always been taken. The case of Mackerston has always been held to fix that point, and so I will hold it; therefore I hold that Earl William must, in dubio, be presumed to have possessed under the assignation 1724.

Then comes the second question in point of fact, Is there any evidence as to which title he did possess under? It appears to me certainly very strong that the possession is in favour of the assignation 1724.

1. The assignation 1730 contained an express power to alter. This was not done per expressum; but Earl William might very naturally consider it as virtually revoked, seeing that his father, having power over it, did, soon after it was executed, record the assignation 1724, while he never recorded the one of 1730. It appears very strange for a man to record a revoked deed for preservation, and not to record the deed which had revoked or superseded it. Therefore, independent of his superior interest under the one, Earl William may in reality have bonâ fide considered the assignation 1724 as the deed actually binding on him; and this at least strengthens the presumption of law. Under these circumstances, if the case had been tried at the time, it is more than doubtful if the Court would not have found that the deed 1730 was virtually revoked.

2. Not satisfied with his special service, which, as including a general one, carried right to these assignations, if a service were necessary to carry them, Earl William expede a separate general service before the Sheriff of the county in 1734, for no conceivable purpose but to carry the assignation of 1724; and he stated this to have been the object of the service; for in 1749, when he produced the assignation in 1724 as his title in an action before the Sheriff of Forfar, it is accompanied with a minute stating, "and to which the pursuer has right as his nearest and lawful heir served before the Sheriff of Forfar, and duly retoured." Now, had he possessed or intended to possess under the assignation 1730, it was easy, and would have been equally to his purpose as a title in that action, to have produced it.

3. In 1734 Harry Maule, just before his death, produced the assignation 1724 as his title in a multiplepoinding, in which his son John, the substitute under the deed 1730, appeared as his counsel, and founded on the assignation 1724 as his father's title, although here too the assignation 1730 would have served equally well.

4. In 1749 Earl William, as already mentioned, in like manner produced the assignation 1724 as his title in the action before the Sheriff of Forfar. I am therefore clear in point of fact (if the presumption of law were out of the question) that both Earl William and his father Harry Maule did ascribe their possession, and did actually possess under the assignation 1724.

The pursuer argued that the possession must be unequivocal. In most cases it is not easy to see how this can be when a man has two titles. But esto it be so, can there be a more unequivocal proof under which a man possesses a subject than the production of one deed as his title, in preference to another deed, in every one case in which it was necessary to produce a title? Mere possession proves nothing as to title, for the mere fact of possession is the same under any title; therefore,

in reference to one title more than another, the ascertained and proved by the use and produ other. The pursuer treated all this very lightly appropriate means to show clearly on which titl stronger manner could Earl William or Harr animus to possess under a particular title?

Suppose the reverse had been the case, and duction of a title was called for or was necessa ation 1730, with what force and success woul founded on, to prove that possession was ascrib 1730, and not under that of 1724?

5. But, in the course of possession, a person r rights, and to do certain things under one tit another. Now Earl William granted subtacks pressly debarred from doing by the deed 173 ascribe this act of possession to the deed 173(and an irritancy under it; therefore, in point of law, possession must be ascribed to the assignati the positive prescription has clearly run.

But there is little occasion to found on the p on the negative prescription. This being mer prescription applies independently of the positiv

If a man claims under a tack on which no document taken on it for forty years, it is perfe by the negative prescription in a question either Now Baron Maule, the next substitute under t have had the custody of that deed for fifty yea brother was possessing under a different title; duced that other title in judicio. I cannot see point is in a manner decided by the judgment c the present defender from the process against ance of the obligation for £9000, the same beir tion." This judgment was affirmed by the I expressly as to this bond for £9000. There is in common sense, on which negative prescript bond, which does not apply a fortiori to the same silence with regard to both. Baron Mau Baron Maule was major during the whole fort tacks, there was something more than silence known to himself, to call his attention to the n the prescription.

But it is said in answer to this,—1. The brothers;—2. Baron Maule was non valens age action under the assignation 1730. As to coll no bona fides necessary in prescription. Era forty years it is not competent to refer to out matter from what cause or motive.

As to non valens agere, it is not so. Earl deed 1724, and especially by granting the subt 1730, was guilty of an irritancy; and Baron M carried these tacks directly to himself as next s by such an action have forced Earl William t would have established his own right under Earl William to possess under that deed, and prescription.

But the pursuer pleads that his mino

in 1773, and from the death of Harry Maule in 1734 prescription had not run. The pursuer founds on the words of the act, "Minority of the party against whom the prescription is used and objected." True, provided that prescription has not previously run against a person major during the whole course of it, and who was in pleno jure et titulo to have brought his action.

Now Baron Maule was major, and the next substitute, and in pleno jure to bring his action; and therefore prescription was completed against him. It is nothing to the purpose that the present pursuer or his father were minors during part of that time. It is monstrous to say that a man's heir of entail shall have a plea not competent to the man himself, and that after my right is prescribed against the true creditor, it may be cut down by his heir.

Suppose a bond by A to B. B brings action on it; A defends on prescription. B was major the whole time, has nothing to reply, and A is assoilzied. Was it ever heard of, that B's heir could bring an action and recover, because he was minor part of that time?

As to the pursuer being an heir of entail, that is nothing to the purpose. In fact he is not an heir of entail, properly so called. He is just the heir in a common jus crediti under a mere personal deed. But there is not one law for tailzies, and another for fee-simple rights. If the creditor in an obligation or other deed was major for forty years, and brings no action, nor takes any document on it, it is cut off for ever; whether his heirs be heirs at law or heirs of entail. Even acquiescence for much less than forty years in an opus manufactum by the heir of entail in possession is binding on all the substitutes possessing after him. This was decided in the case of Small Keir v. Earl of Kinnoull. Heirs of entail in this respect are no better off than heirs at law; for in the case of Ayton it was found that a remote substitute who had a title to pursue, could not found on the minority of prior heirs. Now this could only be on the principle that he was in pleno jure et titulo during the whole time to have brought a challenge, which any remote substitute may do. The case here is still stronger. Baron Maule was not a remote substitute, having only a slight and contingent interest; he was next substitute, entitled to take the subject to himself—was himself major for the whole time, and therefore prescription was fully run, and can never more be opened up; for it is not conceivable how a remote and contingent claim can be stronger than a direct and immediate one.

Agreeably to this also are the cases of Gordon of Whitley and Achindachy, where prescription having run against the next substitute, remoter substitutes were not allowed to found on their own minorities in actions which they afterwards brought. So, whether regard be had to the positive or negative prescription, I am clear that the objection of the pursuer's minority does not apply; and therefore I am for sustaining the defences of prescription, both positive and negative, and for assoilzieing the defender.

LORD BALGRAY.

This is a case of great difficulty, so far as regards one point, on which the merits of the question mainly depend, and on which, in my humble opinion, the decision of the Court must be placed.

The judgments of the House of Lords, and the proceedings of the defender in 1819, compel the Court to take up the case exactly as it stood on the 5th March 1782, and as if the Judges were now advising a reclaiming petition against that interlocutor.

Many topics of law have been introduced into the discussion, but which certainly are not material to the determination of the cause. They are more of the nature of preliminary objections, and which must be removed before the real merits of the question are approached.

I. It has been stated that leases do not fall under the sanction of the statute 1685, and of course cannot be made the subject of an entail cum effectu.

But to this it may be observed,—

1. That although it may be true the statute entailing of leases, yet all limitations, and rest the party conveying, and entitled to convey, law. This is not a question with creditors or inter hæredes, and in fact a question relative t settlement. If the defender was right in this o sary to proceed further in the discussion, as th have been constituted against the institute in t

2. But although the statute 1685 cannot b in the view here to be taken, a lease can be e by the proprietor with the power of assigning, racter in part of dominus, and, consistent with assign his right of possession, and of using conditions, and restrictions he thinks fit. Ne quires, can ever alter the contract with the the law itself, the assignee, without any expre to perform the primary obligations to the prop

All personal rights can be entailed in this s tected by an entail, and may be transferred ations and conditions the original proprietor t Earl of Leven v. Montgomery.

3. Lord Braxfield, in 1782, is reported to tailzie of a lease but those in this cause." sense, and that it cannot be pointed out from been an entail of a lease per se, which has ari yet it is impossible to dispute but that leases many entails, and have been so transmitted.

There are some valuable rights by the la no other tenure.

For instance, there are many kinds held can have no other right of possession but b in the entails of many great families; and wh upon such persons, and that they become their leases, such prolongation of the right thority of the Court, and devised to the pro ditions, limitations, and restrictions of the or

Again, there is another species of valuable right. All gold and silver mines belong to the lead contains a certain proportion of s bound to set in feu or tack to the heritor of them, and which the heritor can demand 1592, c. 31; 4th January 1750, Earl of Hop Leadhills, and Tyndrum, are wrought under are contained in the entails of the estates of albane.

Whatever may be the effect of these ri contained in entails fenced by prohibitory, in

4. It is further singular that the defende entail as to leases, as the first conveyanc mary species of entails, being limited to h without division. There is no personal righ entail than a lease. It is limited to a certa the proprietor. The tenant cannot convey

II. It has been further objected, that as the entails necessarily were deeds of assignation of leases, which by the law, in order to their completion, must be intimated and followed by possession, neither of which took place in this case, they were not complete deeds of entail; and a second assignation would have been effectual and preferable to them.

1. But so this it must be observed, that here there is no competition of rights. It is simply a question of family settlement of a common predecessor; and in such cases the will and intention must regulate where the deed per se is complete.

2. That a second assignation would have been effectual in this case is no proof of the incomplete nature of the entailed assignations, if allowed to subsist at all, because in each of them there was a reserved power and faculty to alter, and therefore a second assignation would have been effectual virtute juris.

3. But suppose that there had been no reserved faculty and power, the proposition is a begging of the question.

The *true* and proper question is, whether actual possession did not take place on a certain right, and if that possession was not de jure intimation?

In the case of assignations of leases it has been sometimes made a question, whether, even where the conveyance was intimated, possession was not also requisite to complete the transference of the lease?—and this point is still sub judice;* but at no period was it ever disputed that possession de facto by an assignee was the most efficient mode of making intimation to all interested, and to the public.

At that period of our law prior to 1693, c. 13, where there was much discussion as to what was a public right and what a private one, the effects of actual possession were always acknowledged.

4. If it shall be held that possession did commence on the entailed assignations, then intimations must be held to have been made in 1765, when Earl William became proprietor, and when, as his father's heir, he had the custody of these very entailed conveyances. No formal intimation was in such circumstances required by the law, he being vested for the time with the joint character of landlord and tenant.

III. It has been further objected, that if the assignations of the lessee are to be held as entails, then that they are defective from want of registration in the proper register.

The answer to this is satisfactory.

1. The question here is inter heredes, and a matter between granter and gratuitous grantee. When it is declared that no unregistered entail shall be good, the meaning is, not that it shall be ineffectual against the heirs who have accepted of the right with all its qualities, but that it shall have no force against singular successors, for whose special security the registration was directed. See case of *Williesn*, Feb. 26. 1724, Mor. 15869; Ersk. 3. 8. 27. It is plain, therefore, that supposing this was the case of an entail of a proper feudal subject, the objection would not be good.

2. The defender has argued that the deeds here executed do not fall under the protection of the statute 1685; and if so, how could they be legally registered under the authority of that statute, which creates that peculiar register?

The deeds here bestow mere personal rights, which are protected by the force of the common law, and require no registration for any end or purpose. The opinion of Lord Braxfield in 1782 is quite decisive on this point. He observes, "The statute 1685 does not relate to subjects incapable of infeftment; besides, a lease is a personal right, and the right itself is qualified, so that it is neither the better nor the worse for recording; but it is the subject of a settlement, and if the granter fences it with prohibitory clauses, these will bar subsequent heirs from alienating."

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* His Lordship referred to Inglis and Company against Paul afterwards decided, (see ante, No. 244. p. 469.)

IV. It has been also stated by the defende
deprive the landlord of his rights; and that as
tion of a lease from the tenant, he cannot be for
the tenant.

This objection is founded on a mistake of the

1. It would be perfectly absurd to maintain t
an entail, infringe in the smallest degree the rig
create obligations over his own rights only; and
case. But it is perfectly clear that when a pr
express power of assigning, he conveys to his t
to a certain extent, thereby authorizing him to a
right to make a new personal contract of his o
the terms and obligations of the original right.
original conditions could be ever varied by any a
the assignee, by the bare acceptance of the righ
to perform all the obligations created over the c

2. The defender seems to suppose that a la
unless the tenant oppose, is entitled to resume
so thereby put an end to the contract of lease. I
mistaken; for a regular contract of that kind, f
taken away but by order of law. The landlord
rised, takes possession suo periculo, and will be a
his heirs or his creditors.

The law is quite settled as to this point. I
1715, Downie; March 8. 1769, Dunbar.

This last related to a lease of the mines of Ma
case; and the judgment of the Court of Session w

3. The defender is also mistaken, in point of
prohibiting any renunciation of a lease is an infri
lord. The original intention of every lease is, th
bound to one another to fulfil it during the whc
The contract never contemplates a renunciation
plished. The renunciation is not comprehended
tract. The arrangement by renunciation is entirel
The landlord, therefore, must take the renunciati
take it under whatever burdens may have been le
fact, the renunciation is nothing else but an assig
lord; no established rights can be thereby destro

This is no peculiarity of personal rights; it e
rights, upon the precise same principles of law an

V. It has been further observed by the defende
by Earl William in 1765 put an end to all leases,

This proposition, however, is quite contrary to
a burden or right can be created de jure by the te
that he can be liberated from his obligation by
If rights are pure, and every right vested in th
minor rights are at an end; but where a medium
created, rights must subsist as they are, and cann
quently occurs in feudal rights, and in such cases
Dec. 21. 1680, Cunningham; Jan. 4. 1726, Cum

The very same thing takes place in personal rig
to expect the extinction of obligation from a juncti
but the law is quite fixed in that matter, Stair, I
supported by many decisions. Therefore the opi
in 1782, with all the respect due to any opinion
says, "I incline to think that the right to the l

lius of the estate." This could not be, if it was in the power of the granters at all to frustrate or evacuate any obligation on their heirs.

VI. The topics hitherto adverted to are more of the nature of preliminary objections, than as touching upon the essence of the cause; and they do not deserve the very anxious discussion which they have received from the parties; they are truly of little moment.

The great and important points of this cause, which require the utmost attention and deepest consideration, are two:—

First, What is the legal title under which the law must hold that Harry Maule and William Earl of Panmure entered into possession of the subjects in question?

Second, Whether the pursuer, in terms of the act 1617, is entitled to deduct his own minority, if the positive prescription applies to the case?

The first is certainly the most material and the most difficult of any point in this cause.

Possession de facto took place; but it must be ascertained under what title this was done, or could be done.

Before ascertaining the precise title which must be held to constitute the right of the parties, it is necessary to premise and fix certain principles of law as premises from which to draw a just conclusion as to title. These require the most serious consideration.

1. Positive prescription is the adquisitio dominii on certain terms, and is the creature of positive enactment, as it ever must be. By our law the positive prescription is introduced by the statute 1617, c. 12, and founded on manifest utility. It is evident from the words of the statute that it was meant to confine the operation of the statute to heritable feudal rights alone. No doubt it has been by practice incautiously extended to teinds, patronages unfeudalized, and even to servitudes and tacks, which are incapable of feudal transmission; Stair, 2. 12. 22. 23; Erak. 3. 7. 8. But still, though this be the case, the great and leading principles of law and justice, which authorize the acquiring of property by the lapse of time, are never to be lost sight of; and were it to be otherwise viewed, it would be a perversion of the law. The unfeudal right requires a precise written grant or title as well as the feudal; and perhaps, on due examination, the case of tacks, when they are said to prescribe, fall more under the negative than the positive prescription. Keeping this in view, it necessarily follows that no prescription can possibly take place, without, 1. A clear and distinct title; and, 2. Continued and unequivocal possession. These are the primary requisites and essentials of all positive prescription.

2. I must next premise, that personal rights stand, suâ naturâ, upon a quite different footing from feudal rights. It is ever to be kept in mind that personal rights consist in obligations. Some personal rights are no doubt held to be heritable; but that does not alter their nature. That heritable quality is conferred, per modum exceptionis, from expediency. But to apply analogically principles of law, appropriate to feudal rights, to personal rights of the above description, is quite contrary to all sound reasoning. The analogy is not true, and it is most dangerous to admit it, because the two rights are quite separate and distinct in their nature.

In personal rights, which, as already mentioned, consist in obligations, the right flows from and depends on the will and intention of the parties. Every condition, limitation, or restriction created by the granter or cedent, is a quality of the right. As long as a personal right remains within the granter's power, every condition or limitation, whether contained in his original grant, or connected to it in any shape or manner in a lawful way, makes part of the grant; and whether the granter's will be in one or fifty separate deeds when delivered to the grantee, they make, after all, but one personal right—they make but one title, and they are to be held as if they were all engrossed in gremio of the primary deed.

Very different is the case with feudal rights. The moment that infeftment is

taken, all personal extrinsic obligations fly off, a
or condition of the right, unless stamped on the
consequent right of the party becomes, by infeft

In the present case there has been a great de
from feudal rights, relative to persons possessing
the favour of the law shown, as alleged, to unli
argument be perfectly correct, to a certain exte
logy does not hold in personal rights. In feud
last infeftment, followed by forty years actual p
title is always indicated by the infeftments.
easy to find out how a double title can exist or
granter, because, till the last moment of accept
qualify the right.

To discuss this point of law with sufficient a
unsuitable and improper length; but nothing c
ence between personal rights and feudal rights,
of Douglas of Kelhead, 22d February 1765
1806. Personal rights to feudal subjects be
equal to apparency. But if the analogy and
and personal ones is for a moment admitted
peting but personal rights, why should not t
over the limited personal one? But such a d
permitted in the law of Scotland, and is c
1617.

3. In personal rights, the grantee or assigne
or cedent in that right. He is bound by all h
be taken as it is given, and it imports not w
one or in many writings. Where they all co
assignee, they constitute but one personal rig

"No assignee can be in a better condition
for the assignment gives him the right merely
creditor. It is otherwise in the transmission
ponee rests upon the faith of the records, and
by his author, upon which judgment has not
ceeded on his own disposition." An assigne
rem suam, and therefore must be in the san
exceptions founded upon any declaration or
from his obligation or delict, are good agai
Ersk. 3. 5. 10.

4. I must, lastly, premise that a lease is a
contract. It consists solely in obligatione. I
lease of those subjects which we consider he
nothing but a personal contract; and we adop
tion, nature, and effects.

The act 1449, c. 18, creates only an exc
the ground, and protects them against singu
leases are still but personal contracts. The
rights. Leases, therefore, are exposed to al
and all the exceptions, which can be directe
contracts.

A great part of the defender's argument
tions which are not warranted by the law of
lease is a true heritable right, and that it is
light as if it was a feudal right, it not admi
all the principles of the law which are p
humbly appear to me to be contrary to al

assimilating two rights which are perfectly distinct, and is a confounding of feudal rights with personal rights. The analogy has been adopted in the argument without due consideration.

These principles being constantly kept in view, the facts of the case are next to be attended to, and they require the most minute consideration; and there is not a step in the progress which does not demand attention.

The origin of the rights which make the subject of the present litigation, are two leases granted by the York Buildings Company in the same terms and on the same day, on 23d April 1724.

The terms of these leases are most singular. They are drawn in terms which no conveyancer in Scotland ever did before, or ever did since, without special instructions. It may be doubted whether the York Buildings Company ever granted another lease in similar terms. It ought to have been the duty of the pursuer to have examined into this matter. The leases are for the endurance of no less than ninety-nine years each. Notwithstanding all this, these leases are not given to 'heirs,' but simply to 'assignees whatsoever.' Perhaps over all Scotland not a lease will be found similar; because it is contrary to all form and precedent.

The conclusion to be drawn from this is most important; it shows that the granter (the landlord) and the grantees (the tenants) contemplated a family settlement ab origine. This conclusion is unavoidable, both from the endurance and from the terms, and still more so from what was done by all the family in 1730.

These leases stand in a different situation, and must be separately considered.

I. The Panmure Lease.

As neither Harry Maule nor his son Earl William were heirs of the Countess of Panmure, they never could have any prospect of obtaining this lease by succession; it could only be obtained by a singular title.

The Countess, soon after getting this lease, and indeed almost immediately, (15th June 1724,) granted a fee-simple assignation thereof to Harry Maule. This was a prudent and judicious measure, in case of her decease prior to the final arrangement among all concerned as to the family settlements. The assignation reserves the use and possession of the subjects 'during all the days of her lifetime;' and she bound herself to hold the same "firm and stable, without revocation or gain-calling whatsoever."

What understanding there was between the Countess and Harry Maule we have no traces, nor does it appear that any letter or acknowledgment was granted, pointing out the purposes of the grant; but it is proved from what afterwards took place, that the Countess was acknowledged to have retained and held a power and faculty over this right.

Harry Maule never intimated this conveyance to the York Buildings Company, and he never entered into possession under it, which indeed he could not do till the Countess's death; and before that time the parties themselves thought fit to remodel the right. While it was in a state of imperfection in the person of Harry Maule, the right was evacuated by mutual consent. That the parties had the power to do this, no one can dispute; and Harry Maule surely had a right to accept the assignation in any terms that the Countess was inclined to bestow it.

The second conveyance, called the entailed assignation, is both peculiar in its terms, and is executed at a most particular time, and under circumstances deserving the deepest consideration. It is quite evident that the whole connexions, after the unfortunate forfeiture, had in contemplation the preservation of so old and distinguished a family, and, in order to preserve it, were anxious to collect every kind of property to be settled upon its proper representative. No person appears to have had this honourable feeling more strongly than the Countess, who gave £9000 to be settled on the heir-male of the family.

It is impossible to go over the series of deeds executed in 1730, without admitting that at that time it was the wish and intention of all concerned to form

an estate for the heir-male. Harry Maule and
parties as the Countess to the family settlemen
not executed by the Countess till the 3d of Octo
ments, and was the key-stone of the whole. Tl
what was the will and intention of parties, wh
rights. It is quite vain for any lawyer to den
power and right to modify and qualify his own
be together could fix what they pleased should t
and under what conditions.

The entailed assignation was executed after s
executed, (3d October 1730); and it was evi
waited till this was done.

The preamble is remarkable:—"Be it know
Lady Margaret Hamilton, daughter of the dece
Duchess of Hamilton, Countess of Panmure,
ation underwritten Margaret Countess of Pan
Master Harie Maule of Kelly, and me the sai
for all right I have by virtue of the assignation
of way, with advice and consent of the said Cou
consent, and assent," &c.

It is evident that this preamble is totally inco
ation to Harry Maule, which is specially referr
principal party, and the principal cedent. It is
Maule's own hand that, notwithstanding his fo
remained vested with the true right. It is in fi
that he held the other temporarily, merely in tr
to assign and convey.

The act 1696, c. 25, requires no particular f
a declaration of trust may be made in many wa

The entailed assignation is of the more imp
and is a mutual settlement, whereby certain p
joint consent and assent.

The second deed is necessarily an evacuatic
narrate the fee-simple deed of 15th June 17
settlements of lands, and state "how just and
manor-place or mansion-house of Panmure sho
self-same heirs. Therefore the said Margar
Harry Maule of Kelly, with advice and consei

It is a declaration by both parties concerne
stituted for the other. It is a declaration by
the Countess his right so modified, viz. the life
and the fee to his son. The right is altered
ever could complete any title by possession.
actual possession, he, under his own hand, d
shall be.

That this entailed assignation was to be th
clause in this settlement of the lease. It dec
and Mr. Harry Maule, hereby reserve full
revoke, alter, or innovate these presents at a
also full power and faculty to me, the said M
innovate the same at any time after the dece
articulo mortis."

From this it necessarily followed, that if
Countess, the deed was irrevocable to all co
party to this deed, declared his acceptance of
fore, when he entered into possession after t

xistence of these entailed leases. He was in the full knowledge of them
s father lived, and of course knew precisely the title under which he en-
to possession of these subjects.
ready stated, so stood the right to these leases when the Countess died in
nd Harry Maule de facto entered into possession—the one necessarily
singular title flowing from the Countess, and the other no doubt under
title of lease, which, before entering into possession, he had settled on
ıle in concert with third parties. These solemn deeds were never altered

Harry Maule's death in 1734, William entered also de facto into pos-
and it is quite plain that he could only take the Panmure lease under the
ıs's singular title, and the Brechin lease under his father's settlement de-
to him at his death.
ıat can be legally predicated upon the matter is, that here certain deeds
and that possession de facto followed. It is here that the great and im-
distinction between personal and feudal rights becomes material. In the
o ambiguity arises from possession where two or more titles exist. The
on is fixed and determined by the infeftment, which again points out the
possession. That title and that possession are pointed out to the world by
publication, where every one may look, and every one concerned is bound
law to look. Where, therefore, in feudal rights there are two titles, one
ıd and the other limited, and infeftment has been taken in the unlimited
'erse to the limited, it is evident that the last must prevail as being con-
ry to the other, and so legally published to the world. It requires no
f the law to give such possession the benefit of prescription. Both positive
ative prescription combine to the same end. The moment infeftment is
ınd published to the world as law requires, all personal rights and oblig-
ɔther than what gave warrant to the infeftment, fly off and disappear, and
'ty years sink into oblivion.
n personal rights all this stands very differently. There is nothing to mark
of possession. If there are various personal titles, and possession follows,
can say on what title the party possesses. There is no promulgation to
ld of the will and intention; there can be no indication of it. In such
such separate titles can possibly exist from the same granter, the grantee
ıs equally upon the whole of them, and the law supposes that he gives equal
) the whole.
ing can better illustrate these principles than the case of Welsh Maxwell,
ne 1808, which has been always held a sound decision, and which I humbly
destructive of the plea of the defender, viewing, as I do, this to be a
ı on mere personal rights. It is upon this ground that I also hold that
logy betwixt feudal rights and personal rights, so forcibly urged by the
r, is not sound, and would be destructive of the true import of the act

lefender seems to be quite aware of the difficulties of this imperfection of
l rights, and that he cannot rest upon mere possession alone, or upon the
ed favour which the law is said to have to unlimited titles; but that it is
ly necessary for him to explain the possession by the posterior acts and
f the party. As to this it may be observed, that no acts and deeds of the
ithin himself ever can create a title, which must flow from another; and,
ext place, it is admitting the very plea which is so forcible on the part of
ıuer. That William Earl of Panmure might have created a new title, is
y obvious; and if that new title had been fortified by prescription, then the
ıs comprehensible. But the question here to be settled is, what was his
ıd how and in what manner could he change it?
acts alluded to by the defender assume that there were two separate and
titles to these leases—one unlimited, and the other limited—which cannot

Following out this power and faculty, Harry general settlements, and most properly mentions t "that it is most just and reasonable the same sh the self-same heirs to whom I have provided my for that end resolved, in virtue of the power and assignation above deduced, to revoke, alter, or in convey the foresaid lease to the heirs of tailzie whom I have settled my said estate of Kelly and and under the reservations, conditions, provisions, expressed: Therefore wit ye me, the said Mr. H constituted, as I, by the tenor hereof, in virtue o served to me by the foresaid assignation, make 8 my eldest son," &c.

Now, is it possible for any lawyer to dispute th to alter his conveyance of 6th June 1730? or c entailed assignation did not expressly revoke the deed narrates the revocable deed—states the res a resolution to be executed in virtue of that reser makes, constitutes, and appoints certain heirs un 'revoke' is not used; but in substance, and in wo tion is declared.

The fee-simple assignation of Harry Maule is tion. Both deeds were executed before Har session, as both were executed in the lifetime o

The entailed assignation also contained this cl served full power and faculty to myself to rev innovate the same as I shall think fit at any tin mortis." Harry Maule never did alter or revok

This entailed assignation of the Brechin lease Panmure lease, thereby marking in the stronges the parties.

It is no less material, in considering what sh have in view that they formed and completed the purpose of rearing up the head of an ancie liest periods, distinguished itself in support xions were impressed with these honourable f this proper measure into execution. William these deeds as Harry Maule. He was comple it is proved, by his granting the obligation rel consenter to these arrangements—that he w fiar in the Panmure lease—and that he appro conveyance of the Brechin lease. In fact, so they were mutual contracts, and savoured of t

That the entailed assignations of the leases w is proved by the deed of Baron Maule, who st manner that these papers "were given to me Countess of Panmure and said Mr. Harry Mau as I should think most proper for the preser and family of Panmure, which has subsisted fo

In a holograph memorandum he adds, that this trunk, belong properly to Lord Panmure. his death, and my brother let them contin them, besides the obligation by my brother £9000 sterling to the same series of heirs, tailzie of Kelly, of which there was only one

It is quite absurd to maintain, or even supp

of the existence of these entailed leases. He was in the full knowledge of them while his father lived, and of course knew precisely the title under which he entered into possession of these subjects.

As already stated, so stood the right to these leases when the Countess died in 1731, and Harry Maule de facto entered into possession—the one necessarily under a singular title flowing from the Countess, and the other no doubt under his own title of lease, which, before entering into possession, he had settled on heirs-male in concert with third parties. These solemn deeds were never altered by him.

Upon Harry Maule's death in 1734, William entered also de facto into possession; and it is quite plain that he could only take the Panmure lease under the Countess's singular title, and the Brechin lease under his father's settlement delivered to him at his death.

All that can be legally predicated upon the matter is, that here certain deeds appear, and that possession de facto followed. It is here that the great and important distinction between personal and feudal rights becomes material. In the latter, no ambiguity arises from possession where two or more titles exist. The possession is fixed and determined by the infeftment, which again points out the title of possession. That title and that possession are pointed out to the world by regular publication, where every one may look, and every one concerned is bound by the law to look. Where, therefore, in feudal rights there are two titles, one unlimited and the other limited, and infeftment has been taken in the unlimited title adverse to the limited, it is evident that the last must prevail as being contradictory to the other, and so legally published to the world. It requires no favour of the law to give such possession the benefit of prescription. Both positive and negative prescription combine to the same end. The moment infeftment is taken, and published to the world as law requires, all personal rights and obligations, other than what gave warrant to the infeftment, fly off and disappear, and after forty years sink into oblivion.

But in personal rights all this stands very differently. There is nothing to mark the title of possession. If there are various personal titles, and possession follows, no one can say on what title the party possesses. There is no promulgation to the world of the will and intention; there can be no indication of it. In such cases, if such separate titles can possibly exist from the same granter, the grantee possesses equally upon the whole of them, and the law supposes that he gives equal effect to the whole.

Nothing can better illustrate these principles than the case of Welsh Maxwell, 21st June 1808, which has been always held a sound decision, and which I humbly think is destructive of the plea of the defender, viewing, as I do, this to be a question on mere personal rights. It is upon this ground that I also hold that the analogy betwixt feudal rights and personal rights, so forcibly urged by the defender, is not sound, and would be destructive of the true import of the act 1617.

The defender seems to be quite aware of the difficulties of this imperfection of personal rights, and that he cannot rest upon mere possession alone, or upon the pretended favour which the law is said to have to unlimited titles; but that it is absolutely necessary for him to explain the possession by the posterior acts and deeds of the party. As to this it may be observed, that no acts and deeds of the party within himself ever can create a title, which must flow from another; and, in the next place, it is admitting the very plea which is so forcible on the part of the pursuer. That William Earl of Panmure might have created a new title, is perfectly obvious; and if that new title had been fortified by prescription, then the plea was comprehensible. But the question here to be settled is, what was his title, and how and in what manner could he change it?

The acts alluded to by the defender assume that there were two separate and distinct titles to these leases—one unlimited, and the other limited—which cannot

be conceded. But suppose that there were ever necessary to show the intention of the parties that titles as the source of their possession, then I do stances condescended on are totally insufficient f

The acts condescended on are six in number :- simple assignations. 2. The production of the Co Maule in a multiplepoinding. 3. The general 4. The granting of leases for a definite endurance tenants on the fee-simple conveyances. 6. The William.

1. The registration of the fee-simple assignatio

It appears that, on the 20th day of July 1730 two leases, and the two fee-simple assignations, v register of probative writs; and it is from thence intention of the parties that these deeds alone sl parties. But, de praxi, this registration is evide was made in the register of probative writs, whic Any thing whatever, without exception, may b person is bound to look into it; it is intended for alone. It was highly proper to put these deeds bottomed the family settlements. To maintain th the whole family settlements is quite inadmissibl neither better nor worse. Besides, in this ca unhappy, because the last entailed assignation, vi till the 2d and 3d October 1730, after the whole This simple fact upsets the whole argument, and operates just the other way, when looking at will

As to the other deeds being family arrangem into the head of any professional man to record

2. The production by Harry Maule of the C multiplepoinding brought by the creditors of February 1734, after the death consequently o on as a circumstance indicative of the title of just as inefficient. The defender constantly fo the fee-simple conveyance are part of the entai In the process of multiplepoinding with the their creditors, it was the only title which was to have been produced: The creditors of the Y company themselves, had no concern with the o and the Countess; neither had they any conce made by them, particularly as the original rig ever." The fact was this, that the Countess retain her rent in part payment of her jointure ; necessarily came to be a count and reckoning and their creditors. Therefore, from the very duction of these papers was the proper product the foundation of the ulterior rights, and me absurd to maintain that Harry Maule, by this se, meant to alter thereby all his entailed sett such pains to frame, and to get others to join w

3. The general service by William to Harr 1734 is said to have been intended to take u make to him the unlimited title of possession. founded upon neither sound law nor sound

his proposition that leases require no service. They are transferred without ervice. The moment the breath is out of the body of the ancestor, like a of honour, it goes into the body of the heir, with all its qualities and con- ons. The heir cannot help himself, if he takes possession at all;—a service ept.

f any argument could be legitimately drawn from the service, it would be erse to the defender; for the service is as "legitimus et propinquius hæres culus linea et provisionis."

ut it is quite unnecessary to pursue such an argument further, because the in and purpose of the general service is most obvious to any conveyancer, was most properly taken out.

taking out special services to remote ancestors, it is often uncertain whether e be correct. No examination of the records, well kept as they are, will re the party absolutely. Infeftments unrecorded start up, and unfortu- ly they are effectual inter hæredes. It therefore becomes absolutely neces- to resort to a general service to carry all procuratories of resignation, epts of sasine, and other personal feudal rights which may be in the person ne ancestor. When, therefore, so legitimate and proper a cause can be ned for the general service, it is quite illogical to assign a cause which did nd could not exist.

ne general service is evidence of nothing but that William proved himself the heir-male of line and of provision to his father Harry; it has rela- o no special deeds whatever.

The granting leases for a definite period of years contrary to the terms of ntail, is also maintained to be evidence of possession under a fee-simple In making this observation, the defender seems to overlook the true spirit meaning of the obligation in the entailed assignation. The clause in the is, that the heir-male shall not "subset the said manor-place, or others n contained, at a diminution of the rent above written; nor for any space than during the lifetime of the granter, or his legal possession foresaid manor-place and others above mentioned." This is a clause known in entails, and was the common prohibitory clause as to granting in entails executed about that period, and for some time after. But in ogress of improvement it became absolutely necessary to disregard the to a certain extent; that is to say, heirs of entail in possession found it eir advantage to grant leases for a definite period. If the heir, the r, lived out the lease, no harm was done to any person; and then, if he t outlive the period, the next heir was at liberty to set it aside as con- o his right, and the tenant had no ground to complain, as he took his indemnification from the granter; but where such leases are bonâ fide operly let, they seldom have been challenged—for this best of all reasons, substantial and good rent cannot be got from the subject without a e endurance. The granting, therefore, of leases for a definite period is no ce whatever of a fee-simple title. One half of the entailed estates in ld have clauses similar to the one stated; and it never was considered ntravention against an heir, if he granted a lease of moderate endurance, l of which he might probably see.

very point is well explained by Lord Armadale in his speech on the y cause.* His Lordship observes, that "it is a solid and unanswerable nat where there has been no violation in effect committed against the the entailer, and no injury done to the substitute heir, there is no in- and there can be no right or foundation in law, for pursuing a declarator ravention."

* See Appendix to Wilson and Shaw's Appeal Cases, Vol. I.

" Put the case of a tailzie prohibiting lea other period. An heir of tailzie grants a lea is liable to have an irritancy declared aga but, before a declarator of irritancy and cont heir of tailzie, the period of the lease is ru ships hesitate for a moment to dismiss such a similar case :—A tailzie prohibits all lifere of tailzie beyond a certain sum, or a certa estate. An heir of tailzie counteracts that infeftment to his wife to a greater amount ; vention is brought upon this act, which app is dead ; but the substitute heir of tailzie n of this infeftment has forfeited his estate. a plea ?—or would a Judge of the law of Sc consideration, if it could be pleaded ? I con is sound and just, and which in itself is a fu as there has been no violation in effect comi tailer, and no injury done to the substitute interest in them, and there can be no right o declarator of contravention in those circumst

This opinion is sound and conclusive on leases granted by William Earl of Panmure the exercise of a sound discretion under hi subsequent heir could have made the smallest time, and at all times, if challenged, he had

5. As evidence of the assumption of the u to certain proceedings in Inferior Courts, w fee-simple titles and the general service to h

The general service, as already stated, av misconception of it never will create a title the other assignations is just as little indicati cesses were miserable actions against small encroachments on the subjects, in which the interested.

The defender forgets that the law of Scot interference of extraneous parties in judicial interest must be qualified before that be per no concern with disputes between the heir i See title in the Dictionary of Decisions under heir of entail by the law of Scotland is domi questions, he is not bound to call the heirs of unless injured de facto.

The defender further also constantly forget stitute part of the entailed progress ; and no prevent Earl William, as tenant in possession, title he chose, if that was sufficient for his pu may have made his title as various as the de affect the party in the process. This point Armadale in his opinion already referred to.

He says, (p. 13.) " A title to exclude ma same title may have different qualities tending and claim. It may be a mere title of prescri years possession, does, in terms of the act

exclude a particular party is also a sufficient title to pursue; and a
ich may be sufficient against one party, may not be sufficient against
The production, therefore, by Earl William of any part of his titles,
or similar processes, never could create a title to him; neither is it any
what he considered to be his real and proper right.
e last circumstance founded on by the defender, as evidence that Earl
possessed the leases on a fee-simple title, is the various settlements
l from 1745 to 1781, seven in number.
hree first settlements, viz. in 1745, 1758, and 1765, have no relation to
s at all. Even in the last, which was at the time that the lands were
d by Earl William from the York Buildings Company, no special men-
ade of the leases.
irst of the remaining four (30th August 1775) is the primary document to
he defender can resort, as any way supporting his argument; but that
of right was so shortly before the Earl's death, when all these deeds were
ed, that it can avail nothing in the matter.
he solid and general answer to this plea upon the settlements is, that the
leeds of a party, which he can create at pleasure in one day and annul the
nothing to the purpose. No one can create a title in this way, neither
get quit of his obligations by any such declarations. As long as Earl
de facto retained possession, these deeds, kept in his own repositories,
ver change that possession, whatever it was at the commencement.
aw of Scotland peculiarly discountenances all change of title by secret and
leeds. It stamps the character of legal fraud on all conveyances or assign-
ttempted while the subject itself is retained in the hands and actual pos-
of the disponer himself.
nclude this part of the argument as to the intention of the parties in mak-
lection of title of possession, supposing two titles to exist, it appears to me
and all of the articles condescended on are vague, uncertain, and incon-
They appear to me to afford no evidence whatever of that distinct and
ocal possession which the statute 1617 requires.
esorting to this line of argument, opens up the consideration of the other
he question. This is altogether independent of the plea, that in law no
exist but the entailed assignations. But supposing these were still among
umptions of the origin of possession, it certainly is more natural to suppose
entailed assignations were the acknowledged lex feudi.
feelings of the connexions were most naturally excited to preserve all the
ts of their property, and to bestow it in one way—to support the rank and
of so ancient a family. This was proper and laudable conduct, and suit-
the views of the times, and to the then circumstances of the family. All
uld be of no importance in feudal rights or conveyances; but in personal
nd personal conveyances, the will, the intention, and the object of the
is every thing. In this case we have more than the mere will and intention
tator. There was evidently an onerous consideration and a mutual consent
ird party, to create an estate for a certain series of heirs. The Countess of
re, by the settlements in 1730, became a party to them. She was a
r in a certain sense, and yet she devoted £9000 to be devised in a parti-
ay, and also gave up the lease of Panmure to be settled in the same way;
any person deny but that she did so upon the understanding that the rest
family were to follow her example in adhering to that arrangement? It is
neral arrangement in 1730 which affords the just interpretation for what
e held as the conduct of the parties when the succession opened, and when
al character was to be stamped upon their possession. Now, is it possible
ceive that Mr. Harry Maule, who had so anxiously persisted in executing
y deeds in favour of the heir-male, should instantly, on the death of the
ess, alter his views, and reject that entailed assignation of Panmure? It

was a joint deed; and the Countess's generous
her destination in the bestowing of the £9000.
dishonourable than to suppose that Harry M
manor-place but as liferenter under the assig
cause at the time why it should be otherwise;
sume that the parties acted as they were bound
The very same observations apply to William
greater force; because, from the various deeds
himself becoming a party in one of them, comply
he is also to be fairly presumed to have give
assignation of the lease of Panmure, wherein h
the full knowledge of all this; and from the so
were executed and deposited, all together an
suppose but, at the time of his entry into poss
tiously to carry these into full execution; and i
it must be held that, at the commencement of
of both subjects were acknowledged.

In this question it is no argument that the e
been found ineffectual, as well as the obligat
such be the case, because, as to the last, the h
prescription to operate, and have given up thei
positive and negative prescription have concurr
and adverse title, legally promulgated and forti
to the leases, all this is just the reverse; the t
pable of publication from the records, and the
right; and the acts of possession operating as ad
and equivocal.

The real facts are very plain. At first, and
parties conscientiously meant to carry into exe
tical reasons they seem to have been anxiou
After the year 1745, when matters became mc
opened to Earl William and his brother. The i
ence with the heir-male in Ireland became we
friendship with the family of their sister beca
their great respectability and private worth,
ments which infringed on the rights of the he
in little correspondence with the family in Sco
the purchase in 1765 that the change of senti
and the various settlements made after that pe
that were entertained as to the right of alterin
the leases.

It is upon the above grounds that I humbly
cannot be pleaded, because there is no title
were there a title, as the defender supposes,
vocal, and adverse to that which is required b

As to the negative prescription, it is entirel
Earl William continued in the actual possessic
nothing.

The best test of this, and the best test of th
Harry Maule and Earl William, so well staf
whether any declarator of irritancy could have
the party who exercised any one of these acts
can bring a declarator that prescription shall n
to law to do so. The heir is not bound to inte
His right must be affected. He is not boun
effectu. When I look at the long train of deed

of Bargany, upon the subject of the non valentia agendi, I am surprised to see it at the present time at all doubted of.

Upon these principles I come to the conclusion that the defender has acquired no right by the positive, and that the pursuer has not lost his right by the negative prescription.

VII. The seventh and last branch of this cause relates to the point, whether the pursuer is entitled to deduct his own minority from the course of prescription which is pleaded by the defender against him? This proceeds upon the supposition that the positive prescription is applicable to the case.

This is a most important question. It is not only ingeniously, ably, but imposingly argued by the pursuer. Mature consideration, however, will satisfy any lawyer that it is not founded on correct principles.

The act 1617 was intended to 'quiet men's minds,' and to secure heritable property. It therefore ought to be interpreted and applied so as to attain that object.

The act 1617 never did or could contemplate entails, or the effect which would be given to them by the act 1685. It is therefore unreasonable that the utility of the statute 1617 should be abridged pactis privatorum, or that there should be one law of prescription for entailed estates, and another for unentailed estates; or that prescription should operate differently inter hæredes, and between creditors and singular successors.

The application of the act 1617 to the cases of fee-simple estates is plain and simple, and how it is to be altered to the law of entailed estates, consistent with principle, it is not easy to discover.

"The plea of the pursuer seems to involve entailed property in an inextricable labyrinth of confusion and uncertainty," as was well expressed by the late Lord Meadowbank. Principles seem to be acknowledged, even by the pursuer, that appear contradictory to his argument. 1. It is admitted that the minority of the whole substitutes or remote heirs is not to be reckoned, otherwise there never could, or at least hardly, be prescription of any entail. 2. That an heir cannot deduct the minority of prior heirs, as was found in the case of Ayton of Kinaldy. 3. That substitutes of entail have no real right in the subject, but merely a contingent right—a jus crediti, which is exactly the same in degree in every substitute, whether near or remote. From these principles, acknowledged on all sides, it necessarily follows, in my humble opinion, that in the case of entailed succession, in applying the doctrine of prescription, either the rules in fee-simple succession must be adopted, or the plea of the pursuer must be admitted, that every substitute, when he comes to be in the state of a pursuer, is entitled to deduct his own individual minority.

If this doctrine be admitted, it is necessary to consider the strange consequences which must be deduced therefrom. 1. It is obvious, that although an entail be a jus individuum, and must go seriatim to the persons designated by the granter, yet this jus individuum may be ineffectual as to one class and prescribed, and effectual and not prescribed as to another class. 2. If admitted to one substitute, on what principle can such substitute be debarred from pleading on the minority of prior substitutes? The principle is the same. The positive prescription is an adquisitio dominii, on certain terms and requisites. It infers nothing against the claimant. 3. This plea is founded on a mistaken interpretation of the words of the statute. The party against whom prescription is used and objected does not mean the immediate pursuer of the action, but the party against whom the prescription is running. This point is extremely well explained by Lord President Campbell in his speech in the Bargany cause, (p. 29,) and also by the other Judges. 4. The words of the statute are, that the years only "during which the parties against whom the prescription is used and objected shall be counted." If so, then, according to the pursuer's interpretation, the years before the birth of an heir, who becomes a pursuer, as in the present instance, should never be counted. 5. This

plea gives up the jus crediti, and proceeds on
opened, and in many instances will limit the d
than if the estate was held in fee-simple.

It is unnecessary to pursue the argument fur
and so well treated in the Bargany cause by L
Lord Meadowbank, the late Lord Armadale, an

But, after all, let the merits of the argument l
such a series of rerum judicatorum,' which has se
contrary to all just principles of expediency and
Prescription is founded solely on utility, and thi

The cases referred to are, 1. M'Dougal of M
voce Prescription, No. 5; Clerk Home, p. 206;
1756, Children of Sir Samuel M'Lellan. 3. 1s
Maitland. 4. 21st December 1784, Gordon of
Case of Bargany.

Upon these grounds, I humbly think that the
minority should be repelled.

LORD MEDWY

As I entertain an opinion in this case somev
which have been delivered, perhaps it may be
myself on the Court, and state the grounds of
the most anxious deliberation, on this very dif

The import of the judgment of the House
that all questions respecting the leases in th
to me that we are exactly in the situation of
petition had been presented against the interl
sustained the pursuer's right to the leases.

Without going over the details of the case
by your Lordship, I shall proceed at once to
according to my views, is, What was the title
Maule held these leases at the time of his de
Brechin, he was in possession under the leas
signees, (the liferent of the Countess having
fee-simple assignation, as well as a subsequen

As to the lease of Panmure, it appears to
in virtue of the lease to the Countess and
assignation in his favour by the Countess, th
entailed assignation.

By these entails Harry Maule did not con
tute, whom failing, his son, nor even to hims
but they are directly in favour of William
whom failing, to other substitutes, reserving
and the Countess's and his liferent in the ot
reserving the power of alteration. They tha
take effect only at the death of the make
expressly give power to the heirs to enter in
tailed title, upon the death of Harry Maule.
death that possession was to be held under
that Harry Maule never possessed under thes
his possession to them. If he had intended
have made himself institute, or at least mad
favour, and without any power of alterin
entirely disregarded the fee-simple assignati

But, instead of doing so, he recorded as probative writs, on 20th July 1780, the fee-simple assignations of the Panmure lease in 1724 by the Countess, along with the leases themselves; and after the Countess's death, which took place in 1731, and subsequent to the date of both the entails, Harry Maule produced in the proceedings, which terminated in the decree of 15th February 1734, as the title of his possession, the two original leases and fee-simple assignation of the Panmure lease in his favour, but did not found his possession on the entails, nor notice them at all. The entailed rights were, by their very terms, not to be effectual for possession under them till the death of Harry Maule, and the succession of his next heir; so that I have no manner of doubt that, at the time of his death, Harry Maule possessed on the fee-simple title. It seems to me that it was only upon Harry Maule's death that the entailed right came into operation, in addition to the fee-simple right on which he had possessed; that the entailed right then became the dominant title, the lex feudi; and his son William, the institute, on entering into possession of the subject of the leases, was bound to have entered into possession in virtue of the entailed title, and to have shown unequivocally that he did so, and that he disregarded the other title on which he was apparent heir.

Although there were thus two titles in his person, and although it has been held that the positive prescription is applicable to a lease, there is some difficulty about applying to such a subject the rule of law laid down in the case of Mackerston and others, as the title to a lease is completed simply by possession; and it may be difficult unequivocally to ascribe the possession to the unlimited title, where nothing has been done contrary to the limited right. Where the subject to be acquired by prescription requires sasine to complete the right to it, infeftment taken on the one title, while the other remains personal or neglected, and possession following on the infeftment, and on all occasions ascribed to it, affords, under the very terms of the act 1617, a prescriptive title to the subjects so possessed; and it is always in such a state of facts, I believe, that the case has hitherto occurred, and the question been tried. But, as observed by Lord Glenlee at the advising in 1817, it has not yet been tried what would be the result if a man died, having made an entail of part of his estate, and his son by service makes up titles, and takes infeftment in the whole estate, and unico contextu also takes infeftment under the entail, having previously entered into possession. To which title are we to ascribe this possession under such circumstances? If he wished to get rid of the entail, it would surely require some very strong act approbatory of the fee-simple title, and reprobatory of the other, and to which the attention of the heirs of entail could not fail to be arrested, before he could be allowed to defeat the entail upon which he had been infeft, and under which the substitutes were entitled to consider him as possessing.

There is a similar difficulty, as it appears to me, in the case of a lease, the right to which, whether limited or unlimited, is effectually completed by possession; and when Earl William, having in his person the limited title as institute in the entails and the fee-simple rights as heir apparent of his father, entered into possession, by what criterion are we to consider the possession so peculiarly appropriate to the one, that it is to be held to validate that right, and invalidate the other? If possession be not attributable to the one more than the other, there can be no prescription in favour of the one against the other, and then the entailed right must prevail. The opposite conclusion can hold only in the case where possession under the fee-simple title has been so conclusive as to show that he rested his title to possess solely on the fee-simple title, rejecting the other entirely, and so public as to call upon the substitutes to attend to their own interest in the succession, which must be otherwise defeated.

With this view, let us now advert to the fac
of Earl William.

1. As to the Brechin lease, when Earl Will
lease, and entered upon possession of the su
conduct relative to the entails of Kelly and B
his intention was all along to possess upon the
also. But this is not enough—neither the in
of possession; but, according to the views I
public act or acts indicated this to the world
a right to challenge his possession as being on
there was a valentia agendi in the heirs to r
virtue of which they would succeed, as soon
sessing on the fee-simple or adverse title. B
equivocal, attributable to the one not more th
to interfere; and therefore prescription would
So far as his right was founded on possessi
say, if his right was attacked, that he was p
his person—*i. e.* he was entitled to ascribe
beneficial to him; and while he had a right t
possession to the one, so as to defeat the othe
his possession to the one title in preference to
title preferably to defeat the other, which wa

Now, the acts of possession are stated in
have been enumerated by your Lordship. T
beyond the simple fact of continuous possession
same time, one is a judicial act; and where the
and unchallengeable, it does not well appear wh
to show on what title he was possessing. In
Niesh and others, Earl William obtains a decre
on is the lease of Brechin, and the fee-simple
This unquestionably is a judicial ascription of
not lay much stress upon the two leases gran
position 1745, nor on that of 1758, both of wh
upon. All these may add to the conviction th
gard the entail; but against the heirs they can
whole, though with great hesitation, I am inc
1740 was such an assertion of his right, and as
fee-simple right, when unopposed by any oppo
as to consider Earl William entitled thenceforw
under that title; and that he sufficiently appris
possessing on a title adverse to their interest
measures, if they could not forfeit him for a c
they could,) at least to compel him to possess

Now, as to Baron Maule, who was the nex
years elapsed from the date of this adverse ac
and as no step was taken by any of the heirs
your Lordship in thinking that prescription ha
lease prior to the challenge in 1782; and that
duction of the minority, either of the pursuer
even supposing it to be a clear point that mino
prescription upon an entail.

2. As to the lease of Panmure, I entertain
prescription had not run against the entailed
ings in 1782. There is a feature in the hist
been of great importance with a view to the
timation to the landlord of the assignation b

ıultiplepoinding in 1784. If this production had been made by William Panmure, I should have held it a most unequivocal proof of possession ıat title, intimation to the landlord with possession being the regular completing the right to an assignation of a lease. This proceeding ıce during the lifetime of Harry Maule, and it was done in his name, ·efore it can have no other effect than to show that he ascribed his pos- ːo the fee-simple title, which it is clear he did, the entailed right being l to become effectual only upon his death. Accordingly, on his death, William had it in his power to continue the fee-simple possession of his ɔr to possess on the other title, which then came into operation; and question is, if there be any public and unequivocal act of possession on title more than the other, to found a prescriptive possession?

ısidering this point, I can lay little or rather no stress on the general ːxpede in 1734. It may have been with the view of taking up the fee- ·ight to this lease, and this is so said in the proceedings in 1749 be- Sheriff of Forfar. But the general service was not necessary or usual ıg up a lease. The fee-simple assignations could not be noticed or on in the proceedings; and there was nothing to make the substitutes ınd that it was adopted with a view to exclude their right. It was, in ɔ public adverse act which called upon them to interfere to protect ·ht from its effects, as the foundation or commencement of a prescrip- ːession.

ːases in 1737 and 1740 are witnessed by Baron Maule, the next substi- person most interested to challenge them as a contravention; and the 1748 is expressly granted by him as his brother's commissioner. Leases in such circumstances can never be received as adverse acts, with the defeat an entail.

ːases in 1749 may perhaps be viewed in a different light. Baron Maule ·espect a party to them. But it is more important to observe, that in the ır certain proceedings took place against Morgan and other cottars in the ːourt of Forfar, where Earl William founds on the lease and fee-simple on in 1724; and if forty years possession had subsequently followed unin- l by any heir of entail, I should have held that the defender had also pre- ı right to possess the lease of Panmure unfettered by the entail. But as ːedings in 1782 were an interruption of the prescription, which, accord- y view, could not begin to run till 1749, I am humbly of opinion that the is entitled to succeed in his action so far as regards the Panmure lease.

may be thought a singular criterion of right which is founded on the acci- ːcurrence of a dispute with other parties; and that because in one case ute took place at any earlier period than the other, to the first should be such important effects in a question with the pursuer, who was totally ːcted with them. Moreover, if no such dispute had occurred with the ınd if possession all along had been held undisputed, and without calling ıublic and judicial claim of possession under the fee-simple right, the sub- ht now, at this distance of time, have been evicted from the party hitherto ıssion. This is very true; at the same time I should not have regretted never had been an opportunity for the possessor to make such an assertion title; for I conceive that he was bound to possess on the entailed right; ı was the dominant title, the lex feudi; and that it was a fraud upon the ɔ the deeds executed in 1730 to exclude the heir-male of the family, to an heir-female. This, however, has been effectually done, as I think, in of the Brechin lease, but not as to the other.

LORD CRAIGH

Said, that he had formed a decided opinion
again considered it with every attention in hi
notes of his opinion, to which the parties might
not detain their Lordships by reading at length
the same as before, that the pursuer's claim was
or negative prescription.

[The following is the opinion with which his
parties.]

With the exception of the bond for £9000, a
the House of Lords, it seems to have been int
Honourable House that the rights of the parti
if they were for the first time subject to discuss
brought while the pursuer's father lived, in the
defender, including the action of reduction anc
father in 1782, ought now to be conjoined, if t
the one last instituted in 1821 by the pursuer
marked, concludes for the rents of the lands,
one of the leases which terminated in 1824,
lease which comes to an end in 1830. It also c

The difference between the deeds executed
upon which the pursuer rests his claim, and
chiefly in this, that by the former the destinat
the family, of which the pursuer, having no c
the latter entails, besides the preference given
Panmure, and of his brother Baron Maule, th
to these parties, but a gratuitous successor, i
and to the pursuer himself, in opposition to th
interests of the Earl of Panmure and his bro
defender, became the same, and both adverse
particularly so to the pursuer, as the next an
of entail under the earlier settlements.

Although a summons formerly brought by
reference to the lands falling under these set
the leases, he has at this time confined his a
been considered as virtually renouncing all cl
holding that to be the state of matters, I sha
acquiring the lands by the positive prescriptic
possession following thereon, it is competent
the leases by the positive prescription, whic
ascribed to those leases.

I am inclined to consider the question be
mutual and onerous agreement between the
Maule, and his eldest son the late Lord Pan
provided for the heirs-male of the family in su
the case in the same manner as I would that
under a similar destination, and where each
a right to the sums destined to him; so that
hands of the contracting parties, and their
successors, the sums provided to each might
the lapse of time might be between the peri
time when an immediate and direct demand

There is, however, no essential difference
an express and direct agreement, and that w
the transactions in 1730 and 1733, as far as

sion, to be of the nature of an entail,—the individuals taking the benefit from the entail being thereby obliged to comply with the terms of it, and liable, when direct fulfilment has become impracticable, in damages to those who were beneficially interested. It must be conceded that the entail of a lease was not within the provisions of the act 1685; but it is nevertheless binding on the different lessees in succession, the questions on all such cases arising not so much from the form of the deed, or from the irritant and resolutive clauses contained in it, as from the true meaning of the stipulations therein inserted. Supposing that, along with a precise destination, there had been a simple prohibition to alter, the same question would have arisen, and the same decision been given.

It will be remembered that duplicates of all the deeds founded on by the pursuer, and which are described by the defender as latent deeds, were made out; one being put into the hands of the late Lord Panmure, the first institute or heir of entail, and the other into the hands of his brother Baron Maule presumptively, and if Lord Panmure had no male children, the next substitute; and both of these parties have been held out (how correctly they fulfilled their duties need not be said) as trustees for the other heirs of entail.

There is no dispute that, according to the plain meaning of the deeds and settlements so often mentioned, upon Lord Panmure's death in 1780, (his brother John having died without lawful issue,) the pursuer's father, and after his death the pursuer himself, was entitled to take up the leases as well as the land estates falling under the settlements; and it is therefore incumbent on the defender to prove, either that the pursuer had lost his right by the negative prescription, or that he himself, as coming in the place of Panmure, had acquired an absolute independent right by the positive prescription.

The rights which accrue to a substitute heir of entail, where there is a prohibition sufficient to infer an actionable obligation, in any discussion between him and the heirs in possession at the time, (or his children and representatives after his death,) are, 1. That of taking up the succession in the place assigned to him;—2. That of challenging any alteration in the succession prejudicial to him;—3. That of requiring the contravening heir, or his proper representatives, to replace or disburden the subjects entailed, if they have been alienated or burdened, if that can be done at the time, or for damages if restitution is impracticable, or in so far as it is so.

As to one and all of those rights, it is to be remarked, that they are equally open to all substitutes, near or remote, for enforcing or ensuring their respective claims, as well as the general permanency and efficacy of the settlement, (Lord Hailes' Decisions in Brown's Supplement, p. 604.) As to the first, like the jus sanguinis in the legal succession, it cannot be lost by prescription either positive or negative; and as to it, as well as to the rest, it will be remembered, that implying an immediate though defeasible right of ownership in the heir of entail in possession, nothing but a right of action, or jus crediti as it is sometimes called, is vested in the substitutes; and this right, being personal in its nature, can only be directly lost by the negative prescription, although, in the case of lands or other heritable subjects, its complete operation may be disappointed by the positive prescription taking effect in favour of another individual, when vested in the appropriate titles, followed with the requisite possession. But although the immediate right of property may thus be vested in a party independent of the fetters of the entail, this does not necessarily exclude in toto the right of action competent to the substitutes, so far as it may be directed personally against the heir who has violated the conditions on which he held the estate, and against those by whom he is generally represented. If an action of contravention and damages is at all competent, it must, like every other action belonging to real property, be competent at any time within forty years from the date of the contravention, and longer, so far as the party to whom it is competent has been under a disability to sue. It has been sometimes matter of doubt how far the action of damages competent in such

a case is to be made effectual, where the vi
total or partial. In the latter case, expedien
debts by which the estate is burdened, or by
it is subject, or by acquiring subjects that are
ment of the lands; but where, as in this cas
substitute of entail, there can be no doubt or
tion with the representatives of the predece
whole in fee-simple.

It seems to be thought by some that the
applicable to the lands or heritable subjects,
negative prescription is of no importance or e
tion can be pleaded with effect, and vice v
quite erroneous. It has been long settled, an
nised, (M'Donald v. Duke of Gordon, 26th F
tually plead the negative prescription with r
who cannot himself prove a right by the p
equally manifest that a right of action resp
variety of cases, be preserved from the effect
the direct right of property may, by the po
another.

The positive prescription, chiefly introduce
directed against the subjects themselves, an
purchasers and creditors, although in some in
as a protection to the frauds of those who hav
disposed of the subjects to the persons again
But the negative prescription, founded upon
ence of dereliction, has been, agreeably to th
ments, confined to those cases where the subj
the statutory period, be claimed for some in
advantage; and I hold it to be clear and fi
claim, such as falls under the negative prescri
only object and effect of an action would b
The case of Pollock in 1778 related to an En
particulars different from the ordinary one; a
tions of competition, and to be governed by t

In the case of an ex facie absolute title o
but qualified by a back bond acknowledging a
rity, should the trustee sell and grant infeft
forty years without legal interruption, the pu
the positive prescription, acquire the prope
coverture, or other legal impediment in the
been created, the obligation of the trustee is
tion, his action of restitution or damages will

If the right of action related to subjects n
for a definite number of years, this does not
though, in the case of a title by infeftment, a
ment taken by him, perhaps in the thirty-nin
that of his author, might thus be secured in
ceive that in this way he should also protect
which would have been competent to compel
be subjected in damages. So in the case of
any other act creating a personal objection a
chaser from him, with infeftment and forty y
any action by the person injured. Still, h
remain entire, in consequence of some legal
forty years. So in the case of a conveyance

warrant for infeftment, or has not executed such a warrant before a second sale is made and followed with infeftment, the latter purchaser, if not a partaker in the fraud, will retain the property after forty years of peaceable possession; and many other similar instances might be given. But whenever the negative prescription is excluded by the circumstances of the case, the action of recourse must subsist, although the property itself may be lost to the pursuer. See Falc. and Elchies, 10th November 1749, Elliot; 20th November 1728, Fraser; also those cases in the Dictionary, voce Prescription, where the right of executors, or others having an equal though not a joint interest, suffer a separate course of prescription, 8th December 1790, Cumming.

This was considered to be the law in the case of Mackerston so often referred to, although, from the general result of the decision, a contrary opinion seems to prevail. It was the case of a conveyance of property to an eldest son, his heirs and assignees, with a reserved faculty to alter, and on which infeftment immediately followed with possession for much more than forty years, without any thing to create a suspicion in the disponee that the faculty had been exercised. It had, however, been exercised in the form of an entail conveying the lands to the heirs-male of the family. In the mean while the heir of the original disponee had made up an unlimited title, and conveyed the whole also in the form of an entail, which was contained in a marriage-contract in favour of his only daughter and heir of line, and the heirs-male of the marriage.

In that case the effect of the positive and negative prescription was separately considered, and the interlocutor of the Court contains special findings as to each, —it being virtually held, that although by the positive prescription the direct right to the lands might be effectually vested in the heir of the original disponee, an action might be sustained against his general representative for enforcing the exercise of the reserved faculty. But although the question occurred with the heir at law of such disponee, it was pleaded that the defender was to be considered not as an heir, but as a creditor under an onerous marriage-contract, and therefore entitled to all the privileges of a singular successor; and the point was so decided, although with the greatest difficulty. It is stated in a reclaiming petition that the decision went on the Lord President's casting vote, one of the Judges present having declined to vote. But no similar determination can since be found; on the contrary, provisions in a marriage-contract to a child or heir of a marriage, although onerous as to the granter, have been held as inferring a passive title in valorem in a question with other onerous creditors; Gordon v. Sutherland, 4th June and 7th December 1747, affirmed in the House of Lords 7th March 1751. The only exceptions are where there has been a trust-conveyance de præsenti for the benefit of the children of the marriage, or where the provision is to be made good at some specific term that may arise during the lifetime of the debtor in the marriage-contract.

The terms of the interlocutor on this point call for particular attention, as reported by Lord Elchies, Lord Kilkerran, and Lord Monboddo, as well as by Clerk Hume. It was found, "that the marriage-contract was fully onerous, and therefore available to the husband and to the heirs-male of the marriage, notwithstanding the latent entail made more than forty years before, the same never having been recorded, nor any infeftment or document taken thereon;"—thus plainly indicating, 1. That a determination on the plea of the positive prescription, whereby the direct right of property might be governed, could not preclude a personal claim or jus crediti, if saved by interruptions or otherwise from the negative prescription;—2. That had the question been, as in this case, with the general representatives or gratuitous successors of the original disponee, the decision would have been different;—3. That even in such a case, if the tailzie, instead of being latent, had been known, and in the possession of the party pleading prescription, and still more, if, as in this case, the deed of tailzie had been withheld by the institute and presumptive substitute from whom the party pleading prescription had acquired

by a gratuitous conveyance, no such defence
lastly, That if the entail related to a subject wl
feftment, the heirs called in the exercise of the
M'Dowall, would have obtained judgment for

It may be thought unnecessary to observe, tl
sumption or hypothesis, that by the positive pr
had been transferred to the defender. There
which could have any influence in bar of the
remained with the Court to dispose of the ri
excluded by the negative prescription; and h
heir of a marriage-contract as fixed nearly a c
in question, and also keeping in view the circu
with the rationes decidendi in the case of I
result, as it appears to me, ought not to be att

It only remains to be observed, that if the
ruled by the negative prescription, the plea of
to that arising from that of non valentia ag
of Panmure having died in 1731, and Har
period alone prescription would begin to run,
in 1773.

But, in the circumstances of this case, the
well as his own, is to be taken into view. By
to Lord Panmure would have been his son,
Maule was not in law the next substitute, alth
have been so termed; and upon the death of
without lawful issue, the next substitute was t
been in minority for a dozen of years at least
was he alone, of all the individuals just now
preservation of the early entail; in opposition
suer's father, as well as the pursuer himself, v
dividuals in the same degree benefited, by th
ever existed where the plea of minority coul
negative prescription, it would have been h
the right of obtaining redress of a manifest w
of the party committing the wrong, or of hin
instead of depending upon the minority of the
injured, appears to be altogether inadmissible.

It has been said that the pursuer's father r
fore the succession opened to him, from whi
the lapse of the quadriennium utile he had los
occasion for the law of quadriennium utile in t
actment 1617, declaring " that the years of r
counted, but only the years during which
scription is pleadable and objected are majors.
Holding that, in consequence of the minority
the leases was not cut off by the negative pr
mure's death, when actions were brought ar
leases belonged to him, and are due to the p
father; and it would not alter the case, altho
have fallen under the submission and decree
said; for still they must be received as havin
and levied in his right. Even that, howeve
lating on the minority of the pursuer's father,
off by the negative prescription when Lord Pa
to prove that, by the litigations which immedi
prescription for many years yet to come.

in an action strictly penal ex parte rei, as in the case of a messenger sued
ersation, or for a culpable failure in his duty, the action may be insisted
t the defender's representatives, if, before his death, litiscontestation has
ıce; and a fortiori, in an action of restitution or damages, such as here
he same rule would prevail, although the defender should have died im-
y after litiscontestation. But here the abatement of the action arose from
ı of the pursuer; and besides litiscontestation, the case had been fully
ed, and an interlocutor pronounced in his favour, so far as related to the
now under discussion. If, therefore, a plea of minority was competent,
n the age of the pursuer's father, it must be so still.
› the positive prescription, my opinion is, that it is inapplicable, 1. In
of the titles; and, 2. In respect of the possession.
e leading and original titles were the leases from the York Buildings Com-
ıich contained no limitation; but, by express and onerous agreement be-
l the parties interested, they were combined with deeds importing a
lestination, accompanied with a prohibition to alter, and also with the
irritant and resolutive clauses of an entail, which, however, in the present
, are of little importance. In this way, an immediate and vested right
blished in the persons called to succeed, which was not substantially altered
ted from at the death of the Earl of Panmure in 1780.
ere was no possession which could extinguish the rights of the parties, as
nally and finally settled. The registration of the fee-simple assignation by
ıtess of Panmure of the lease obtained in 1724, probably made out to ex-
r heirs at law until a final agreement was made, as well as the correspond-
of Harry Maule, could be of no avail in opposition to the agreement itself
ımediately followed. Indeed in a question of prescription it was alto-
ıimportant; it was not an act of possession, but used merely for pre-
:vidence of the writing. The insignificant judicial pleadings which followed
sence and without the knowledge of the pursuer's father and himself, and
ıiderable distance from each other, wherein a reference was made to the
cuments, (the earliest of them within forty years from the pursuer's birth
) could not have warranted an action of irritancy by the substitutes of
The inchoated and unrecorded deeds of entail in 1745 and afterwards
rove an intention to violate the entail, if it could have been done with
ut, in regard to the actual possession required by the statute, were no less
ıt. The competition upon the Earl of Panmure's death, commencing in
fected an interruption of the positive as well as of the negative prescription,
it was then incomplete; and between 1734, when Harry Maule died, and
cannot with truth be said that the Earl of Panmure, upon a fee-simple
ualified title, had for the space of forty years, such public, peaceable, and
d possession as is there pointed out. If an action of contravention and
had been brought, it cannot for one moment be alleged that the particu-
ady stated would have weighed a feather in the balance against the de-
ıs an abandonment of the possession which he was bound to hold, and in
f which only he could legally enter into possession.
ıe time I thought that, even with regard to the positive prescription, the
ninority might be urged with effect, and if in any case, surely it would be
to here; and in some cases it seems to have been sustained, Geddes,
:ember 1740, Elchies; but the later practice seems to have established a
rule; and here it can be of no importance, unless it were to be held,
the pursuer has lost his right of action by the negative prescription; and,
, the defender has proved a sufficient title and possession to create an
'e right by the positive prescription.
were to be held that the defender had acquired, by prescriptive possession,
perty of the lands contained in the leases, it would fall to be considered
: he could at the same time (especially in a question with the same party)

establish a prescriptive right to the leases. The
not simul et semel possess vis facti upon the lea
ascribing his possession to his title of property, they
the right of property; but they could not be allowe
that they possessed in virtue of the separate and opp
destination of the leases at the time being differen
over which the leases extended, the former could n
the latter, although on that ground it was that an em
Dundas) rested his opinion in 1782. Had the Earl
after the purchase, it appears to be clear that wh
would have descended to his heirs of line, or those
leases must have fallen to the heirs favoured by the

These observations also apply to the decisions i
and others, the authority of which has been held to b
is. Lord Panmure might elect the title of property as
but he could not at the same time, in a question wit
possession to the leases, when these became the su
rate, one having right to the lands by several different
different destinations and limitations, might, in litiga
ascribe his possession to the titles not claimed upon
all the different heirs, which would be absurd, as well

It only remains to advert to a plea mainly founded
the matter of entails the minority of the later substitu
only of the substitute who is next to the contravener,
of entail in possession, is held to be trustee for all the
said that it is not the minority of the pursuer or h
Maule, that is to be attended to; and if this rule was
be no prescription in the case of lands so situated,
interested. This reasoning, however, appears to be qui
The statute 1617 makes no distinction between land
the enactment 1685, when prescribing the forms by w
dered effectual, "not only against heirs of entail, but
chasers," is equally silent on the subject. Indeed, the
making such a distinction, unless for enabling heirs of
tions on which they received and ought to hold their
terms of such settlements, or by something therein imp
and the next substitute were held to be trustees for al
that, upon a contravention, both the one and the other w
be subjected to an action of damages, at least so far as
the act complained of. But there is no pretence for th
trust. In judicial discussions relating to entailed estate
entitled to take the lead; and if there be no fraud or
will be binding, both for and against the other heirs of e
well observed in the case of Kilbucho, still undecided,)
racter of trusteeship, but because, in so far as he is not
there is no restraint imposed with regard to judicial disc
to act as an unlimited proprietor may do. With the sa
said that a remote substitute bringing any action compe
character of a trustee, which is not the case, although,
rized by the entail, his proceedings will be effectual, as n
of entail for the time in matters falling under his adm
administered by him.

In general, the different heirs of entail stand not in the
trustees, but in that of debtors and creditors, each having
interest, which he is entitled to protect and enforce. It
traordinary state of matters, if, in virtue of a deposit

in possession, and the next substitute, (in most cases his nearest heir and epresentative,) could affect or limit the interest of the other substitutes. ie circumstances of this case appear to preclude any argument of that sort. those trusts which arise from positive and express appointment, the annot act where he has an interest adverse to that of any of the parties , or where his heir at law or donee has an interest the same with his, and in tion to that of the other parties. He cannot be auctor in rem suam, more tor or other administrator. In this case, the late Earl of Panmure and his brother had a joint and common interest under the later deeds, opposed f all the other heirs of entail; and the pursuer, after his father's death, dverse interest, not only to Lord Panmure and his brother, but to all the mbers of the family, holding the character of last heir of entail, and en- not barred by prescription, to take the whole estates and leases without

he whole, my opinion generally is, that after combining the action last with those formerly depending, and particularly with the action of reduc- leclarator in 1782, an interlocutor should be pronounced in terms of the n. Whether, in virtue of that action, and in consequence of the voidance mission and decree-arbitral, and the decree of repetition lately obtained fender, it may be competent to the pursuer to extend his claim to the equent to Lord Panmure's death, after deducting the sums received by r's father, has not been brought into view, and may be the subject of ry, if to any extent he is successful in the pleadings now before the Court.

LORD JUSTICE-CLERK.

of the Judges of the Second Division, I must express my regret that een called upon to review the arguments in this case, because I have no n saying, that on looking back to the opinions delivered in 1817 in the vision, upon which a majority of that Division did decide that the leases ff both by the negative and positive prescription, I have not been able any difference in the state of the question, except the new plea that rged as to the deduction of the years of minority. I must beg leave ice, that in the judgment of the House of Lords there is no instruction opinions of the Second Division, and that must have proceeded from tion that the pleadings, although, from the objection in point of form, l not be given to them, had so exhausted the whole argument, that their did not consider it necessary to require the opinions of the Judges of l Division.

standing the pleadings we have lately heard, and the opinions delivered your Lordships, I have seen no reason to alter the opinion which I pressed, and to which the parties have already had access, that these ses have been cut off both by the negative and the positive prescrip- ve no intention of going over the facts and circumstances of the case. say for one, that I have not seen any example of the entail of a lease ed like the present; and that I have great doubt how far there can be, ct 1685, an effectual entail of a lease, unless a great deal more had than was done in this case. If it is carried into effect in any way by andlord takes a part in it, then I might be able to understand it; but andlord is no party, and where no intimation was ever made to him, nk there can be a right created which can be fully protected by the

ng it for granted that a lease may be entailed as this was, the question , is it not liable to the rules of the law of prescription? I think it is he sun at noon-day, that, making allowance for the particular nature , we must apply to it the same rules of prescription that we would

apply in the case of any other entail. In regard to leases of tein[illegible] decided, in the case of Muir of Caldwell v. Heritors of Dunlop *in 1*[illegible], *it has been* are subject to the rules of prescription. I am bound, *therefor*[illegible] *52, that these* whether there was a title of prescription in William Earl *of Pann*[illegible], to consider sidering the various conveyances of the leases in question, and [illegible]*ases; and con-* stances connected with them, there is not the smallest doubt tha[illegible] *all the circum-* him two titles to these leases, one in fee-simple, and the other limi[illegible] *there were in* fore the only question is, has there been a possession following o[illegible]*ted; and there-* title on which prescription has run?—and has possession for th[illegible]*n the fee-simple* years run against the entail? I have nothing to add on these [illegible]*e period of forty* been so well stated by your Lordship. [illegible]*ints to what has*

Keeping in view the nature of the subject, it is clear to m[illegible] that there was a plain intention to possess on the fee-simple title. It may be [illegible]nceded that there was an intention to defeat the entail, but that does not at all a[illegible]ect the question of possession. The intention of Earl William's possession as t[illegible] the Brechin lease has been well stated by Lord Medwyn; but I cannot see the [illegible]stinction in regard to that of Panmure, which has been drawn by his Lordship. It is certainly im- portant that there was no other subject to which the general service could apply but these leases; and we have the judicial step taken by the Earl of Panmure, in which he expressly states his title as in virtue of his gene[illegible] service. In 1749 the person who alone had right to produce the fee-simple [illegible]le actually does so, and states explicitly what his title was under that servic[illegible] and therefore it is impossible to say that he took the general service for any [illegible]ther purpose. I am quite satisfied, then, that there were acts of possession for [illegible]a period above forty years sufficient to found the plea of positive prescription, and I have as little doubt that the negative prescription has also run against th[illegible] limited right.

The only other answer that has been attempted to this [illegible]s, that the pursuer is entitled to the deduction of the minority both of his father *and himself. I think* this is, however, altogether impossible; for I am clear, th[illegible]*t if ever there was a* point of law which should be considered as settled, it *this, that under such* circumstances as occurred in this case, the minority of n[illegible]*her the pursuer nor his* father can be deducted; and it would be most dangero[illegible] if any doubts on that point were now to be thrown out. Upon the whole, I t[illegible]nk *the defender ought* to be assoilzied.

LORD CRINGLETIE.

The question at issue is simply, whether the pursuer [illegible]has right to *two leases*— one granted to the Countess of Panmure of the house [illegible] Panmure and other sub- jects specified in that lease—and the other of the hous[illegible] *of Brechin and other* subjects granted to Harry Maule? This action was raise[illegible] in April 1821, when both leases were current, as that of Panmure did not e[illegible]rs till 1823, and that of Brechin will last till 1839; and I consider that, in co[illegible]*sequence of the judgment* of the House of Lords, 26th May 1826, the point is [illegible] open for discussion as it would have been if we had been sitting in judgment [illegible]o discuss *the merits of a* reclaiming petition offered against the decision of the C[illegible]ourt, pronounced in March 1782.

But, in giving my opinion upon this case, I think [illegible]t necessary to refer to the various deeds which gave rise to the question, the [illegible]n attending them, with the conclusions in law which appear to me to arise out [illegible] *the whole.*

James Earl of Panmure having been attainted f[illegible] rebellion in 1715, *forfeited* his estates; and his Countess, a daughter of the no[illegible]e family of Hamilton, having been provided by contract of marriage to a liferent[illegible]f the family seat of *Brechin*, and an annuity out of the estate of Panmure, w[illegible] permitted to possess these rights. The forfeited estates of the Earl were a[illegible]uired by the *York Buildings* Company, who, on 23d April 1784, granted to Ha[illegible]ry Maule, immediate younger

brother of the Earl, and his assignees whatsoever, a lease of the house of Brechin, and other subjects therein mentioned, for ninety-nine years, to commence at the term after the death of the Countess, which happened in 1731; and which lease would be still current till 1830.

Harry Maule executed an assignation, dated 6th June 1730, of this lease in favour of his eldest son William, afterwards Earl of Panmure, and his heirs and assignees, in fee-simple; and he reserved to himself the power of alteration or revocation thereof.

On the 8th of June, two days after, he executed another assignation, in which he narrated the lease granted by the York Buildings Company to himself;—2. The assignation which he had granted to his son two days before, with the power of alteration or revocation therein contained; and on the further narrative that he had executed a tailzie of his estates of Kelly, and others therein specified, in favour of his said son and other heirs therein described, and that it was proper that the lease should descend to the same heirs as were to enjoy these estates; he therefore assigned to him the lease of Brechin, under the conditions, limitations, irritancies, and resolutive clauses of a strict entail.

The York Buildings Company also granted a lease, dated 23d April 1724, to the Countess of Panmure, and her assignees whatsoever, of the mansion-house of Panmure, offices, and gardens thereof, with a number of other subjects described in the lease, for the term of ninety-nine years from and after her entry thereto, which was declared to be 15th May 1724; and this lease her Ladyship assigned by deed, dated 15th June same year (1724,) to Harry Maule, and the heirs-male of his body — which failing, his other heirs and assignees whatsoever, reserving to herself the full use and enjoyment of the premises during her life. This lease expired in 1823.

On the 3d October 1730, the Countess and Harry Maule, with mutual and *joint consent*, granted an assignation of this last-mentioned lease to William, afterwards Earl of Panmure, and other heirs, under the same conditions, limitations, clauses irritant and resolutive, as were contained in the assignation to him of the lease of Brechin. Harry Maule had executed an entail of his estate of Kelly on his son William, and other heirs therein mentioned; and the assignment to the lease of Panmure proceeds on the inductive cause, "that it is most just and reasonable that the same, during the years thereof above written, from and after the decease of the longest liver of us two, should descend and devolve upon the same heirs to whom I the said Harry Maule have provided my lands and estate foresaid." The deed then assigns the lease, "and that for the whole years, terms, and space of the said lease or tack to run from and after the decease of the longest liver of us two, to and in favour of the said William Maule, Esq. eldest son of me the said Mr. Harry Maule," &c.

Here I think it essential in this cause to remark, that there never was a tailzied fee of either of these leases in the person of Harry Maule himself. They flowed from the York Buildings Company, and contained no destination of succession, nor any of the restrictive clauses of an entail. He held an assignation by the Countess to himself and his heirs in fee-simple; and the tailzie which the Countess and he executed was not on Harry Maule himself, but on his son William, whereby it is clear that Harry died possessed of this lease in fee-simple. Had it therefore been a truly feudal subject susceptible of sasine, Harry would have died infeft in fee-simple; and although he executed an entail, it could not be the title of his own possession, because it was not in his own favour. He did nothing to perfect the entail, whereby his son and heir William had two titles—one of apparent heir in fee-simple, and the other as disponee or institute under the entail.

With regard to the lease of Brechin, the Earl had three titles:—1. An assignment to himself of it in fee-simple;—2. Apparency as heir to his father, who died holding the lease in fee-simple, for he never conveyed it to himself under the fetters of an entail;—and, 3. The Earl had a title as institute or disponee in the

tailzie of the lease executed by his father, as already mentioned, on the 6th of June 1730.

The Countess died in 1731, so that the lease of Brech [illegible] commenced then; and being for ninety-nine years after her death, is yet current till 1830. Harry Maule died in June 1734, when the succession to all his heritable property opened to his eldest son William, afterwards Earl of Panmure. And here it is proper to premise a few words on the law of prescription. The act 161[illegible], c. 12, introducing the positive prescription, applies only to feudal rights, and requires, as a title of prescription, a charter of the lands, annual rents, or other heritages, with the instrument of sasine following thereon; or, where no charter in extant, that there be instruments of sasine, one or more, on retours or precept of clare constat. I presume that all must admit the meaning of the word *sasine* to be *possession*. Craig, p. 237. § 1. writes, "Itaque dominus, post investituram factam, statim plenam possessionem tradere tenetur. Hanc nos sasinam vocamus Gallico vocabulo, quod argumentum plenissimum est sasinas a Gallis ad Anglos, ab Anglis ad nos defluxisse." Sasine in England is in fact and in law;—in fact, when corporal possession is taken—in law, when something is done which law accounteth sasine. Johnson's Dict. voce Seizin. In England, notorial instruments of sasine are not known; and with ourselves there was a time when no written evidence of right or sasine was necessary or ever used. The superior delivered possession to his vassal on the ground in presence of the pares curiæ, which perfected the vassal's right. Afterwards, however, sasine was evidenced by a writing called *breve testatum*;—next, instruments of sasine, to prove that same act of taking possession, arose into use; and accordingly the act 1617, c. 12, makes an instrument of sasine to be absolutely essential to prove the assumption of possession.

Suppose, then, that a person shall take sasine of his lands before all the world, it is of no consequence to him in a question of prescription, unless the fact be proved by an instrument of sasine. But although the said statute does not directly comprehend tacks, the spirit of it has been extended to them. Anciently they were perfected by sasine as well as other heritages, for which the tack bore a warrant; but, for a long period of bypast time, sasine could not be had, so that the possession has not been proved by writing. Still, however, sasine is necessary, that is, possession, to complete the tacksman's right; and it is a fact proveable prout de jure. Such is the law beyond dispute. The tacks themselves granted by the York Building Company to the Countess and to Harry Maule are no way fettered by the limitations or conditions of any entail. That to the Countess was conveyed in fee-simple to Harry Maule, who died in the fee-simple right that to Harry Maule himself was conveyed to his son in fee-simple, and the power died in the fee-simple also. Had, therefore, these been feudal subjects, the Earl might have infeft himself in them in fee-simple, notwithstanding the destinations of them under entail, and his instrument of sasine would have proved the fact. But as an instrument is not necessary to prove the sasine or possession in these tacks, but that it is proveable prout de jure, it is clear to me that possession alone must constitute the prescriptive title to these or any other tacks; and that no written title is necessary to an heir to give him right to a tack, is laid down by all our authors; see Erskine, b. iii. tit. 8. § 77. It is therefore proper to extend to the conduct of William afterwards Earl of Panmure, and observe his acts, in order to see under which of his titles he assumed possession of these; for as Harry Maule whether that possession was adverse or not to the tail. [illegible] and heir had it in his himself died in the fee-simple right of these leases, his [illegible] ry to have any other power to continue that possession, without its being necessary to have any other right or title than that of apparency.

1. The inductive cause of placing these two leases under the entail was, that Harry Maule had entailed his estates of Kelly and others on his son, and it was most just and proper that the leases should descend to the same heirs under the same conditions. But, instead of making up titles to Kelly under the entail, Lord Pan-

) made up a title to it in fee-simple, by special service as heir-male of provi- and heir of line to his father; and it has been finally determined that he red that fee-simple by the positive prescription, while the entail of that estate ut off by the negative. The summons in this action, no doubt, includes a tion of the judgment of the Court relative to the estates of Kelly and Balie, and the bond for £9000; but it is admitted (pursuer's Case, p. 18) that oint is final as to these; and it is impossible, in fair construction of his es, to imagine, that when he repudiated the entail of Kelly, the principal, hich the leases were only an accessory, he should, notwithstanding, make ntails the title of possession of these leases. He also expedited a general ce as heir-male of line and of provision to his father, whereby he could take very heritable subject, as heir-male or of line to his father, on which infeftment ot passed. With the view of making up a title to these leases, he had no or any service, if he meant to possess under the tailzies, because he was the t disponed. It could therefore only be with the view of possessing in feele that he used the service.

The entailed assignations were kept latent, while that by Harry Maule to on of the lease of Brechin was recorded, and also the assignment by the tess to Harry Maule of the lease of Panmure in fee-simple; they were put record by David Maule, the agent for the family; and consequently all these edings must have been well known and assented to by John Maule, the imte younger brother of William, who was at that time a lawyer.

In the year 1740, a person of the name of Neish, and some others, intruded me of the subjects contained in the lease of Brechin, and the Earl caused an to be raised against them, concluding for damages. It was brought into the ff's Court, and the libel narrated the original lease to Harry Maule from the Buildings Company, with the assignment thereof to his son the Earl in fee-e, dated 6th June 1730, and decree was obtained on this. So that here was owed declaration by the Earl in a public Court of Justice that he held the under the assignment to him in fee-simple; and it was, in my opinion, an act ater notoriety than taking a sasine of a feudal subject. The latter is in law o be a public act, but it is in fact generally known to few; whereas the for- also a public act, and must be known to many.

With respect to the lease of Panmure, the same course appears to have been . In 1749 the Earl prosecuted a parcel of tenants before the Sheriff of , and produced as his title the lease to the Countess, her assignment to Harry and his heirs, and the Earl's service as nearest and lawful heir of line and ion to his father, in virtue of which he claimed right to the Countess's lease. was another public act, claiming as heir of line to his father; for had the possessed on the entailed assignment, that was the title which he would have ced, because it conveyed the lease of Panmure directly to himself. No doubt, years had not elapsed between the year 1740 and 1782, when the action was rought into this Court by the pursuer's father; but I hold that this was only lic avowal of the title on which he had been possessing from the death of his ; and further, I hold that where a man has two titles in his person, the one d, and the other unlimited, the presumption is, that he possesses on the latter re beneficial to himself. Besides, he began in 1737 to grant leases of the ts in the Panmure lease, in contravention of the restrictions in that entail.

The entailed assignations prohibited the Earl from letting any part of the ts contained in them for any longer than his own life; and consequently, had possessed on them, his Lordship could not have granted leases for any l but that of his own life. But in 1746 he granted a lease of the Brechin for nine years. In 1755 he renewed that lease for nine years more.

th regard to the subjects of the Panmure lease, the Earl granted numerous all for a fixed period of years, from 1737 downwards; and as late as 1749 he ne to John Craig for nineteen years.

The Earl executed various deeds relative to his estates; and
:h are specified in the record, he disregarded the entail, and al
uccession; so that, on the whole, I have no sort of doubt tha
ued a number of overt acts with relation to these leases, declara
inct manner that he disregarded the entails, and claimed to hol
er fee-simple rights; and consequently the question comes to
y had a right in fee-simple?

ow, I have already observed, that there is a difference betwee
two leases. Of the lease of Brechin, the Earl had an assignme
simple. No doubt there was an assignment, dated two days aft
e subject under entail, and it is quite indisputable that the
ht have compelled his Lordship to possess under it; but it w
Earl (whether lawful or not) to use the assignment in fee-simp
owers of revo-
ry Maule executed the tailzied assignment, it contained full
lease to himself
n, and had no effect till his death. He did not assign the
-simple, where-
er the clauses of entail, but continued to hold the subject in f
r of line, and he
t was also competent to the Earl to take up the subject as he
rer, that he used
ed himself as such to his father. It does not appear, howe
e rested his right
service as the connecting link for the lease of Brechin, for
he assignment to him in fee-simple by his father.

With regard to Panmure lease, the fact is somewhat differ
t. Harry Maule
an assignment to it from the Countess, under the reservation
of her own liferent
r; and although both joined in the assignment to William
Maule and other
s under the conditions of an entail, the right in the pers
n of Harry Maule
self was in no way altered. The assignation was not to h
imself, but by him
is son; and consequently, after the Countess's death, he
and no right to the
e of Panmure, but her ladyship's assignment; under that h
possessed, and died
he fee-simple of the lease; and, from the legal proceedi
s after mentioned in
Sheriff's Court of Brechin, it appears that Lord Panmu
set forth his right
hat lease to be his service to his father as heir-male a
d of line. If he had
ided his right on the tailzie, he had no need for any
rvice, for he was the
ct disponee in the entail. It therefore appears to me d
stinctly clear, that as
he lease of Brechin, he took right to it under the ass
nment to him in fee-
ple executed by his father; and as to the lease of Pan
ure, as well as to the
te of Kelly, the Earl acted as heir to his father in fee
mple, and that he did
with the consent of his only brother John, because at
at time the latter was
he Bar, was employed as counsel for his brother, an
must have been cog-
nt of all the proceedings.

: is now a decided point, that the Earl acquired the e
tates of Kelly and Bel-
bie by prescription, founded on investitures thereof in
fee-simple; and had the
es been susceptible of investiture, the same judgmen
must have been given
respect to them. But as infeftment could not be
aken on the leases, the
rt, by a majority of one vote, but not a majority
opinions, (for the then
d President gave his opinion the other way, but t
re not being an equality
otes, he had none,) decided that there was no acqu
ition by the positive pre-
tion, and that the entailed assignations were not c
off by the negative pre-
tion; as they held, that as there had been no a
verse possession by Lord
mure, there was a non valentia agere cum effectu
the heirs substituted to
Lordship.

here were only six of the Judges who voted on thi
occasion; the other three
were present were non liquet. And when a judg
ment was thus pronounced
only three out of the nine for it, without the fac
being disclosed which we
have on record, I may safely say that it was
fully considered, and de-
es to be seriously reviewed.

he question is, therefore, were these leases acqu
red in fee-simple by the pe-
e, and were the entails cut off by the negative
prescription, as well as the

tailzies of Kelly and Ballumbie? And into this enters not only the point of non valentia agere, but whether the prescription was suspended by the minority of the pursuer's father and his own?

On this last I will say a few words, first, because if there was a suspension of prescription, it is unnecessary to notice the other.

Great labour was bestowed, and much ingenious argument was used by the counsel for the pursuer, to whom the Court are much obliged for their exertions, in order to prove that the minority of substituted heirs of tailzie, though not immediately entitled to succeed, must be deducted from the years of prescription. If we err, it is not the fault of the pursuer's counsel, who most ably performed their duty. I have carefully considered all the cases referred to, and must declare my opinion, that it is not now an open point, and even in 1782 was then allowed to be settled; nay, the argument then was, whether the minority of even the heir next in succession could suspend prescription? And I confess that I am inclined to lean on that side by the ingenious reasoning then used by the late Sir Ilay Campbell. I think that it has been repeatedly decided, both here and by the House of Lords. I refer to the procedure in this very case in 1782. I understand it not to be disputed that the pursuer's father was born in 1740, whereby, if his minority could have been deducted, there could not have been prescription. Harry Maule died in 1734, from which till 1782 there had elapsed only forty-eight years; so that, if his minority had been deducted, twenty-seven years only remained behind. But Baron Maule was the heir immediately next to the succession, who was of age during all the period; and the Court found that prescription both positive and negative extinguished the entails of Kelly and Ballumbie, and this was affirmed in the House of Lords. Again, look to the case of Bargany; if Mrs. Fullarton could declare an irritancy against Sir Hew Dalrymple, she became the heiress of tailzie entitled to succeed to the estate. This Court found she had no title to pursue, owing to Sir Hew's rights being covered by prescription. Beyond doubt, if her minority could have been deducted, there would have been no prescription; and when the judgment of this Court was carried to the House of Lords, they did not repudiate the principle, that the minority only of the heir immediately entitled to succeed could be deducted; but, on the contrary, recognising that principle, that right Honourable House said that this Court had assumed the point without trying it, that Mrs. Fullarton was not that heiress; or, in other words, whether there had been an irritancy or not, through which she could be the nearest heir. And accordingly they remitted to this Court to try the matter, how far the merits of the cause involved the title to pursue. We did so, and on the whole rejected Mrs. Fullarton's claim, which was also affirmed on appeal. I therefore consider the point as finally decided, and therefore that prescription must have run, unless it can be held that there was a non valentia agere on the part of the pursuer's father.

Now, whence this doctrine of non valentia agere cum effectu has been taken, I profess myself utterly unable to discover, though I have very often attempted it. Sure I am that it is not derived from any of the statutes relative to prescription; neither do I think it founded in expediency, nor in sound legal deduction. What is meant by a non valentia agere cum effectu? Do not the statutes all require peaceable and uninterrupted possession as an ingredient for the positive, and in the negative of obligations that document be taken on them? Is not then interruption alone an object? Can it be said that it is not acting cum effectu when prescription is interrupted? Certainly it cannot. All admit that in the positive prescription there must be interruption; and the same must be admitted in the negative prescription of almost all obligations. If a person do not ask payment of principal or interest of a bond, heritable or moveable, for forty years, he will lose the obligation; but it may be said that in these cases he acts cum effectu. Suppose that A B, owing a debt of £1000 to C D, becomes bankrupt and leaves the country, what effect will any action have against him at the instance of C D, ex-

cept to interrupt prescription? Would your Lordships hold, that if C D returned after forty years, the debt was not prescribed because A B was non valens agere cum effectu? Certainly not. My idea is, that the same applies to tailzies as well as bonds; for by an action he can have it declared that the tailzie is in existence and forms the title of possession, and which is admitted to be necessary where there is avowedly an adverse possession.

I am well aware of the cases of Welsh Maxwell and Lumsden of Blanerne; but I do not consider them to contain any objection to my ideas. The Court, in these cases, did not rest their opinions on non valentia agere; on the contrary, they thought that there was no occasion for an action at all. They held that the entails were the leges feudi; that the heirs were bound to make these the titles of their possession; that while they did nothing to the contrary, they were possessing on these entails; and as prescription had not run after they made up titles in fee-simple, the Court found that prescription was not applicable.

But, as I have already observed, had the heirs under these entails possessed for forty years under unlimited titles without interruption, all must admit that they would have been secured by the positive prescription as well as the negative in a fee-simple holding. Now, what are the facts in this case? I know, for I have looked into the pleadings, that they were not brought forward in the action decided in 1782; and for the best reason, that they were not considered to be necessary. We all know, that although leases were in old times followed by infeftment, the practice has for many years past been discontinued, and that possession on a lease renders it a real right, both in the persons of the original lessee, and of his heirs and assignees. Lord Panmure then had no occasion for infeftment; he could not take sasine on these leases, there being no warrant for it. He had different titles to them, as already observed; and the question is, on which of these titles he possessed? For possession on a lease is sasine. Even if there had been no evidence to the contrary of the Earl not having possessed on the entails, I rather think that the case of Welsh Maxwell does not apply; for I hold it to be clear that where a person holds two titles which are the foundation of the positive prescription, the one limited and the other unlimited, he is entitled to impute his possession to the latter. Now the Earl of Panmure had, by right of succession alone, as good a right to the leases as he had by the tailzied assignation, or as he had to the estates of Kelly and Ballumbie by service and infeftment, and therefore might impute his possession to his right by succession; whereas, in the case of Welsh Maxwell, he required infeftment in fee-simple to form his prescriptive title to cut down the entail.

I see, from the facts which I have detailed, which were all and each open notorious acts in a Court of Justice, permitted by the next heir to his Lordship, who was then a lawyer, which acts were in truth more notorious than his taking sasine on any conveyance, and which openly avowed a possession adverse to the entails, that from the death of his father in June 1734, Lord Panmure took up every right descending from him in fee-simple. I hold that when these public declarations were made of his title on which he meant to possess, his heir was as much called on to compel him to possess on the entails, as he was bound to force him to possess Kelly and Ballumbie on the tailzies thereof. Sasine of these in fee-simple was the title for positive prescription; and possession of the leases, on an avowed fee-simple right, became also the title for positive prescription as to them; and no interruption having been made, his Lordship acquired right to these leases in fee-simple, as much as he did to the landed estates of Kelly and Ballumbie; and therefore the defender should be assoilzied from that branch of the action which relates to the lease of Panmure and Brechin.

I take no notice of the plea, that an entail of lease cannot be granted without consent of the landlord, who is not bound by any deeds of his tenant, because I think there are no termini habiles for it. The landlords, the York Buildings Company, while they held the property, made no objection to the entails; and after

Lord Panmure himself became the proprietor of the subjects under the lease, he could not have objected to the entails of them, because he was heir of the entailer, and as such bound to implement his deeds.

LORD COREHOUSE.

Since ever my attention was called to this case, I have considered it to be attended with great difficulty on the point of prescription, and on no other point; for, as to the plea of minority, I agree with the majority of your Lordships, and hold that that question is no longer open.

As to the plea of prescription, the difficulty arises from this circumstance:—The framers of the statute 1617, when they introduced the positive prescription, had clearly nothing in view but feudal rights where there is a title by infeftment—that is, by a written instrument containing the limitations of the right which is renovated on the entry of every heir, as well as every singular successor. But in practice the statute has been extended to tacks, rights of teinds, patronage, &c., which do not admit or may not require sasine, and where, of consequence, there is no renovation of the title. But it is scarcely possible to apply the principles established in the one class of rights to the other class. This is the case with regard to the doctrine of prescription on a double title—a doctrine which has given rise to so much discussion for nearly a century. Even as to feudal rights it is intricate, and involves nice distinctions; but when it is applied to rights which transmit without infeftment from the ancestor to the heir, the analogy is so unsatisfactory that it cannot be relied on. This is the very first instance in which the *application* has been attempted, and there is no precedent to direct us; for the *decisions* in the preceding stages of the cause, in 1782 and 1817, being directly at variance, neutralize each other, and the point therefore remains quite open. If the question here had occurred with regard to a feudal subject—for example, a feu-disposition on which the Earl of Panmure had been infeft—I would have agreed with every word that has fallen from the Chair; but the whole difficulty lies in the circumstance that the subjects in dispute are leases, in which there is not, and cannot be, a title by infeftment. To understand the matter, it is necessary to begin with this doctrine of double title in a feudal subject. Suppose a person to be infeft in a landed estate in fee-simple on a charter to himself and his heirs whatsoever, and that his son enters into possession on apparency—that is, without renovating the title; in that case he may plead his father's title, joined with his own possession, to create a prescriptive right against any one claiming a better right than his father, on whose title he founds. This was decided in Caitcheon v. Ramsay in 1791. But vary the case:—Let the father, as before, be infeft in fee-simple, and then suppose that he makes a personal deed of entail to a different series of heirs, fenced with irritant and resolutive clauses, his eldest son being the first member of tailzie; in that case, if the eldest son enters into possession without making up a title, he could not found on his father's fee-simple title and his own possession to cut off the personal deed of entail. To do this effectually, he must have a title in his own person, or at least there must be a title adverse to or independent of his father's title, to which he can ascribe his possession. If it be a title in his own person, it is of no consequence whether it be completed by service or precept of clare constat to his father; for, after the lapse of the prescriptive period, there is no room to look back to the warrant of his infeftment. If he has an infeftment in fee-simple independent of his father's, and forty years possession, he has all that the statute 1617 requires. On the other hand, if he wants that independent title, it will not avail him though he should ascribe his possession, by the most unequivocal acts, to his father's fee-simple infeftment, in contradistinction to the personal deed of entail. Prescription is prevented, not in consequence of any quality in the possession, but from the want of a habile title. The personal

deed which qualifies his father's infeftment is the lex feudi, until prescription has run on a title different from that infeftment.

In the cases of Mackerston, Kirkness, the Duke of Hamilton v. Douglas, Lealie Grant v. Gordon, Ayton v. Monypenny, and in every other case in which a personal deed of entail was found to be cut off by the positive prescription, possession invariably proceeded on an infeftment different from the infeftment of the maker of the personal deed.

On the other hand, in circumstances precisely similar in every respect, except that the heir had no fee-simple title to found upon, save the fee-simple title of the maker of the entail, it has uniformly been decided that prescription did not run. That was the species facti in Welsh Maxwell v. Welsh Maxwell, and in Balfour v. Lumsden. In the first of these, the positive prescription was not so much as pleaded; in the second, it was pleaded and overruled. And it will be observed that the judgment did not proceed on the ground that the heir had not de facto ascribed his possession to the unlimited title in the ancestor, (in the case of Lumsden he had done so in the most unequivocal manner,) but on the ground that there was no double title—that is, no title unqualified by the personal deed of entail.

These principles are settled in feudal rights, but in this case we must apply them to leases; and here the difficulty begins. Take, for example, the case of the Panmure lease.

I admit that a lease is a good title for the positive prescription, for so it has been fixed by many decisions, though contrary to the spirit as well as the letter of the statute 1617; and so also is an assignation to a lease. Now, as Harry Maule had an assignation from the Countess of Panmure to this lease in favour of himself and his heirs whatsoever, the Earl of Panmure, his son, undoubtedly could plead his own possession on that assignation to support his right against any one claiming a better right than his father's. But could he plead his possession as heir under that assignation, to cut down his father's entail of the lease? I think not, because, if he could, he would be in his different and better situation than the heir of a feu-right; for, as we have just now seen, if the grant from the Countess to Harry Maule had been a feu instead of a lease, prescription could not have run against the entail. The defender, therefore, attempting to apply a principle in this case which does not apply in feudal rights; he receives no support from the decisions on double title; they are directly against him.

I am perfectly aware of the difference between a feu and a lease—namely, that the heir of a feu remains in apparency till he completes his title by infeftment, whereas the heir of a lease requires no infeftment; mortuus sit vivum. But this does not appear to me to solve the difficulty. The statute 1617 requires a written title as the foundation of the positive prescription. The decisions have fixed, that if a personal deed of entail is to be cut off by the positive prescription, the written title must not be the title of the maker of the entail. If a lease does not afford an opportunity of creating an independent title at every transmission, as a feu does, the necessary inference must be, that, when it is not so created, there is no room for prescription—I mean that application of prescription which relates to double title. Though the heir is in apparency in the feu while he has a vested right in the lease, he is exactly in the same situation in both cases as to the writing in so far as written title is concerned. In both he must have an adverse title that of the maker of the entail, otherwise he can take no benefit from the statute 1617.

It would be anomalous to hold that the positive prescription is not only to be extended to leases which do not fall within the purview of that statute, but that a person acquiring a lease by prescription should be placed in a much more favourable situation—namely, that his possession alone should work as much as both possession and title in the case of feudal subject. This would be a violation, not an extension, of the statute; it would be to dispense with a written title altogether, which, by the statute, is essentially requisite. Therefore, the case of Panmure,

f opinion that there was no title on which the positive prescription could
cut off Harry Maule's entail. The Earl of Panmure could possess only
Maule's assignation to him. I lay the Countess out of view as an entailer.
l divested herself by the previous assignations in fee-simple to Harry Maule;
ıer name was used in the entail, it was only from courtesy, or to show that
ırties were desirous that the entail should take effect.

the case is different as to the Brechin lease. There we have not only the
y the York Buildings Company to Harry Maule, and his entailed assign-
f that lease to the Earl of Panmure and a series of substitutes, but we have
ous assignation by Harry Maule to the Earl of Panmure in fee-simple.
a separate title; it is independent of Harry Maule's title; and I see no
why the Earl of Panmure should not prescribe upon it, to the effect of
down the subsequent entail, in the same manner as Thomas Macdougal
Mackerston case prescribed on his own infeftment, to cut down the entail
ıently executed by his father. If he did ascribe his possession to it, which
ɜr of fact, and as to which I shall speak immediately, I think his fee-simple
ould be completed.

he point of title, therefore, I am inclined to take a distinction between the
I think there was a double title in the case of Brechin, but not in the
Panmure.

negative prescription depends in this case on the positive. If the positive
ıning, there was a valentia agendi on the part of the heir of entail to inter-
If the positive was not running, there was a non valentia, as is clearly
in the very learned and able argument in the case of Welsh Maxwell,
was sanctioned by that decision, and by the decision in the case of Balfour
msden.

ıubt has been started, whether the distinction between personal and feudal
hould not prevent prescription from applying to the case of Brechin. In
ner, it is said that the assignee represents his cedent, is bound by all his
ıd takes the right tantum et tale as it was in the cedent, and qualified by
conditions which he chose to adject to it; further, that in the case of mortis
nd gratuitous assignation, it is of no consequence whether these conditions
tained in one or many deeds. This would lead to the inference that the
ple assignation to the Earl of Panmure must be qualified by the subsequent
Undoubtedly this is true within the years of prescription in the case of
l rights, and the same thing would hold here though the subject were
because the Earl of Panmure represented his father, and was bound by
leeds. But in every case where the positive prescription applies, (and it
in the case of a lease, though quodammodo a personal right,) after the
ears have elapsed, the right of the representative is just as good as the right
ingular successor. The lessee, when his right is completed by prescrip-
unshackled by the deeds of his author, and by the qualities of his author's
So far from taking the right tantum et tale, a lease a non habente potes-
when so confirmed, is as good as a lease from the proprietor, as has been
l in a great many cases. On the same principle, a revoked lease is as good
or prescription as a revoked charter or disposition.

aps the view which I have taken may appear too critical; but though it
roneous, I should arrive at the same conclusion on the grounds stated by
Iedwyn. Where there is an obligation to possess on a fettered right, law
ver presume that the party possessed on one that is unfettered—in other
that he acted contrary to his duty. The presumption is exactly the reverse.
naintains that he possessed on the unfettered right, the burden lies on him
' that he did so. Now, what are the facts as to the Panmure lease? I see no
e of possession on a fee-simple title till a period within the years of prescrip-
It is true that in 1734 Harry Maule produced the fee-simple assignation
ıe Countess in a multiplepoinding against the York Buildings Company;

but that was his own subsisting title at the time, which of course was not affected by the mortis causâ assignation to his son. This, therefore, was no act of possession contrary to the entail, which was not to take effect till his death. The proceedings in that process, therefore, must be laid out of view. Neither is the Earl of Panmure's general service of any consequence. As to the leases, it was quite inept; they vested before the service, and they are never mentioned in it. It was not a service as heir of line only, but as heir of line, heir-male, and heir of provision—a proceeding to catch every heritable right that might chance to be in the ancestor not clothed with infeftment, except the lease, to which it could not possibly apply.

It is true that Lord Panmure did grant one or two trifling leases for nine or ten years certain, instead of the period of his life, as authorized by the entail; but that cannot be considered as a repudiation of the entail, or evidence of an intention to possess on fee-simple right. They were not subject to challenge, unless he had died within the ten years; and if he had died, no irritancy could have been declared—the leases would have been reducible, and the tenants would have had to recur to the personal warrandice of Lord Panmure. But a contravention of this kind, if it can be called a contravention, is a liberty which few heirs of entail hesitate to indulge in. It is attended with no danger, and is often an act of beneficial administration. There is no other act having the least appearance of an intention on the part of Lord Panmure to contravene, and far less to repudiate the entail, down to the year 1749—that is, far within the years of prescription. After 1749, undoubtedly, he did attempt to shake off the fetters, but the pursuer's father brought his challenge in 1781.

On the other hand, there is evidence, as to Brechin lease, that William Maule did ascribe his possession to his fee-simple title as early as 1740, when he produced it in the action against Neish and others; and he maintained his possession on that title exclusively for the whole prescriptive period.

Lord Alloway.

The opinion so well delivered from the Chair has in general expressed so entirely the sentiments I entertained on the subject, that I did not mean to say any thing; but as two opinions have been delivered quite adverse to your Lordship's opinion, I shall beg leave to say a few words upon those views which have been brought forward by my Learned Brethren, and for whose opinions I entertain the highest possible respect.

As to the opinion entertained by Lord Balgray, a very few words will suffice. It is clear and consistent with itself, and just comes to this—that in this case it was impossible that there could be two rights, one in fee-simple, and the other restricted or entailed; because leases being personal rights, no heir of Harry Maule could take up the fee-simple right, without being bound by the restricted or entailed rights with which these preceding rights had been absolutely qualified; and that William Maule, afterwards Lord Panmure, must, upon his father's death, have instantly possessed upon the last or entailed lease, which necessarily qualified the first or fee-simple lease, and had no other title of possession. In short, this view would just come to this, that leases being personal rights, although they might be entailed, yet, from their very nature, there could be no means by which an entailed or restricted lease could be worked off by prescription, as in feudal property, where there could be two distinct rights, and where possession upon the one, or unlimited title for forty years, might extinguish the entailed or restricted title. Indeed his Lordship's view has not occurred to any other Judge; and I shall not enter further into it than to state, that I cannot conceive that if leases can be entailed, they are the only subject to which the common rules of the law of prescription cannot apply. This would equally apply to the case of William Maule, in 1734, having burnt or destroyed the entailed lease, and having

imputed his possession solely to the unentailed lease; or suppose that he had never heard of the entailed lease until Baron Maule's death, forty-eight years afterwards,—in such a case, would not action for proving the tenor, and the latent entail, be entirely cut off by prescription?

But I humbly conceive that the whole of Lord Balgray's ingenious doctrine has been completely removed by the most able and acute reasoning of my brother Lord Corehouse, with whom I concur as to the views taken by him and Lord Medwyn as to the Brechin lease, in which they admit that there were two titles *of possession*, that possession had followed upon the fee-simple rights, and that the *entailed lease* was totally cut off by prescription; although I conceive they *have erred in* considering the Panmure lease.

It appears to me that the rules laid down by your Lordship are indisputable,—that where a person has two unlimited titles to the same subjects, prescription cannot run upon the one against the other, because, whenever he pleased, he could put an end to either of them; and which was so well exemplified by the cases of Smith and Bogle against Gray Durham, and by a multitude of cases of the same description. On the contrary, a person having two rights to a subject, the one entailed, and the other in fee-simple, was entitled to possess upon his fee-simple title; and if he did so for forty years, he not only acquired a fee-simple title by the positive prescription, but the entailed title was completely extinguished by both the positive and negative prescription. Such was the clear principle established in the case of Mackerston, and in many other cases referred to by your Lordship.

These rules, which certainly apply universally to all cases of prescription, positive and negative, must apply to the case of leases, to which, according to the opinion of Erskine and our other institutional writers, the law of prescription applies equally as to all other heritable property. No doubt, in considering the plea of prescription, there is much more difficulty in applying it to leases than to feudal subjects. In feudal subjects, by the very act 1617 introducing it, it could *only take* place in virtue of sasine, and of possession having followed upon it for forty years; whereas upon leases no infeftment takes place, but the right to the lease is vested by possession alone; and therefore, as Lord Corehouse justly observed, there must always be a greater difficulty in ascertaining the possession upon leases than with regard to feudal subjects, upon which infeftment must take place.

But his Lordship's great difficulty in applying the doctrine of prescription in the present case is founded upon the cases of Welsh Maxwell and Lumsden of Blanerne, in which the doctrine that had been established in the case of Caitcheon *against* Ramsay was introduced to support the plea of positive prescription, especially in the last case of Blanerne. But, with great deference, I conceive that these cases do not at all apply to the present case. I think that the case of Caitcheon against Ramsay was perfectly well decided, but that it could not possibly be applied, either to the case of Welsh Maxwell, or to the case of Lumsden.

In the case of Caitcheon, an heritable subject had been adjudged from Caitcheon's predecessor. The adjudger had obtained a charter of adjudication, and had been infeft, but had obtained no decree of expiry of the legal; and he sold the subjects to Ramsay, who was also infeft. Ramsay died before the years of prescription had run; and his son, who succeeded him as apparent heir, had never taken infeftment. Caitcheon brought an action for reducing all those rights, and old Ramsay's infeftment, upon the ground that the debt contained in the adjudication had been extinguished by intromissions before the expiry of the legal. Although prescription had not run during the life of old Mr. Ramsay, whose title was challenged, yet, if his son's possession could be imputed to his father's infeftment, more than forty years had elapsed before the title was challenged. The question therefore came to be, whether, under the words of the act 1617, the son, without being *infeft*, was entitled to found upon his title in apparency in support of his

father's infeftment? And the Court found that he was; for as his father's infeftment was challenged, and the whole question was whether it was saved by prescription, the son was found entitled to impute his possession in apparency as continuing that of his father, so as to support his father's infeftment.

I conceive that this is all the length that this case went, and that it was sufficiently supported by the words of the statute. But how can this be applied to the cases either of Welsh Maxwell or of Lumsden? Indeed I conceive that neither of these cases has the slightest application to the present, both of them being cases of the negative prescription, and to which the positive prescription did not at all apply. In the case of Welsh Maxwell, although the late President Blair was the leading counsel, the positive prescription was never so much as pleaded; and it still appears to me that there were no grounds whatever for it. There Alexander Welsh in 1742, having completed his title, executed an entail in favour of William Welsh—whom failing, to a certain description of heirs. The entail was recorded in the Register of Tailzies in 1742. He died in 1748, and was succeeded by William, who was the institute of the entail, and also apparent heir under the preceding investiture. William never completed any title whatever to the estate, and was succeeded in 1793 by his son John Welsh, who completed a title by Crown charter and infeftment in fee-simple; but having only possessed upon this title for seven years, when he died, a competition took place for the estate betwixt the heir under this title and the heir under the entail. It seemed impossible to maintain the positive prescription, as only seven years possession had taken place upon infeftment. And the whole question turned upon the negative prescription, which did not apply, as there was no obligation in the entail to make up titles within any limited period, and to possess the estate solely upon the entail; and no measure, therefore, had been taken, which could in the slightest degree injure the right of entail. Besides, in feudal rights, it was argued that the negative prescription never could be maintained by any party who could not plead the positive prescription.

The case of Lumsden of Blanerne appears to me precisely similar to that of Welsh; only in that case it is true that the positive prescription was pleaded by attempting to apply the doctrine of the case of Caitcheon and Ramsay, but for which I apprehend there was no room in that case. For as the party founding upon the prescription could only found on thirty-four years possession upon a title completed in fee-simple, they attempted to apply the doctrine in Caitcheon and Ramsay's case in this way:—John Lumsden, who executed the entail, had completed his titles; the entail was executed in 1753, and was then registered; and it was maintained that the apparency of his son James must be held as giving him a fee-simple title upon his father's infeftment, so as to cut down his father's entail. This seemed to be absolutely absurd; and indeed it might have led to this singular consequence, that if John, the entailer, had completed his titles thirty-nine years before he executed and recorded his entail, and had survived the execution of it only one year, his heir-apparent, founding upon his father's infeftment in fee-simple, when only one year in possession, might have pleaded the positive prescription against that entail. This was not supported by the doctrine of Caitcheon against Ramsay; and it therefore appears to me clear that neither the case of Welsh Maxwell nor the case of Lumsden in the slightest degree affects the present question.

It is most important to consider whether there is any serious difference between the two leases—whether there was any title of prescription in the one case that did not apply to the other. If there were two titles in the Brechin lease, upon one of which prescription could be pleaded to the extinction of the other, (in which I entirely concur with the opinion delivered by Lord Corehouse and Lord Medwyn,) I am equally clear that there is precisely the same title with regard to the Panmure lease; and as it is admitted that prescription had run in the Brechin lease, I cannot discover the grounds upon which it had not run in the Panmure

lease. Indeed I cannot help considering, that according to the opinion delivered by Lord Glenlee upon advising the case in 1817, if there be any distinction as to the leases, that of Panmure stood in a situation more favourable to Lord Panmure, as it was intimated to the Company, and Harry Maule's right under it completely established. For look at the proceedings even before Harry Maule's death. In the decree of multiplepoinding and preference in the case of the York Buildings Company and their creditors, and in which both Harry Maule and William Maule his son were parties, Harry Maule produced the lease of Panmure granted to the Countess, and also the assignation by the Countess to him and the heirs-male of his body—whom failing, his heirs and assignees whomsoever; and as the Countess was then dead, and William Maule was her executor, and he had in that character a claim for part of the rents affected by her locality due to the Countess at the time of her death, he was found entitled to the £100 due from the Panmure lease by Harry Maule, his father, as the Countess's assignee to that lease. Thus, after the Countess's death, the fee-simple title was the only one produced as the title of possession, and upon which William Maule was himself preferred to the extent of £100, as due by his father. It was the only title intimated to the landlords; it was recognised by them, and the possession solely ascribed to it. Here, then, upon the Panmure lease, not only was the fee-simple lease intimated to the landlord by being produced in the multiplepoinding, but a preference was obtained upon it; and this was perfectly known to Baron Maule, the next substitute in the entailed lease, and who, it is said, was the custodier of it, but who never thought of producing the entailed lease, but himself produced the fee-simple lease as the sole title of possession. Supposing it, therefore, to be more difficult to ascertain the animus of possession in lease than in feudal subjects, could there be a more decided intimation of the title of possession than what took place in the present case, viz. not only Harry Maule, but his son William, afterwards Earl of Panmure, and Baron Maule, who was the next heir under the tailzied lease, having all of them been parties alongst with the landlord in that discussion? And it is quite clear that Lord Panmure, as his father's heir, was the only tenant that the landlords ever knew of, or had recognised. Of course, there seems to have been clear possession, after the Countess's death, upon the fee-simple title; and it is not even alleged that the entailed lease had ever been intimated, but had remained in the custody of Baron Maule, the next heir of entail, for forty-eight years afterwards, and had never been heard of till after his death.

But further, the animus as to possession of the Panmure lease upon the fee-simple title seems more clear and decided than with regard to the Brechin lease; for look at the petition in the case of Morgan. In that application Lord Panmure produced as his title, not only the registered tack, but the assignation granted in favour of his (the Earl's) father and the heirs of his body, and to which the pursuer has right as his nearest and lawful heir served before the Sheriff of Forfar, and duly retoured. Of course, this certainly showed the animus to possess upon the fee-simple right which had been produced and acknowledged by the landlord during his father's life, and to which he had right by his service from the time of his father's death, and which was again produced as his title of possession. The service might not have been necessary to vest the right; but having thus attributed his possession to his service from the time of his father's death, it must at least show the animus upon which he possessed that lease from that time; and the judgment is founded upon the title produced by Lord Panmure. This is the more important, as at that period he could never have conceived or anticipated that any such question as the present could ever arise; and therefore he bonâ fide imputed his possession to the only title upon which he had ever possessed.

This is entirely independent of the several observations made by your Lordship as to possession by William Maule, and to his never having let a lease in terms of the entail, but directly contrary to it. Besides, this was only a sub-

sidiary entail to the entail of Kelly and Ballumbie, whic[redacted] he put an end to and counteracted from the very first, and which the Cou[redacted] was unanimously of opinion, in 1782, had been totally extinguished by p[redacted]scription; and no Judge since that period seems to have expressed a doubt [redacted] the soundness of that decision. Indeed it seems impossible that he could e[redacted] have intended to extinguish and destroy the principal entail to which the l[redacted]se related, and to preserve it in that subsidiary state of which, in as far as [redacted] know, there is no example in the law of Scotland, except where the lease is a[redacted]art of, or relative to the principal estate entailed.

In conclusion, I must state that I concur entirely with y[redacted]ur Lordship in repelling the doctrine maintained by the pursuer as to minori[redacted]y. In fact, if that doctrine could be listened to, I conceive that the act 161[redacted] perhaps the most valuable in our whole statute-book, might be totally an[redacted]hilated. Indeed I conceive the matter completely settled, if any point can[redacted] be settled, by the numerous authorities referred to by your Lordship and the [redacted]other Judges.

Lord Mackenzie.

I concur in the opinion given by Lord Medwyn, and also[redacted] in the opinion expressed by Lord Corehouse, as far as it agrees with Lord M[redacted]edwyn. In respect to one of the leases, I think that there was a fee-simple tit[redacted]e; and I have also come to think (not without difficulty) that there was suc[redacted]n evidence of possession, by virtue of that title, as to establish a right to it [redacted]by prescription. In respect to the other lease, I do not think that there is suffi[redacted]cient proof of possession for forty years by virtue of the fee-simple title. In considering this proof, I think it necessary to go no further back than to[redacted]he death of Harry Maule, who had power of revoking the entail. In his t[redacted]e there could be no prescription. Looking downward, then, from that time[redacted] I think it would be necessary to prescription that the proof subsequent to h[redacted]death should establish possession by virtue of the fee-simple title fully co[redacted]enced at the beginning of the forty years; but I do not see any proof of t[redacted]t kind in respect to this lease; for I cannot consider a few short leases as [redacted]icient for this purpose, since such slight contraventions are commonly gra[redacted]ed by mere heirs of entail, who have no pretence of fee-simple title at all; [redacted]r can I give to these so important an effect, even connecting them with the [redacted]nduct of the heir in regard to the other entailed estates.

With regard to presumption of possession on the fee[redacted]mple title, I am not able to adopt the doctrine laid down by the defender. [redacted]see no ground for it in the statute 1617, or any authority for it in any case [redacted]atever. In the case of Mackerston, and every one of the cases following up[redacted]n that case, it is expressly mentioned that the possession was, in point of fac[redacted]held in virtue of the fee-simple title alone; and the opinion of Lord Kilkerra[redacted], in his report of the case of Smith and Bogle, assumes that, in order to pre[redacted]ription, this must be the case. The distinction he draws is this, that where th[redacted]re are two fee-simple titles, there cannot be prescription against either; but w[redacted]ere a title is limited, there may be prescription on the fee-simple title, provide[redacted]possession be in fact held for forty years by virtue of that title. He does n[redacted]t say that possession by virtue of that title is to be presumed without sufficie[redacted] proof, and that prescription is built upon presumption.

In all cases of prescription and double titles, I think it [redacted]must be made out by proof in point of fact, and that the possession was by v[redacted]rtue of the unlimited title, to the total exclusion of the limited one; for if th[redacted]ere were in any measure, or to any extent, possession by virtue of the limited [redacted]title, that would preserve it from prescription. In rega[redacted]the insufficiency [redacted]of title in *fee-simple*, so far as respects this lease, to fou[redacted]cription, in ca[redacted]e there had been pos-

or forty years upon it alone sufficiently proved, I should wish to reserve ion. It is sufficient that I think such proof is wanting. In reference lea of minority, I concur with the opinion expressed by the majority of t.

LORD NEWTON.

ur with Lord Corehouse as to the Panmure lease, there being no sepa- on which prescription could run. It was not possible to go back to of Harry Maule to cut down his own deed.

ur also with Lord Medwyn as to this lease; but I have some doubts Brechin lease, although the fee-simple assignation might constitute a prescriptive title, whether the proceedings in the actions against the ere such public acts as to put the heirs of entail on their guard. It process with other parties, of which the heirs were not bound to know .

he question of minority, I entirely concur with the majority of your s. The argument of the pursuer is founded on the peculiar words of te, and seems never to have occurred to any lawyer in this country the remit by the House of Lords in the Bargany case. If there is it in the argument, it must be applied to prescription generally. It is n the assumption that the words in the statute, "the parties against scription is used and objected," apply exclusively to the pursuer of , against whom prescription is set up as a defence; and hence it is that he is in all cases entitled to deduct his minority, while it is ad- the other hand, that he is not entitled to deduct the minorities of his ors in the right.

re the question still open, as I think it is not, it appears to me that ssible to give to the words of the statute the sense here contended for. observed that the words above quoted apply more immediately and the majorities which are to be counted, than to the minorities which deducted. It is declared, "that, in the course of the said forty years on, the years of minority and lesage shall noways be counted, but ears during which the parties against whom the prescription is used ed were majors, and past twenty-one years of age." Now, if by the re mentioned we are to understand exclusively the pursuer of the n it must necessarily follow that no years can be counted, in com- prescription, but those during which the pursuer individually has r. But such a construction is obviously inadmissible, as it would statute altogether nugatory. It is impossible to dispute that the of the pursuer's predecessors who were in the right at the time must , and that they, no less than he, must be held to be meant by the inst whom the prescription is used and objected.

LORD GLENLEE.

of the same opinion I expressed when the case came before us in hink prescription does apply in this case, and that there is no room a of minority.

LORD GILLIES.

y concur in the opinion expressed from the Chair.

GES present, being equally divided in opinion in regard to the Pan- , ordered a further hearing in reference to that lease, after which

LORD PITMILLY.

that, in consequence of the Court having been equally divided, at g on the 15th of January last, on the subject of the Panmure lease, it

has become necessary to require opinions from
were not present at the pleading of the cause
or during the deliberations of Court on the 16th
cumstances, I have read attentively the printed C
ings of the parties, and also have had the adva
the opinions delivered on the occasion above refe
and from having heard the renewed argument o
Panmure lease on the 19th of February, I have
my opinion on this important and difficult cause

It appears from an attentive consideration
clearly pointed out by Lord Medwyn in his op
only title to the leases both of Panmure and Br
which was created in the former case by the a
Panmure, and in the latter by the lease in I
Buildings Company. Of consequence, his poss
hended in the Panmure lease, from the time o
1731 down to his own death in 1734, and his
prehended in the Brechin lease during the whol
of that lease in 1724 to his death in 1734, was,
on the fee-simple title.

One of the effects of this state of the titles
Mr. Harry Maule undoubtedly is, (as remark
acts of possession by him are not important, in
the question at issue. It is evidently only whe
ing titles of lease in the person of the tenant,
whether his possession must be ascribed to th
of these titles.

But, in another point of view, the fact of M
in his own person the fee-simple title, and ha
possession, and having completed it, in so far as
ed, by intimating the assignation from the Co
important facts in favour of the defender. In
simple was marked out and kept alive. It fo
ledged title of possession during the lifetime
death, it must have formed a distinct, and co
succession to his heir. It was indeed that
the law recognises, and which is the only titl
common and ordinary case. Service as heir
or indeed of any avail; and accordingly, if
were granted in October 1730 had never been
of Panmure would still have succeeded to th
in virtue of the same kind of title which, by
confers a right of succession on the heir of
currency of a lease.

Neither does it affect the right of successic
fee-simple title, that he has separate, and dist
lease at the same time in his person, on whic
finds it advantageous to do so. The one s
supersede, or affect the other. Either of th
valid titles; and in such an event it only
which of the titles possession followed—whe
titles was not completed by possession, wh

n has not, by the force of the positive prescription, been completely lished, while the other has been destroyed by the negative.

. Harry Maule, in his entail of the estate of Kelly on the 14th of April resigned these lands, under the fetters of a strict entail, in the following :—"In the hands of my said immediate lawful superiors, &c. in favour r new infeftment of the same to be made and granted back again by them ; and failing of me," &c. If he had entailed the lease in similar terms aself and his heirs, it would have been said (whether on sufficient grounds ot necessary to consider) that he had thereby extinguished and put an the fee-simple title, and that from thenceforward the entail would have uted the only title of possession of the leases. This would have been the l course to pursue, if it had been intended that the entails of the leases become the regulating titles of possession. But, as if with the object w of avoiding this arrangement, and for the very purpose evidently of g up the fee-simple title, he preserved it as his own title of possession, a separate title which would of course fall to his son by inheritance. same time, in order to provide for his son and other heirs a tailzied title icident to and connected with the entail of the estate of Kelly, to which ight have recourse or not as circumstances might render it expedient, he with the Countess in entailing the lease of Panmure, by a deed dated 3d October 1730, not on himself as in the entail of Kelly, but to and vour of the said William Maule, Esq. eldest son of me the said Maule, and the heirs-male lawfully to be procreated of his body, which " &c.; and reserved his and the Countess's liferent. The deed of entail lease of Brechin by Mr. Harry Maule, which was executed four months the entail of the lease of Panmure, viz. on the 8th of June 1730, was in the same terms, and on the same series of heirs; and thus it appears different deeds, and at different dates, while Mr. Harry Maule made the institute in the entail of the estate of Kelly, he provided the entail leases to his son and the other heirs. In this manner he kept up the ple title to the leases; and while it formed his own only title of pos- during the whole period of his life, it became a separate and independ- of succession to his son, equally available as the distinct titles which n created in his favour by the entails.

ig offered these remarks, which apply equally to the Brechin and to the e lease, I have only to say, with regard to the former, that I concur en- the opinion expressed by the Lord President and other Judges, that pos- s proved to have followed on the fee-simple title; and that, by the force ossession, the title in fee-simple was confirmed by the positive, and the as cut off by the negative prescription, before the proceedings took place ere instituted in 1781. I am also of opinion, for the reasons which have lained by the Judges referred to, that the years of the pursuer's minority e deducted.

regard to the Panmure lease, though the fee-simple title to that lease om the fee-simple title in the case of Brechin, and there is great ingenuity gument founded on that difference, yet I cannot discover sufficient grounds iguishing, in the matter of prescription, between the Panmure and the leases.

to the title, I have already remarked that the assignation by the Countess ire to Harry Maule, and to "the heirs-male of his body—whom failing," e especially as this assignation was intimated to the landlords, and thus complete, created an unquestionable title to the son and heir of Harry It has been admitted that his possession following on this title might i pleaded in support of his right against any one claiming the subject of . It has been admitted that this lease would have been a good title of ive prescription; and if so, I cannot see what authority there is for saying

that the prescription, which would thus have se
against a competitor, shall not be attended with
quence of prescription, that where there are two
the other fettered, and possession has followed
shall be held to be established by prescription.

I apprehend, that in applying prescription to
ference to the rules applicable to this species o
the rules applicable to feudal rights requiring sas

In the case of rights which are perfected by
daine against Balfour, it was impossible to conne
in apparency, with the unlimited titles of the an
of entail which the ancestor had granted; and i
though there was possession in that case on t
could not be allowed the effect contended for of
apprehend it is different in the case of leases—
lease. Though it be true that Harry Maule, l
ation by the Countess, executed an entail of th
latent deed, while, on the other hand, he had p
timation of it to the landlord; and he continue
after the date of the entail, and while the entail
a title of possession; and he left the assignation
session for his son, who accordingly connected
as 22d October 1734, and used it ever after,
such circumstances, there is no difficulty in givi
ation the effect for which the defender contends

I do not conceive that the title in favour of tl
lease, which was created by the assignation fr
degree more effectual, as a title of possession
respect, than his title to the lease of Panmure fl
of his father Harry Maule and " the heirs-male

It has been said, indeed, that the Earl of I
landlords to grant a new lease in his favour. I
would have created a right more effectual in an
belonged to him in virtue of the original assign
to make way for a new lease, the former lease
been renounced—a fact which of itself proves t
it not plain that the single purpose of a new gr
been to furnish an argument in law, after an in
purpose, the accomplishment of which the la
mean time, and during such possession, to cre
in any respect than the former acknowledged ti

I cannot doubt, on examining the titles, tl
framing them was to put the right to the lease
footing in every respect as the right to the leas
been effected by the steps which were resorted
by the York Buildings Company was conceive
and his assigns, without mention of heirs. It see
proper for him to grant the assignation of June
heirs. But, with regard to the lease of Par
Countess being granted to Harry Maule and
deemed superfluous for him to grant a separate
and it seems to me clear that the entail of tl
affect the fee-simple assignation of that lease, tl
could affect the assignation of 6th June 1730.
the Court has been expressed, on the latter, in
this as a very important precedent in his favou

2. *As to possession* under the Panmure lease, I beg to refer to what has been said *on that subject in the* opinions of the Lord President and Lord Alloway.

But on this point of the case I must add, that it will not probably any longer be disputed that the general service of the Earl of Panmure as heir of line to his father, with the avowed purpose of taking up and founding upon the fee-simple assignation to the lease, is evidence of a decided intention to this effect, and amounts to an important act of possession; since it was shown at the last pleading, that at the period when the general service was expede, a service was considered necessary when a lease was taken to assignees.

But it is plainly of no moment whether service was absolutely necessary in law to vest the right of lease in the heir, or if it was only thought, though erroneously, to be necessary. The chief point of inquiry is, whether there is evidence of intention on the part of Lord Panmure to possess on the fee-simple title; and the fact of a service having been resorted to in order to establish his right of succession to the assignation, and in consequence of the generally received opinion of lawyers and men of business at that time, is decisive evidence of the purpose and intention.

I must also beg leave to submit an observation on an admission which I see has been made, that if the acts of possession on the fee-simple lease by the Earl of Panmure in 1749 and subsequently, had been followed by forty years possession, they would have been sufficient to establish the fee-simple right by prescription. Now I consider these acts of possession as only proofs and instances of the same possession which had taken place from the first in 1734, and which possession must evidently begin to bear date, at the latest, from the date of the general service on the 22d of October of that year, as the terminus a quo. If, between the period of the commencement of the possession of the Earl of Panmure in 1734 and the year 1749, there had been certain acts of possession following distinctly and confessedly on the tailzied title, then it might have been necessary to take the year 1749, when it is admitted that there was an act of possession sufficiently marked on the fee-simple title, as the terminus a quo prescription had begun to run on that title. But the whole of the possession was on the same title. I cannot hold, without evidence, and indeed in the face of evidence to the contrary, that the Earl of Panmure possessed from 1734 to 1749 on the tailzied title, and then began to possess on the fee-simple title. The latter, I think, is proved to have been his title from the first, and throughout.

And this is the view of the acts of possession in 1749 which must be held to have been taken by the substitute heirs—a consideration of the greatest importance, when attending to the question whether these heirs were valentes agere cum effectu.

In short, the Earl of Panmure had clearly in his person a double title of possession. He had right to the assignation granted by the Countess, which had been intimated to the landlords, and was recognised by them. This, too, was a title in fee-simple, (a circumstance which the law certainly considers of importance in a question of this description,) and it was founded on and produced by him as his title on every occasion when it was necessary to exhibit a title. He had also a latent right in the custody of Baron Maule—never in the hands of Lord Panmure. He had no opportunity of founding on it at any time, and never did so; and it was a tailzied right. The presumption of law, in my opinion, concurs with the proof of the fact that the Earl of Panmure possessed on the unlimited title.

It has been remarked that it is difficult to apply the doctrine of prescription to leases. But it has been admitted that, in practice, the statute has been applied to leases, and to other rights which do not require sasine. It is not denied that a lease, or an assignation to a lease, is a good title for the positive prescription. And although the application of the doctrine of prescription to leases may in many cases be difficult, yet the present is just a case (an instance of double titles, on one

of which possession took place, while the other lay in ment having been taken upon it,) in which the applicat tion to confirm the one, and of the negative to cast do both easy and natural.

LORD MEADOWBANK.

I entirely concur with Lord Pitmilly that this is a portant question, in which, under any circumstances, I have delivered an opinion. But, considering the differ among your Lordships upon the only point which I decision, it must be matter of much regret to my tw sincerely been to myself, that we did not enjoy the sa the Court of hearing the argument in this case, whic length and for many days at the Bar in the pres were required to form our judgment mainly upon a p before any difference of opinion existed, your Lords materials for enabling you to arrive at a mature judg

With these certainly very unsatisfactory and ina ever, gone over this case more than once, and consi which its great importance merits; and I am not ash than once, in the course of these deliberations, ch giving it the fullest consideration, and after most at ments of your Lordships, which we have had an o there is only one of these opinions with which, on agree, and that is the opinion expressed in the ju Corehouse. Indeed, after having made up my no length the grounds on which the view of the case I found that I concurred so entirely with his Lords to detain the Court by delivering my opinion at gr has been so clearly expressed by his Lordship.

But I am at the same time bound to say, that I ing been required to deliver a judgment upon the lease, because, after considering it with every atte at the conclusion I have done in regard to the Pa the same opinion as my Learned Brother in regard fore, had I been required to form an opinion upon have been bound to detain the Court by deliverin of his Lordship in regard to the Brechin lease. culty, and therefore have only to add, that, with concur in the opinion which has been given by L the pursuer is not cut off by prescription.

LORD FULLERTO

Upon considering the point on which I had arguments of Counsel, and to which my atte Lordships' interlocutor of the 24th January, e lease of Panmure,) I have been led to concur Corehouse. It does not appear to me that the Earl of Panmure such a title as could, in reg of prescription of the peculiar character found

It is true that leases afford to the original signees, effectual titles of prescription in that

of prescription is most generally applied. When followed by possession for the requisite period, they protect the possession under them from all challenge on the ground of a right preferable to, and exclusive of such leases. But the question still remains, in what manner and to what extent, leases, and assignations of leases, are affected by that peculiar operation of prescription, which, in cases of possession on a double title, the one fettered and the other free, is held to extinguish the obligations created by the one, and to secure the rights arising under the other. It is well known that even in land rights the effect of prescription in these latter particulars was not admitted without great difficulty; and indeed this is not much to be wondered at, as it does seem to be a considerable and somewhat artificial extension of a principle introduced for a different object. It is too late, however, now to investigate the justice of that application of the law of prescription. It is fixed by repeated decisions, those of Mackerston, Kirkness, &c. that in cases of double title, the one fettered and the other unfettered, the fee-simple title may be established, and the entailed title effaced, by the positive and negative prescription.

One condition, however, of the admissibility of prescription in such cases might be anticipated, and is indeed necessarily involved in those principles on which all prescription is understood to operate. That necessarily implies the competency or possibility of interruption. According to the expression of Lord Braxfield, as quoted by Lord Hailes in his report of this very case, "It would be a solecism in law to say that a right could be lost by prescription, while no action could be brought to interrupt." In the circumstances which usually occur, and when there are not merely adverse titles, but titles founding adverse claims of possession, interruption is attended with no difficulty, as the party against whom prescription is running has it always in his power to challenge the possession, as well as the title of his competitor. But when there exist two titles, under both of which the same individual has the right to possess, the latter mode of interruption is excluded. It is the title, and not the possession, which can form the only object of challenge; and it would seem to be an indispensable condition of prescription running in favour of one title against the other, that the one should afford the means of calling the other in question. Unless it can be held, contrary to the most obvious principles, that prescription may take effect without the possibility of any action to interrupt, it is clear that there can be no prescription on an unfettered title against an entailed title, unless the former be such as to form a competent object of challenge at the instance of the parties holding the contingent rights of succession under the latter. Indeed this seems the only security which the circumstances of such a case can admit of, as it is difficult to understand how a party holding two titles in his person could be compelled to possess on the one rather than on the other; or to contrive any legal measure for confining his possession to one title, except that of reducing the other, to which his possession might be ascribed.

It will be observed, that the whole decisions upon this particular branch of our law seem to correspond exactly with this view.

In the first place, in all the cases, from that of Mackerston downwards, in which the fee-simple title was established and the fettered title destroyed by prescription, the fee-simple title was only truly adverse to the entail—i. e. not merely different from the entail in its qualities and conditions, but positively adverse—one which admitted of being reduced on the ground of its adversity to the entail. Thus, in the case of Mackerston, the first title, that of 1669, was to Henry Macdougal in liferent, with power to alter, and to Thomas in fee. The second, that of 1684, was by Henry to himself in liferent, and to Thomas in fee, under the fetters of an entail; and even viewing this latter as a mortis causâ deed, yet, from Henry's death in 1692, the positive and negative pre-

scription was understood to run, because, altl
unchallengeable, there was from that moment
heirs of entail to reduce the fee-simple title 16
in which the plea of prescription was sustain
was a fee-simple title which might have bee
tail.

While this condition existed, then, in all th
held to run in favour of the fee-simple title;
that in another class of cases in which that co
prescription was repelled. Such were the
Balfour v. Lumsden, in which an attempt was
possession to a title in apparency connected wi
the granter of the entails before their execu
simple title in apparency was unquestionably
it was a good title of prescription in the usu
have been competently combined with the
to protect the rights under that title from c
parties claiming the estate. But it was not a
entail, because the fee-simple title, from whicl
was not a title which the heirs of the entail
duced or set aside. It is true, that if in those
the granters of the entails had made up titles
have run, because from that moment there v
simple title—an adversity, however, arising s
newal of the fee-simple title in the person o
visions of the entails.

I may add, that some late cases, in which
of the unfettered title was sustained, serve to
the decisions of Welsh Maxwell and Lumsde
of the Duke of Hamilton against Westenra, 1
ber 1827. In both of those cases, a title in a
of prescription sufficient to extinguish the
entailed title—a result which appears at first
decisions last alluded to. But the peculiarity
cases was, that the fee-simple title, with whi
nected, was a title posterior to and adverse
cisions confirm the distinction already pointed
den and Welsh Maxwell, and those of Mack
title in apparency may form a valid title of
this kind, if it be a title admitting of challe
entail. In short, those cases appear to com
the principle, that the sufficiency of a title,
the fetters of an entail, depends upon its inv
violation of the conditions of the entailed
of challenge at the instance of those holding

Such, then, appearing to be the condition
particular kind is allowed in questions of la
principle to the Panmure lease must be at
Panmure, the original lessee, assigned it to
1724; Harry Maule then assigned it, on th
William, afterwards Earl of Panmure, under
though the Countess joined in this assignatio
deed of Harry Maule, who had already full
assignation. On the death of Harry Maule,
two titles of possession—the fee-simple titl

signation 1724, and the entailed title under the assignation 1730; and it may be admitted, that the first was not only a good title of possession, but of prescription against all parties challenging the lease, and the possession of William Earl of Panmure. But it was not a good title of prescription against the heirs of the entailed assignation, because the assignation 1724 was not a title adverse to the entailed assignation;—it was not a title which admitted of being in any way challenged in virtue of the prohibitions of the entailed assignation; on the contrary, it formed, as in the cases of Welsh Maxwell and Lumsden, the very title in virtue of which the entail had been executed.

And this difficulty is not removed by the consideration, that leases require no renewal of title in the person of an heir, and that the right is fully vested in him by possession; from which it seems to be inferred by the defender, that the present question ought to be treated in the same way as if it had related to a landed estate to which William Earl of Panmure had made up a fee-simple title, contrary to the entail, by connecting himself with the fee-simple title held by his ancestor before the entail was executed. It is true that prescription then would have taken effect; but upon the single ground, as appears from the whole train of decisions, that a renewal of the fee-simple title, an act admitting of challenge under the entail, had taken place. So far, then, from considering such a question to be identical with the present, I think that they differ precisely in that essential particular upon which the decision of each must depend; and that the fair inference from the circumstance of there being no renewal of title in the person of an heir in regard to a lease is, that prescription will not in such a case run in favour of the fee-simple title held by the ancestor prior to the execution of the entail, precisely for the reason that the case does not involve that condition, on which alone the operation of prescription in the case of land rights has been found to depend.

Such being the view which I entertain on the question of title, I do not consider it necessary to inquire into the effect of those circumstances from which it is presumed that William Earl of Panmure intended to ascribe his possession to the title in fee-simple. I do not see the relevancy of any such inquiry. If one could suppose a course of possession so exclusively distinctive of the fee-simple title, in opposition to the entail, as to call for, or even to admit of interruption on that ground at the instance of the substitutes, there might be something in the argument. But considering the nature of possession, I do not very well understand how such a distinctive possession could be exercised. At any rate, it cannot be pretended that there was any such here. The utmost that can be said is, that William Earl of Panmure referred to the fee-simple title at different times, and on certain occasions, which neither admitted nor called for the interference of the heirs of entail. And even giving to these circumstances the utmost weight that can be given to them, as evidence of his views and intentions, they certainly do not amount to any evidence of distinctive possession. Indeed, upon this point too, reference may be made to the decisions in the cases of Lumsden and Welsh Maxwell, as in both of those cases there were various circumstances in the conduct of the parties, at least as strong as any which exist here, evincing their intention to adopt the fee-simple title in preference to the entail.

In conclusion, then, I have only to add, that while I agree with the great majority of the Court in regard to the deduction of minority, I am of opinion that the pursuer's claim to the lease of Panmure is not excluded by prescription.

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AUDITOR. See *Account*, *Agent's*, 2.
BANKRUPT.
1.—(1.) Circumstances under which a p
composition from his debtor, was enti
the full debt.

BANKRUPT.

(2.) A banker, who was creditor by a bond payable by instalments, having, in the ordinary course of business, received indorsed bills from his debtor, the proceeds of which were put to his credit in an account-current, and applied, by an order from the debtor, in payment of an instalment past due—Held that although the indorsation was made and the order granted within sixty days of the debtor's bankruptcy, they did not fall under the act 1696; but that the indorsation of bills, and an order for payment of an instalment not due, were struck at by the act, No. 60. p. 124. Dec. 3. Patison (Blincow's Trustee) v. Allan and Co.

2.—(1.) A bank bill, payable at sight, being remitted by a bankrupt, within sixty days of his sequestration, to brokers with whom he transacted business, and who were considerably in advance to him, with instructions to apply the proceeds to take up a bill granted by the bankrupt to a third party; and they having, instead thereof, applied it to the liquidation of their own general balance—Held that the transaction did not fall under the act 1696, and that, in a question with the bankrupt's creditors, the brokers were entitled to appropriate the proceeds of the bill as they had done.

(2.) Question raised, but not decided, whether the act 1696 could affect a transaction, the completion of which took place in England, No. 62. p. 132. Dec. 3. Dixon &c. v. Cowan (Constable and Company's Trustee.)

3. A party having executed a trust-disposition of his property to his wife and children, which was challenged by a creditor as in fraudem of his rights, a remit made to ascertain whether the deed was onerous or not, No. 119. p. 254. Jan. 15. Spence (Megget's Trustee) v. Thomson &c.

4. A party having sold certain premises, under a stipulation with the purchaser, made in knowledge of a creditor, that the price was to be applied in extinction of that creditor's debt; and part of the price having been accordingly paid him in cash, and another part by bill, the debt for which the bill was given not being, however, presently due; and the seller having been sequestrated within sixty days; but there being no evidence that the purchaser was an interposed person in collusion with the bankrupt and creditor—Held,

(1.) That the sale was valid.

(2.) That the payment by the purchaser in cash did not, while the payment by bill did fall under the statute 1696, No. 382. p. 749. June 11. Ramsay (Glass's Trustee) v. Scales's Representatives &c.

5. Question raised, whether a payment in cash made by a bankrupt to a banker who was his creditor, was a payment in the ordinary course of trade, No. 383. p. 753. June 12. Patison (Blincow's Trustee) v. Allan and Co.

6.—(1.) Circumstances in which an heritable bond not executed for two months after the debt arose, and on which sasine was not taken for five years thereafter, held to be a novum debitum, so as not to be struck at by the act 1696.

(2.) Deliverance on a petition for sequestration no mid impediment to prevent infeftment on a previous bond being thereafter taken, and such infeftment preferable to the subsequent infeftment of the trustee under his adjudication.

(3.) Delay to take infeftment, where no fraud, does not afford a personal exception against taking advantage thereof in a question with other creditors.

(4.) Delivery not necessary in the case of a bond which the party was bound to grant in consequence of previous mutual contract, No. 465. p. 868. July 8. Cormack (Gardner's Trustee) v. Anderson &c.

BANKRUPT.
7. Reference to the oath of a sequestrated
to be allowed in a question with the o
July 11. Mein v. Towers.
See *Husband and Wife*, 3.—*Process*—*Se*
BASTARD. See *Proof*, *V.*
BILL OF EXCHANGE.
1. A party having accepted a bill blank in t
be delivered to the person intended as the
whose son signed it for him, as alleged,
having charged on the bill; and the acce
other bill in security of this first bill, b
suspension, in which, after stating in the l
tween the parties was whether the seco
part-payment, he pleaded that a bill sig
the ground of summary diligence; held, i
to maintain that plea, No. 78. p. 155, De
2. Prescription of a bill of exchange not i
registered, No. 89. p. 192. Dec. 12. Scott
3. Evidence that a letter of advice of dish
tended for William Milligan, residing at '
diate vicinity of Dumfries, which was the
Milligan, ' Trench,' Dumfries, (Trench b
mediate vicinity of Dumfries,) was put in
glas, about twenty miles distant, held no
cation, No. 251. p. 489. Feb. 27. Milligan
4. Held, that in a question with a co-acce
accommodation of the acceptor, he was
the debt, notwithstanding the lapse of six
Jolly and Husband v. M'Neill.
5. A bill having been accepted for the acc
to the drawer; and the drawer having
there being a marking on the bill, indicati
and it having been retired by the drawer
mitted by him to the party for whose accon
and by him indorsed in security to anoth
was not entitled, in a question with the a
onerous bonâ fide holder, No. 341. p. 67
Stirling Bank) v. Murdoch &c. (Buchanan
6. One co-acceptor of a bill of exchange hav
it had been protested and charged upon b
upon received from the holder the bill and
rizing him to proceed with the diligence i
having obtained a regular assignation; and
against the other acceptors, to the effect
that this mode of procedure was perfectly re
Walker and Johnstone v. Sir William Forl
7.—(1.) A person having, at the request of
third party, to whom the friend was debtor
tion of the debt—this held to be value in a
(2.) Question raised, but not decided,
noted in name of one individual, and there
of protest may be extended in name of the
(3.) Not competent to insist in such an
oath, No. 363. p. 706. June 5. Allan v. Ga

BILL OF EXCHANGE.
See No. 34. p. 59. Nov. 25. M'Lennan v. Rose.
See No. 36. p. 60. Nov. 25. M'Ara v. Gilfillan.
See No. 39. p. 64. Nov. 26. Stobie v. Baillie.
See *Adjudication—Discharge*, 3. 4.—*Process*.
BILL-CHAMBER CLERK. See *Public Officer—Process*.
BLANK WRIT. See *Writ*.
BONA FIDES—
A father having, by his deed of settlement, conveyed all his property to his eldest son, under an obligation to pay £100 to a younger son, or, at the option of the latter, to make over to him one half of a certain tenement on his paying £50 to the eldest; and a family arrangement having led the eldest son to believe that the younger son had renounced his claim on the half of the heritage—held to have been in bonâ fide to possess the heritage, and reap the whole fruits, without being accountable therefor, until the younger son duly intimated his election of the heritage; and the rents, prior to intimation, found not imputable to extinguish the £50 payable by the younger son on choosing the heritage, No 354. p. 693. June 2. Laing v. Laing.
See *Violent Profits*.
BOND, CASH-CREDIT.
Held that a clause in a bond to a bank, bearing that a balance ascertained by the cashier should fix the sum due by the obligant, did not preclude him from showing that the balance was erroneous, No. 418. p. 792. June 25. Smith (for Stirling Bank) v. Drummond &c.
BOND FOR AMOUNT NOT ADVANCED. See *Stat.* 1696.
BOOKING. See *Superior and Vassal*, 2.
BREVI MANU. See *Fishing—Road*, 3. (2.)
BURGH ROYAL.
1. A burgh royal having been disfranchised, the Court appointed the persons interim managers who had been last lawfully elected Magistrates, No. 192. p. 379. Feb. 10. Reekie &c. v. Gardiner &c.
2. Held,
(1.) That the burgh of Earlsferry is a royal burgh.
(2.) That it has a servitude of golfing, under certain limitations, over the Ferry Links, No. 384. p. 755. June 12. Magistrates of Earlsferry v. Malcolm &c.
See *Exclusive Privilege*.
CARRIER.
Circumstances of delay to inquire effectively for a package which had not reached its destination, held not sufficient to preclude an action for recovery of its value from Society of Porters, to one of whose members it was traced, and who were jointly responsible for each other, No. 431. p. 806. June 27. Mann and Co. v. Hall.
CAUTIONER.
1. A bank having required an additional bond of caution for one of their agents who had been several years in their employment, and having accepted the bond covering past as well as future transactions, without acquainting the cautioners with certain circumstances, as to the situation and conduct of the agent, which might have induced the cautioners to refuse to subscribe the bond, and which could be known only to the bank —Held that the cautioners were not bound, No. 118. p. 244. Jan. 14. Smith &c. v. Bank of Scotland.
2. Circumstances under which a cautioner for a trustee on a sequestrated

CAUTIONER.
estate was held not liberated by the on
missioners to observe certain provisions
p. 356. Feb. 3. Eadie (M'Lackie's Trust
3. Held that cautioners in a suspension are
relative conjoined reduction in which t
No. 226. p. 447. Feb. 21. Adam &c. v. I
4. A party having become bound that a fac
missions, but stipulated that discharges
a year, and this not being done—Held
obligation, No. 375. p. 732. June 10. Fo
5. Circumstances under which a cautioner
delay in discussing the principal obligants
(for Stirling Bank) v. Campbell.
6. Process against a principal and his ca
against whom decree in absence had bee
on his being charged, decree given again
July 7. Macdonell v. Rankin.
See *Process, XVI.* 2.—*Relief*, 1.—*Warr*
CAUTIONER DE JUDICIO SISTI. See *Agent*
CESSIO BONORUM.
1. A party having discounted a bill drawn
payment from the debtor, refused the be
Nov. 15. Cassels v. Bank of Scotland &c
2. It having been proved that the pursuer
pended certain funds belonging to him
building a house, the titles to which he
several years before incurring the debt
(which was his only debt,) the Court r
statu, No. 72. p. 144. Dec. 6. Carlaw v.
3. Although the general rule is, that where
incarcerated by the mother for payment
the benefit of the cessio; yet, where he
is entitled to it, No. 90. p. 193. Dec. 13.
4. After an interlocutor finding a party en
pronounced, it is not competent to ask s
pay, No. 101. p. 214. Dec. 19. Williams
5. Held necessary in a process of cessio to
although abroad; and not sufficient to
diligence be executed in their joint name
art v. Lumsden.
6.—(1.) Incompetent to recall a decree of
regularly obtained.
(2.) Circumstances under which regul
reclaiming note in a process of cessio
p. 825. July 3. Clark v. Mather.
7. Incompetent, after a summons of cessio
Court, to call as defenders, in virtue of
but this must be done by a supplemen
July 10. Muir v. His Creditors.
See No. 148. p. 312. Jan. 24. Dougal v. N
See No. 174. p. 354. Jan. 31. Ross v. His
See No. 228. p. 448. Feb. 21. Kilpatrick v
CHURCH. See *Manse*.
CIRCUIT COURT. See *Jurisdiction*.

CLAUSE. See *Discharge*, 1.—*Irritancy—Superior and Vassal*, 1.—*Testament.*

CLERGYMAN. See *Factor loco Tutoris.*

COAL.

A party having a reserved right of lordship in the coal of certain lands, and it being implied, from the terms of the reservation in the titles of the disponee, that the coal should be worked by pits situated on the lands themselves—Held that the disponee was not entitled to work them by pits situated on other lands, No. 158. p. 324. Jan. 27. Dixons v. Buchanan. See *Landlord and Tenant*, 4.

COLLEGE.

The regulation of the College of Edinburgh, and the course of study to be therein pursued to entitle students to degrees, found to be in the Magistrates and Town Council, and not in the Professors, No. 121. p. 255. Jan. 15. Magistrates of Edinburgh v. Professors of the University of Edinburgh.

COMMISSARY COURT. See *Arrestment*, 1.

COMMONTY.

No objection to a party claiming a share in the division of a commonty, in respect of several separate estates, that he had originally maintained that he had an absolute right of property in the whole of it in virtue of his titles to a certain piece of land, No. 9. p. 18. Nov. 14. Gilchrist v. Houston's Trustees and Dempster.

COMPENSATION.

1. A party who alleged that he had a claim against another, having purchased articles at a roup with a view to found a plea of compensation, the Court refused to sustain it, No. 358. p. 698. June 4. Finlayson v. Russell (Ross's Trustee.)

2. Compensation on an illiquid claim of damages for breach of contract not pleadable against a liquid claim for money belonging to the pursuer, although it came into the hands of the defender under the contract, No. 362. p. 704. June 5. Fisher v. Geddes.

3. Assignation of bills to answer one claim to a greater amount, for which an action is depending, not pleadable in compensation of another subsequently arising, No. 437. p. 816. June 30. Smith (Trustee for Stirling Bank) v. Drummond.

See No. 84. p. 184. Dec. 11. Lawson v. Halyburton.

See *Landlord and Tenant*, 3.—*Principal and Agent*, 2.

COMPOSITION-CONTRACT. See *Discharge*, 3. 5.—*Bankrupt*, 1. (1.)

CONDITIO SI SINE LIBERIS DECESSERIT.

Circumstances which were held not sufficient to elide the application of the condition si sine liberis, No. 365. p. 709. June 5. Colquhoun &c. v. Campbell.

CONDITIONAL SALE. See *Sale*, 1.

CONQUEST. See *Service*, 2.

CONSIGNEE. See *Retention*, 1.—*Usage of Trade.*

CONSUETUDE. See *Jurisdiction*, 6.—*Lordlord and Tenant*, 6.

CONTEMPT OF COURT. See *Law Agent*, 1.

CONTINGENCY. See *Process, XVII.* 5.

CORPORATION. See *Exclusive Privilege.*

CURATOR BONIS. See *Factor, Judicial*, 3.

CURATOR AD LITEM. See *Pupil*, 1.

CUSTOMS.

The Magistrates of Hamilton have no right to exact payment of a penny as custom on each boll of barley imported into the town by a resident brewer,

CUSTOMS.
for the purpose of being converted into n brewery, No. 283. p. 566. March 10. Scott Hamilton.
DAMAGES. See *Process, XVII.* 14.—*Reparat*
DEAN OF GUILD. See *Property*, 5.
DEATH, PRESUMPTION OF. See *Factor loco A*
DEATHBED. See *Relief*, 2.
DECLARATOR. See *Process, XVII.* 15.
DECREE IN FORO.
1. Bill of suspension of a decree in foro, whic and through poverty passed on caution and duction having been brought, No. 330. p 6
2. Incompetent for a defender to suspend gation that expenses decerned for to the person not authorized to act as an agent, N v. Wight.
DECREE, WARRANT TO EXTRACT. See *Proc*
DEFENCE, PRELIMINARY. See *Process, VIII*
DELEGATION.
A party under an obligation to another not third party without consent of the creditor; the obligation not being reclaimed against by for the third party to reclaim against it, Nc v. Reid.
See *Process.*
DELIVERY. See *Bankrupt*, 6. (4.)
DESTINATION.
Circumstances under which a destination t guished, and one to heirs of tailzie rev Lady Essex Ker's Trustee v. Hamilton's T
DILIGENCE, LEGAL.
1. Letters of horning and charge, describing ceeded, of a date different from the true d Feb. 26. Freebairn v. Dalrymple.
2. Bill of suspension of a decree in absence, of the summons did not bear the names nesses, passed simpliciter, No. 29. p. 51. N
3. Not competent, in a suspension of diligen execution, ex facie regular, by production copy, No. 91. p. 193. Dec. 13. Ramsay v.
4. Found competent to raise summary diligei pay the balance which might be due by a as the same should be ascertained by a st no consent to the registration of the accoun p. 97. Dec. 2. Fisher &c. v. Syme &c. (fo
5.—(1.) A sist on a bill of suspension stay well as personal diligence.
(2.) Circumstances held to form a suffic being subjected in penalties for proceeding a sist, No. 98. p. 208. Dec. 18. Keltie v.
6.—(1.) Non-compliance with the provision inserting in the service copies of inhibitic

DILIGENCE, LEGAL.

7. Warrant of imprisonment inept, in which the surname of the party against whom it was directed was written on an erasure, though it was repeated without this defect in an after part of the warrant, and although the warrant referred to a petition on which it was written, wherein he was fully designed, No. 272. p. 553. March 6. Cowan v. Watt.

8. A party having presented a bill, founded on a bond for £5000, praying for letters of inhibition, in respect he intended to suit action for £10,000; and having got the usual warrant, and the word 'five' having been written on an erasure in the expede letters at the place where the bill stated the sum to be 'ten thousand'—Held that the diligence was inept, No. 426. p. 800. June 26. Elliot v. Johnston (for Leith Bank.)

See No. 176. p. 355. Jan. 31. Allison v. Allison or Miller.

See *Bill of Exchange*, 6. 7. (2.)—*Process*.

DILIGENCE, SUMMARY. See *Submission*, 4.

DISCHARGE.

1. A widow having executed a deed of renunciation of certain liferent provisions in her contract of marriage, stating in the narrative that her object was to afford funds for the maintenance of her two daughters; and that, for this purpose, she had agreed to renounce these provisions in favour of her daughters, without mention of their heirs; but the obligatory clause of the deed bearing a renunciation in favour of her daughters, 'their heirs and assignees;' and both daughters having died in minority, without issue—Held, in a question with their paternal uncle and heir at law, that the deed was ineffectual so far as it bore a renunciation in favour of the daughters' heirs, or at least that the heirs mentioned must be understood as heirs of the body only, No. 381. p. 743. June 11. Moodie or Anderson v. Anderson.

2. Circumstances in which executors were held bound by a discharge granted by them as attorneys of the deceased, No. 402. p. 774. June 19. M'Kenzie's Trustees v. Leckie &c.

3. Although the holder of a promissory note has acceded to a private composition-contract, and discharged the granter, he is entitled to insist against an indorser for payment of a composition under the Bankrupt Act, to the effect of recovering the full debt, No. 454. p. 840. July 7. Calder and Sons v. Borthwick (for the National Bank.)

4. A bill having been indorsed by a party in his individual character, and by two companies of which he was a partner; and a discharge having been granted by the holder to one of the companies, who paid a composition, and to the individual partners, including this party—Held that he was not thereby relieved from liability as an individual indorser or partner of the other company, who had also indorsed the bill, No. 482. p. 901. July 11. Sharpe v. Simpson &c.

5. The creditors of a bankrupt having, by an extrajudicial composition-contract, agreed to discharge him on payment of a composition; and having received bills for the composition, with security to their satisfaction, and thereupon executed a full and absolute discharge—Held that this discharge was not clogged with the implied condition that the composition-bills should be paid; and the creditors accordingly found entitled, in a subsequent sequestration, to rank for the unpaid balance only of the composition, No. 77. p. 152. Dec. 9. Graham &c. v. Cuthbertson.

See *Heritable Security*, 3.

DISCHARGE, IMPLIED. See *Discharge—Landlord and Tenant*, 2.—*Process, II.* 10.

1.—(1.) Circumstances under which it was held,—1. That an entail exe-

ENTAIL.

cuted in implement of a decree-arbitral did not prevent an heir-substitute from selling part of the estate.—2. That a sale under a power in the entail, and by authority of the Court, in absence of minor and pupil heirs, was effectual.

(2.) A posterior entail, inconsistent with the original one, having been sustained by the Court; and an action having been brought by the heirs-substitute under the original entail, concluding for reduction of the sales of parts of the estate falling within it—for declarator of irritancy against the heir in possession under the second entail, in respect of his having concurred in those sales, and to have the next substitute found entitled to possess; but that substitute having had the succession to the fee propelled to him under the second entail, and been infeft, and enrolled as a freeholder, and having voted as such—Held,—1. That the original entail was annihilated.—2. That the action was not maintainable by that substitute, nor any others suing with him, notwithstanding a renunciation by him of the infeftment, and a decree of reduction, pendente lite against the other heirs; and, 3. That these objections were pleadable by the defenders, although not heirs of entail, No. 257. p. 503. March 3. Dickson &c. v. Cuninghame and Lord Medwyn.

2. Circumstances not sufficient to render an heir of entail liable for meliorations stipulated in a lease granted by a predecessor, No. 364. p. 708. June 5. Barclay v. Earl of Fife &c.

3. A remit made to the Jury Court in an action of damages against the representatives of an heir of entail alleged to have violated the entail, to ascertain whether he had been lucratus by the violation, No. 392. p. 765. June 16. Marquis of Queensberry and Trustee v. Queensberry Executors.

4. An heir of entail in possession having granted provisions in shape of annuities, and also principal sums to his younger children, under a power in an entail; and the children having brought an action against the succeeding heir, who died; and the process having been transferred against his succesor—Held that the latter was liable for the bygone annuity and interests, as well as those to become due in future, No. 457. p. 844. July 7. Hon. H. D. Erskine &c. v. Earl of Mar.

5. Circumstances under which the amount of provisions to children, granted in virtue of an entail, was held to be regulated by the rental at the death of the granter, and not at the date of the bonds, No. 167. p. 339. Jan. 29. Earl of Rothes v. Countess of Rothes &c.

See *Heir Apparent—Prescription, I.* 3.—*Service*, 1.—*Title to Pursue or Defend*, 7. 11.

ERASURE. See *Diligence, Legal*, 7. 8.—*Writ*, 5.—*Process, XV.* 6.

ERROR. See *Sale*, 2.

EXCAMBION.

Condescendence before answer ordered, as to whether certain roads were included in lauds excambed, No. 473. p. 889. July 10. Lord Melville v. Wilson &c.

EXCLUSIVE PRIVILEGE.

1. Held that the Society of Solicitors before the Sheriff and other Inferior Courts of Edinburgh have no privilege to exclude others from being admitted to practise before the Sheriff Court of Leith, No. 63. p. 134. Dec. 4. Solicitors of Edinburgh v. Smillie &c.

2.—(1.) The employment, by an unfree manufacturer of unfree weavers within burgh, to weave cloth for sale within the same, and the selling it therein, held violations of the exclusive privilege of a Corporation of Weavers.

EXCLUSIVE PRIVILEGE.

(2.) Held that the weaving of cotton cloth falls within such privilege, though unknown at the date of the seal of cause of the corporation, No. 886. p. 789. June 12. Christie v. Glasgow Weavers' Incorporation.

EXECUTOR.

In an action against a cautioner for two confirmed executors, one of whom had died, it is necessary to call the representatives of the executor deceased, though there be no special allegation of intromission on his part, No. 246. p. 476. Feb. 26. Monro &c. v. Lyon.

See *Heir and Executor—Process, VI.* 4.—*VII.* 4.

EXPENSES. See *Process, II.*

EXTRACT. See *Process.*

FACTOR. See *Cautioner*, 4.—*Principal and Agent.*—*Trust*, 6.—*Trustee*, 3.

FACTOR, JUDICIAL.

1. The disposal of certain trust-funds, over which the trustee had obtained the appointment of a judicial factor, being before the Court in a process of multiplepoinding—Held that the factor was not entitled to demand that the funds in the hands of the trustee should be paid over directly to him, but ordered to be consigned in a bank in his name, and the receipt lodged in process, No. 110. p. 223. Dec. 20. M'Kenzie &c. v. Grieve.

2. *The Court, in* appointing a judicial factor, refused to give him any special or extraordinary powers as to leasing—observing, that if any thing required the exercise of such powers, he might make a special application to the Court, No. 159. p. 327. Jan. 27. A. B. petitioner.

3. A curator bonis appointed to a lunatic who had right to valuable property vested in trustees for his behoof, but of whom only one was alive, and who had recently been bankrupt, and had got a discharge on a composition; and power granted to the curator to call the trustee to account, No. 287. p. 573. March 11. Robertson v. Lamb.

See *Trust*, 2.—*Process, XVII.* 4.

FACTOR LOCO ABSENTIS.

Two parties having presented petitions, the one praying for the appointment of a factor loco absentis in regard to a person abroad, and the other for a factor loco tutoris, on the assumption that he was to be presumed dead, the Court refused to grant the prayer of the latter; but while they granted that of the other, they named the person suggested as factor loco tutoris to be factor loco absentis, No. 273. p. 555. March 7. White &c. v. Stevenson &c.

See *Process.*

FACTOR LOCO TUTORIS.

1. Circumstances under which a person suggested as factor loco tutoris by the party entitled to serve tutor at law, but who was abroad, was preferred to the nominee of the mother of the minors and her relations, No. 100. p. 214. Dec. 19. Sinclair &c. v. Sutherland &c.

2. A factor loco tutoris appointed hoc statu to a pupil, although the tutor at law stated that he intended to serve, No. 429. p. 805. June 27. Weir v. Prentices.

3. The Court refused, on a summary petition, to authorize a factor loco tutoris to renounce a lease belonging to the pupil; but superseded the petition till an action of declarator should be brought, No. 460. p. 848. July 7. Carrick, petitioner.

See No. 6. p. 13. Nov. 14. Nicol &c. petitioners.

See *Pupil.*

FENCE. See *Reparation*, 3.

FEU-DUTIES. See *Heir and Executor*, 1. (4.)—*Property*, 3.

FINAL JUDGMENT. See *Process, I.* 4. 5. 7. *and XIII. XVII.* 20.

FISHING.

Held that a party is not entitled brevi manu to seize on a boat, the property of another alleged to be fishing in a river belonging to the party making the seizure, No. 461. p. 849. July 8. Lady Ashburton &c. v. Mackenzie.

FORCE AND FEAR.

An allegation that a bill had been obtained by concussion, held refuted by a partial unconstrained payment before the bill fell due, No. 144. p. 305. Jan. 23. Thomsons v. Annandale.

FOREIGN. See *Approbate and Reprobate—Bankrupt*, 2. (2.)—*Writ* 2.—*Master and Servant*, 1.

FOREIGNER. See *Jurisdiction*, 6.

FORGERY.

The Lord Ordinary having found forgery proved comparatione literarum, the Court qualified his interlocutor by finding that it was proved by witnesses and comparatione, No. 401. p. 773. June 19. Greig v. Clark.

See No. 448. p. 831. July 4. Mitchell v. Taylor.

FRAUD.

1. A party having been intrusted with a bill to retire a previous one, which the person who gave the bill was not bound to pay, and having applied the proceeds to other purposes—Held liable to repeat the amount to the person from whom he received it, although the first bill was ultimately retired by the proper debtors in it, No. 411. p. 782. June 20. Mackintosh v. Cooper.

2. Held that a pursuer who insists in an action founded on a fraud alleged to have been committed on a third party by the defender to the loss of the pursuer, but in which the pursuer was participant, is not entitled to maintain the action, No. 424. p. 797. June 26. M'Ghie v. Butter.

See *Cautioner*, 1.—*Proof, VI.* 1.

FREEHOLD QUALIFICATION.

(1.) Circumstances held sufficient to show that a party claiming enrolment as a freeholder was possessed of the whole property appearing as a cumulo valuation in the cess-books.

(2.) Where the disposition and sasine differ from the charter of confirmation, the latter must be taken as the rule.

(3.) Freeholders are not obliged to hear counsel in support of an objection to a claim for enrolment.

(4.) A disposition being granted, making a considerable proportion of the price a real burden, and the purchaser having further granted a disposition redeemable on paying up that part of the price within a certain period, but on the lapse of which the disposition was to become absolute —held not to be such a defeasible right as to be incapable of affording a freehold qualification, No. 467. p. 873. July 9. Campbell v. Dixon.

FREEHOLDERS. See *Process, XVII.* 15. 19.

GESTIO PRO HÆREDE. See *Passive Title*, 1. (3.)

GLEBE. See *Jurisdiction*, 8.—*Manse.*

GROUNDS AND WARRANTS. See *Res Judicata.*

HARBOUR.

Held,

(1.) (In passing a bill of suspension,) That the Commissioners of the Leith harbour and docks are not compellable to aid the Magistrates of Edinburgh in levying harbour-dues.

(2.) That a question as to whether they might be compelled to keep the drawbridge of the harbour and the gates of the docks shut, was not

ime; and therefore a bill of suspension of an interdict by the Judge
ral passed, No. 18. p. 26. Nov. 18. Leith Harbour Commissioners
gistrates of Edinburgh.
rim Possession—Title to Pursue, 4.—*Proof, II.* 2.
ARENT.
apparent of entail, possessing for more than three years, having exe-
bonds of provision over the estate, in favour of his younger child-
1 conformity with the entail, and his grandson having passed him
making up titles—Held that these provisions were to be considered
IS, without regard to whether the granter possessed other estate,
which he might have the provisions, and that the heir passing by
ound by them under the act 1695, No. 201. p. 397. Feb. 11. Ken-
r. Kennedys.
sive Title, 1.
EXECUTOR.
ty having, in his son's contract of marriage, become bound for a cer-
rovision to the children of the marriage; and having thereafter exe-
a general settlement, wherein he provided for the payment of this
ion out of the rents of an estate entailed by him on his son, and
in he also left certain provisions to a daughter, declared to be in
all legal claims; and, on his death, the daughter having refused
ept these, and betaken herself to her legitim—Held,
) That in estimating the executry of the deceased, the provision con
in the son's contract was not to be deducted.
) That the daughter was entitled to found on the deed, the provisions
ch she had repudiated, to show that this sum was not a burden on
ecutry fund.
That an advance of legitim being made during the father's life,
t on it, as well as the principal, falls to be deducted.
That arrears of feu-duties due by a vassal are a burden on his
or, not on his heir, and must be deducted from the executry in
ting the legitim, No. 114. p. 226. Jan. 13. Johnston v. Cochran and
e.
on raised, but not decided, whether, on the death of a tenant, against
decree of reduction of his lease and of removal had been pro-
d, before the term of removal arrived, the claim of damages arising
1 descended to his heir or his executor, No. 117. p. 243. Jan. 14.
haels v. Queensberry Executors.
ament, 2.
: BOND. See *Stat.* 1696. *c.* 5.
: SECURITY.
e on a sequestrated estate not entitled to prevent an heritable cre-
olding a bond and disposition in security, with powers of sale, from
in virtue of these powers, without qualifying some substantial in-
be suffered by the creditors, No. 129. p. 279. Jan. 17. Beveridge
on.
itable creditor, who was entitled under his bond to a premonition
nonths before payment, having raised an adjudication against the
s estate; and the debtor having thereafter tendered payment, and
ed the money—Held, in a question as to interest, that the heritable
r could not insist on his right to six months premonition—the adju-
1 being an intimation of his readiness to take immediate payment,
6. p. 321. Jan. 27. Duke of Queensberry's Executors v. Tait.
stances in which decree in a multiplepoinding as to the amount of

HERITABLE SECURITY.
an heritable bond, containing declaratory conclusions of the nullity of certain adjudications of the bond, and that the lands should be disencumbered, held a sufficient discharge, all parties having interest being called, No. 357. p. 696. June 3. M'Neill v. Littledales.
4. A bond for an annual rent payable out of lands, and precept to infeft therein, constitutes a good security, though there be no dispositive words in the bond, No. 445. p. 826. July 3. Campbell v. Macdonald's Trustees.
See *Process, VI. 5.—Sasine—Sequestration*, 13.
HOMOLOGATION.
1. A party against whom judgment was pronounced by an Inferior Court, having granted his bill for the amount decerned for, and thereafter attempted to resist payment of the bill on a ground impeaching the judgment, found barred from doing so, No. 155. p. 320. Jan. 27. Dunlop v. Sutherland.
2. Held (according to the opinion of English counsel) that it is competent for English assignees under a commission of bankruptcy to homologate a trust-deed executed by the bankrupts in relation to their effects in Scotland, which, it was alleged, fell under the commission; and that they had, by their deeds, homologated the trust, No. 352. p. 686. June 2. Stein's Assignees v. Gibson-Craig and Brown.
3.—Circumstances under which a plea of homologation of an entail was repelled, No. 94. p. 200. Dec. 16. Colquhoun v. Colquhoun &c.
See *Entail*, 2.—*Real Burden*.
HUSBAND AND WIFE.
1. Bill of suspension of a charge against a married woman passed simpliciter, No. 43. p. 71. Nov. 27. Hannah or Thomson v. Cross.
2. A poinding at the instance of a married woman, for a debt due to herself, without concourse of her husband, sustained, he having subsequently concurred, No. 215. p. 420. Feb. 17. Borthwick (Grant's Trustee) v. Urquhart or Grant.
3. Circumstances under which it was held that a property purchased by a wife with money borrowed stante matrimonio was not attachable by the creditors of her husband, No. 274. p. 555. March 7. Boax (Liddell's Trustee) v. Loudon or Liddell.
4. Summary diligence of a bill in favour of a woman who afterwards marries, and by whom it is not indorsed, is incompetent at the instance of her husband, No. 470. p. 885. July 10. Smith v. Selby.
See *Aliment*, 1.—*Arrestment*, 1. (2.)—*Bankrupt*, 1.
HYPOTHEC, LANDLORD'S.
A party who had the charge of the sale, by public auction, of the furniture of a house, having allowed to be sold along with it a few articles which were part of furniture of another house belonging to the tenant of that house, and which had been sequestrated by his landlord for rent; and having received the money, and paid it, in ignorance of the sequestration, to the tenant—held not liable in repetition to the landlord, No. 164. p. 335. Jan. 28. Laing v. Robertson or Harper &c.
HYPOTHEC, WRITER'S.
1. Circumstances under which it was found that a writer was not bound to subscribe, as consenter, a disposition of a property bought by him in his own name, but truly for another party, till he was paid an account for business due to him by the seller, No. 42. p. 70. Nov. 27. Wight v Kidd.
2. A party having obtained decree, with expenses, in an Inferior Court process, which was thereupon advocated, and the agent who had conducted the process having taken a bill for his business account, and the party having there-

HYPOTHEC, WRITER'S.
after been sequestrated, and his trustee having compromised the action, receiving from the defender a certain sum, together with the expenses that had been awarded; but having, upon the party's obtaining a discharge on a composition-contract, paid over to him the balance of the estate, without having paid these expenses to the agent, although the agent had made a demand for the same, and decree of exoneration having thereafter been pronounced in the sequestration—Held that the trustee and the bankrupt were nevertheless liable to the agent for the amount of the expenses, No. 122. p. 268. Jan. 15. Swan v. Jeffrey &c.
IMPLIED ABANDONMENT. See *Insurance*, 3.
IMPLIED DISCHARGE. See *Discharge*.
IMPLIED LIABILITY.
Circumstances held not sufficient to make a party, who had attended meetings regarding the opening a new line of road, liable for the expense beyond the amount specially subscribed by him, No. 183. p. 366. Feb. 5. Condie v. Stewart.
See *Process*.
IMPROBATIVE WRIT. See *Writ*.
INDUCIÆ LEGALES. See *Submission*, 2.
INFERIOR COURT. See *Process, V.—Jurisdiction—Road*, 2.
INHIBITION.
1. A defender who had been assoilzied from an action on which inhibition had been executed, found entitled to apply for a recall of it, and not bound to extract the decree, so as to get the inhibition scored, No. 107. p. 219. Dec. 20. Jacks v. Dalrymple.
2. An inhibition over an estate, proceeding on a decree cognitionis causâ for a debt constituted by an English bond, (but which was objected to in a suit in the English Court of Chancery,) restricted to part of the estate, No. 199. p. 395. Feb. 11. Ker &c. v. Trotter &c.
3. An heritable bond having been granted spretâ inhibitione; but the party inhibited having died, and his heir having sold the property to a person who had acquired right to the heritable bond; and having allowed him to retain part of the price in liquidation of the bond—Held that the inhibiting creditor was not entitled to reduce the bond, to the effect of obtaining payment out of the price so applied in liquidation of the bond, No. 302. p. 611. May 14. Roberts v. Potter &c.
4. The Court refused to recall, without caution, an inhibition used on the dependence of an action of relief by the assignee to a bond which had been reduced as not duly tested, against his cedent, who had granted warrandice from fact and deed only, No. 408. p. 779. June 20. Muckarsy v. Small.
5. An inhibition competent on the dependence of a petition by an agent for a remit to the Auditor, and decree against his client, in terms of the Act of Sederunt 1806, No. 120. p. 254. Jan. 15. Gibson v. Dods &c.
6.—(1.) Non-compliance with the provisions of the act 1693, c. 12, as to inserting in the service copies of inhibitions the names and designations of the witnesses, does not infer nullity, but merely punishment of the messenger.
(2.) The effect of an inhibition is extinguished by an intervening sequestration followed by a discharge on a composition, though the inhibiting creditor have not ranked, so far as regards the bankrupt's interest in his property, so that an adjudication cannot proceed to the effect of attaching that interest.
(3.) Observed, that the inhibition remains effectual quoad real securities

N.
ed prior to the sequestration, spretâ inhibitione, No. 31. p. 535.
h 4. Holmes or Shiells &c. v. Reid.
. 264. p. 545. March 5. Rennie v. Sommervilles.
ent and Client, 2.—Diligence, Legal, 8.
. See Process, III.

CE.
aving been found by the verdict of a Jury that a house rotected by
licy of insurance from damage by fire had been injured the falling
ie gable of another house in consequence of fire in that ouse—Held
the insurers were liable, although the house insured h not been on
and the gable of the other house had stood for two s after the
was extinguished, and fell in the course of operations it by order
he Dean of Guild, with the view of taking it down, . 32. p. 52.
. 25. Johnston v. West of Scotland Insurance Co.
umstances in which a party, not entered as owner in th egister, held
le to reimburse a part-owner who had effected insura s and paid
premiums, No. 209. p. 412. Feb. 13. Ritchie v. Lang.
umstances in which a trustee on a sequestrated estate w held to have
ndoned a policy of insurance on the bankrupt's life in f ur of a cau-
er, No. 412. p. 783. June 23. Thomson (Fraser's Truste v. Shepperd.
hipowner, 2.

CT.
umstances in which a landlord was found liable in th expenses of
ussing a question, whether he ought to have been mad a party to a
pension and interdict against his tenants for a use o his proptery
plained of as a nuisance, No. 86. p. 184. Dec. 11. La Fairfax &c.
reenshields.
ties found to have committed a breach of interdict, al ough only a
y of the interlocutor granting interdict, and not of the b , was served
n them, it appearing that they knew the matter to whi it applied,
124. p. 272. Jan. 16. Robertson v. M'Donald &c.
arty has no right to demand an interdict against the rem val of a float
ighter which had been used in the erection of his harbo by the con-
tor whose property it was, on the allegation that the ork was not
pleted in terms of the contract, No. 231. p. 449. Feb. 1. Matheson
'Douall.
stion, whether a party had been guilty of breach of inter lict, remitted
he Jury Court, No. 479. p. 899. July 11. Mackenzie &c. Magistrates
Dingwall &c.
ppeal—Diligence, Legal, 5.—Process, XVI. 4.

ST.
ulation of interest on interest, in respect of a personal and ordinary
tract debt, is incompetent, No. 340. p. 666. May 28. Jol v. M'Neill.
o. 111. p. 223. Dec. 20. Couper &c. v. Marquis of Bute. bmission, 5.
Heir and Executor, 1.—Landlord and Tenant, 5. 7.—S limits of the
ter, No. 285.

PossESSION.
n possession by two tenants of a private quay within the
bour of Leith allowed to be regulated by the harbour-mas an ex facie
68. March 10. Pollock v. Menzies and Wilson.

ICY.
uction of a clause of irritancy in a back le
No. 422. p. 795. June 2
Property, 5.

JUDICIAL EXAMINATION. See *Proof, VII.*
JUDICIAL FACTOR. See *Factor Judicial.*
JUDICIAL SALE.
An estate having been ordered to be sold under articles of roup, whereby the purchaser was bound to grant bond, with a cautioner, for payment of the price at the first term thereafter, with interest till that period, found incompetent for the Lord Ordinary, at the sale, to authorize an alteration, to the effect of giving the purchaser an option immediately to consign the money in bank, or be relieved of subsequent interest, No. 123. p. 270. Jan. 16. Hunters and Co. v. Bowie &c.
See *Process, XVII.* 18.
JURISDICTION.
1. The judgments of the Water Bailie of Glasgow are not subject to review by appeal to the Circuit Court of Justiciary under the 20th Geo. II. c. 43, No. 26. p. 41. Nov. 21. Donaldson v. Chapman.
2. A bill of advocation to the Court of Session of an action before a Sheriff, founding on the statutes prohibiting the profaning of the Sabbath, and praying for penalties against a party sailing a steam-boat with passengers on Sundays, and for interdict, held incompetent, No. 50. p. 83. Nov. 29. Jobson &c. v. Lambert.
3. Whether an action for abstracted multures, when there is no dispute as to the right to levy them, be competent before the Judge of the defender's domicile, he not being the Judge Ordinary of the bounds within which the thirl lies, No. 52. p. 88. Nov. 29. Bryson v. Weir.
4. It being provided in a statute creating certain new penalties that they may be recovered before any two Justices of the Peace, and that if any person shall be dissatisfied with their judgment, " it shall and may be lawful" for him to appeal to the Quarter Sessions, whose decision should be final—Held (without determining whether the judgment of the Quarter Sessions would be subject to review by the Court of Session) that a party cannot bring the cause into this Court from the Petty Sessions, but must first appeal to the Quarter Sessions, No. 59. p. 117. Dec. 2. Alexander v. Seymour.
5. Magistrates of a burgh of regality held entitled, in respect of immemorial usage, to exercise a jurisdiction of lining boundaries similar to that of the Dean of Guild in royal burghs, No. 83. p. 182. Dec. 10. Neilson v. Vallance.
6. Arrestment, jurisdictionis fundandæ causâ, of goods belonging to a foreigner, upon a Sheriff's precept, does not create a jurisdiction against the foreigner in the Sheriff Court, No. 92. p. 194. Dec. 13. Burn &c. v. Purvis &c.
7. Held competent for the Court of Session to remit to the Auditor the account of an agent against his client, relative to an action of damages before the Jury Court, No. 191. p. 379. Feb. 10. Jameson v. Wight.
8. A presbytery has no jurisdiction to entertain a question as to whether the incumbent of a parish is entitled to certain land alleged to have been at one time glebe, but which has for a considerable time previous been possessed by the proprietor of the surrounding lands as part of his estate, No. 214. p. 418. Feb. 14. Marquis of Queensberry v. Gibson.
9. Circumstances under which it was held that a tenant was barred from objecting that an action of removing, founded on an irritancy in his lease, was not competent before the Inferior Court, No. 249. p. 481. Feb. 27. Scott v. Wotherspoon.
10. Held competetent for the Court of Session to sustain a reduction of a sentence of Justices of Peace, under the 17th Geo. III. c. 56, " for the

JURISDICTION.
more effectually preventing of frauds" in manufactures, in respect it is a criminal statute, even to the effect of giving civil redress under conclusions for damages in the same summons, and although excess of power was alleged, No. 320. p. 633. May 21. Robertson v. Bisset.

11. Bill of suspension passed simpliciter of a decree by the Admiral Depute of Leith in an action at the instance of the collector of the Leith harbour dues for the Magistrates of Edinburgh, of whom the Admiral Depute is one, No. 391. p. 764. June 16. Hull and Leith Shipping Co. v. Sandeman.

12. Incompetent for the Court of Session to award execution pending appeal of a verdict obtained in the Jury Court in an action of damages, or of the judgments of that Court awarding expenses, even where these expenses have been partly incurred in the Court of Session, No. 435. p. 813. June 30. Robertson v. Allardyce &c.

13. An Inferior Court has no jurisdiction to entertain an action against a trustee on an estate under sequestration for payment of a dividend alleged to be due to a creditor, No. 456. p. 841. July 7. Mitchell v. Mein.

See No. 154. p. 320. Jan. 27. Skirving v. Stewart.

See *Appeal, Execution pending*, 1.—*Arrestment*, 7.—*Harbour—Process, XVII.* 15. (2.)—*Property*, 5. (3.)—*Road*, 2.—*Sequestration*, 11.

JURY COURT.
A question relative to an agreement between merchants remitted to the Jury Court, without any findings as to the import and effect of it, No. 259. p. 526. March 3. Schuurmans v. Stephens.

See *Jurisdiction*, 7. 12.—*Process, IV.*—*Usage of Trade.*

JUS TERTII. See *Entail*, 1.—*Property*, 3.

JUSTICE OF PEACE. See *Privileged Slander—Jurisdiction*, 4. 10.

KING'S PROPERTY. See *Poor*, 1.

LANDLORD'S HYPOTHEC. See *Hypothec, Landlord's.*

LANDLORD AND TENANT.

1. It being provided by a lease that certain buildings and fences should be erected on a farm, the tenant having the option either to advance the necessary funds himself, to be repaid at the end of the lease; or, if the landlord did so, to pay him six per cent. interest during the subsistence of the lease; and the landlord having advanced the money, but not having drawn the interest during the lease, held not barred by taciturnity from demanding it after its expiry, No. 41. p. 69. Nov. 26. Brisbane's Trustees v. Leads.

2. A subtenant in one of the Queensberry farms, the leases of all which had been challenged as in contravention of the entail of the estate, having, after decree of reduction had been pronounced in the leading case chosen to try the validity of the leases, granted a subtack, without any expressed warrandice, "for the length of the Queensberry lease"—Held that the period for which the subtack was granted was that stipulated in the principal lease, had it been allowed to come to a natural termination; and that where no warrandice is expressed in a lease, absolute warrandice is understood; and consequently, on the principal lease being reduced, the holder of this subtack was found entitled to damages for the whole period of endurance in the original lease, No. 45. p. 76. Nov. 27. Middletons v. Megget.

3. A landlord having, under a warrant of sale, taken of consent, in a process of sequestration against his tenant, sold greatly beyond the amount authorized by the warrant, and without the notification thereby required, held (after he had been subjected in damages for the irregularities) that, in a count and reckoning as to the surplus proceeds, he was entitled to state

LANDLORD AND TENANT.
his accounts as if the sale had been completely regular in all respects; and in particular held,
(1.) That he was entitled to a deduction of discount on the whole proceeds, on the ground of the sales being made at three months credit, both as to the purchase made by others, and those made by himself.
(2.) That he was entitled to credit for a commission payable to the sequestrator, under regulations of the Sheriff Court, both on the amount authorised to be sold by warrant, and on the surplus.
(3.) That he was entitled to set off against the claim for the surplus previous arrears for which he held decree, while the tenant was not entitled to recompensate by counter claims for which he had raised action, but had not obtained decree, No. 337. p. 662. May 27. Cargill v. Bartxe.
4. Tenant of a coal-field, though never previously worked, entitled to be liberated on the ground of sterility; and the landlord held liable in the expense of a judicial survey, not having been satisfied with less expensive evidence of the exhaustion of the coal, No. 204. p. 404. Feb. 12. Murdoch v. Fullerton.
5. Interest on meliorations payable at the end of a lease, due from its expiry, although a subtenant continued in possession for one year longer, No. 364. p. 708. June 5. Barclay v. Earl of Fife, &c.
6. Custom of a small estate not relevant to affect the rule of law, that a landlord must pay for the dung left by an outgoing tenant, when the matter is not regulated by the lease, No. 413. p. 784. June 23. Allan v. Thomson.
7.—(1.) How far buildings &c. suitable to a farm in a claim for remuneration by a tenant under a clause in his lease at the expiry of his tack.
(2.) Interest due on the amount of meliorations stipulated to be paid for at the end of the lease from the date of its expiry, No. 442. p. 824. July 2. Jolly v. Graham.
8. Held that discharges of rent by a landlord to a tenant for five years consecutively presumed payment of all arrears, and a settlement of their mutual claims under the lease, No. 267. p. 548. March 5. Hunter v. Lord Kinnaird's Trustees.
9. Circumstances not sufficient to warrant a presumption in law that a landlord had agreed to an abatement of rent below that contained in a written contract of lease, No. 344. p. 677. May 28. Gibb v. Winning.
10. Tenants held to have taken their chance as to whether a certain piece of disputed ground belonged to their landlord or not; but the landlord bound to allow them the use of his name to vindicate the property, reserving the question as to the party on whom the expense of doing so should fall, No. 439. p. 819. July 1. Kinloch &c. v. Fraser.
11.—(1.) Competent to support by parole the execution of a verbal warning to remove within burgh, in which execution the term, as contained in a printed form, was delete, and another term inserted.
(2.) A house within burgh let as accessory to certain burgh enstoms, but not used for the purpose of collection, having been subset, as was alleged, with part of the customs—Held competent to remove the subtenants from the house as a separate tenement, and according to the forms of warning in use as to other houses within burgh, No. 293. p. 592. May 12. Scott v. Boyd and Latta.
12. A party who had been ordained to remove from a farm within three weeks, allowed a reasonable period and accommodation to thrash out his grain, and dispose of his cattle, No. 307. p. 617. May 16. Finlayson v. Pedie.

LANDLORD AND TENANT.
See No. 13. p. 20. Nov. 15. Strachan v. Nicoll.
See No. 51. p. 88. Nov. 29. Mowat v. Denham.
See No. 288. p. 573. March 11. Shanks v. Grant.
See *Entail*, 2.—*Heir and Executor*, 2.—*Hypothec, Landlord and Tenant*, VI. 1.—*Jurisdiction*, 9.—*Process*, XV. 7.—*Proof*, *Violent Profits*.

LAW AGENT.
1. Held,
(1.) That a law agent is not responsible for false statements in a bill of suspension communicated to him by his client, and pertinent to the cause.
(2.) That the client is not liable to be punished for contempt or abuse of the forms of Court in respect of these false statements.
(3.) That it is irregular to produce affidavits in support of the statements of a party, No. 115. p. 234. Jan. 14. Johnston (for Leith Bank) v. Scot &c.
2. An agent held personally liable in the amount due to an accountant for a report prepared by him under a remit by the Court, although he had not been agent at the date of the remit, or during the preparation of the report, but only when it was delivered, he having received it from the accountant, No. 423. p. 796. June 25. Scott v. Robertson.
See *Agent and Client—Process*.

LAWBURROWS.
Lawburrows, on the application of a father against his child, should not be granted without some evidence of the cause of fear, No. 420. p. 794 June 25. Taylor v. Taylor.

LEASE.
1. Circumstances in which an intimated assignation a lease in security not followed by possession, held not capable of competing with another assignation of a subsequent date, but on which possession had followed, No. 220. p. 435. Feb. 19. Kennedy v. Forsyth &
2. Held,
(1.) That an assignation by a subtenant of his lease in security of debt, intimated to the principal tenant, but not to the possessors of the subject, and on which no actual or civil possession was taken, was not effectual in competition with the right of a trustee under a questration of the estates of the subtenant.
(2.) That an intimation of the assignation to the sequestration, was unavailing, No. 244. the possessors, posterior Company v. Paul (Morison's Trustee.) 469. Feb. 26. Inglis and
3. Held that the scroll of a lease by a minor in favour of a tenant possessing under a certain lease, but on which scroll no possession had been taken, did not afford a defence to the tenant against payment of the rent due under his former lease, No. 256. p. 502. Mar 3. Pentland v. Scott &c.
4. A creditor holding an assignation in security a lease under an obligation to pay the rents, and being in possession of e subjects, having become consenter to an assignation to a purchaser was compelled to pay certain arrears of rent due prior to his entry, for a period while the creditor was in possession, the latter held not ble to relieve the purchaser of this arrear, No. 291. p. 581. March 11. rter v. Houldsworth.

LEGACY.
1. A father having in consideration of an assi ment to his daughter of certain heritable bonds, received from her an obligation to leave her by his will his herit-

LEGACY.
able estate to his eldest son, under burden, inter alia, of payment on a certain day to the daughter of £500; and having put up her obligation along with the disposition—Held that the legacy was extinguished by the obligation, No. 286. p. 571. March 11. Cairns or Chapman v. Cairns.
2. Trustees being appointed in a trust-deed of settlement, "in the event of their considering it proper," to pay to the testator's niece a legacy of £1000 "at such times and in such payments as they in their discretion may think expedient;" and the niece having survived the testator, but having died before the trustees paid the money, or made any entry in their minutes binding themselves to pay—Held that the legacy had lapsed, and did not pass to the executors of the niece, although, prior to her death, the trustees had entered in their sederunt-book a view of the trust-affairs, where they deducted this legacy from the free proceeds along with debts and absolute legacies, and although, subsequent thereto, they acknowledged that they had resolved and agreed to pay the legacy, but were prevented by her death, No. 378. p. 735. June 10. Burnsides v. Smith &c.
See *Testament*.
LEGAL DILIGENCE. See *Diligence, Legal.*
LEGITIM. See *Heir and Executor*, 1.
LEITH WALK. See *Road*, 1.
LIS ALIBI PENDENS. See *Process, XVII.* 3.
MANDATE. See *Shipowner.*
MANDATORY. See No. 152. p. 316. Jan. 24. Murray v. Little.
MALICE. See *Reparation*, 1.
MANSE.
(1.) Held that the church of St. Leonards is a parish church, and the minister of it entitled to a manse and glebe.
(2.) That a general clause of exemption from taxations in favour of heritors does not embrace an exemption from the burden of manse and glebe, No. 248. p. 479. Feb. 27. Rev. Dr. Nicoll &c. v. Dr. Hunter.
MARRIAGE.
1. Circumstances under which it was held that a man and a woman who had occasionally addressed each other, in presence of third parties, as husband and wife, were not married, No. 296. p. 597. May 14. Adair v. Adair &c.
2. Circumstances not sufficient to infer marriage by habit and repute—Observed that, in the proof of such marriage, the evidence of the friends of the parties in the same rank of life is chiefly to be considered, No. 466. p. 872. July 8. Thomas v. Gordon.
MASTER AND SERVANT.
1. A workman holding himself out as bound with an English company for a term of years, having entered into an agreement in England with a Scotch company to exchange with another workman in their employment, and having entered on his service accordingly, not entitled to plead the rule of Scotch law, that a verbal contract of service is only binding for one year, No. 184. p. 369. Feb. 5. Dale v. Dumbarton Glasswork Company.
2. A grieve or farm-overseer held to be hired for a year, and a year's wages accordingly allowed on his being improperly discharged, No. 369. p. 717. June 6. Finlayson or Muir v. M'Kenzie.
MEDITATIO FUGÆ WARRANT.
It is competent for the drawer of a bill, who has discounted it with, and indorsed it to a third party, to apply for a warrant against the acceptor, as being in meditatione fugæ, No. 79. p. 158. Dec. 10. Thom v. Black.
See *Agent and Client*, 1.
MERCANTILE CONTRACT. See *Jury Court.*

ENGER'S EXECUTION. See *Diligence, Legal*, 3.
STER'S STIPEND.
Act of Parliament having been obtained by the
rose for levying an annuity of five per cent. on the
or the support of a second minister; and they h
evied the full amount, generally giving the minister
imes more and sometimes less than the proceeds o
mount having now, by the extension of the town
um—Held,
(1.) That the Magistrates were not bound to levy
(2.) That they were bound to levy as much as w
llowance to the minister, which allowance was fix
(3.) That if they levied more, they were not ent
lus to the purposes of the burgh, but must pay it t
. 573. March 11. Paterson v. Magistrates of Montro
R.
A minor proximus majorennitati, who was married an
is father, but was an apprentice, having granted a b
n which he was charged by her and his father, havi
ion, on the ground that the bill was truly granted t
longed to him jure mariti, and was null and void, and
had counter claims—Held that, in the circumstances
he state of the process, a reduction was not neces
Nov. 28. Anderson v. Cation &c.
Question raised, but not decided, whether it is a good
mons of multiplepoinding brought in name of a mino
n name of all the curators, No. 216. p. 421. Feb.
. Niven &c.
Apprentice, 1.—*Process*.
Carrier—Cautioner, 5.—*Mutual Contract—Sale*,
TIFICATION.
sum being mortified for the purpose of teaching the
and reading at ordinary times in the kirk, and the int
to be given to the schoolmaster and reader, (who g
and the latter office having been subsequently discon
or sanction of the church—Held, although the same
since the date of the mortification (200 years ago) be
precentor, that the schoolmaster of the parish was entitl
of the mortified fund, notwithstanding his refusal to prec
Nov. 21. Kirk-Session of Monimail v. Esplin.
TIPLEPOINDING. See *Process, VI.*
UAL CONTRACT.
cumstances under which a party was found not liable
alleged undue delay in taking delivery of a cargo of coals,
June 19. Paton v. Warden.
LE OFFICIUM. See *Factor Judicial*, 2.—*Factor loco*
tutis, 2. 3.
ENTRY. See *Superior and Vassal.*
FICATION OF DISHONOUR. See *Bill of Exchange*, 3.
M DEBITUM. See *Bankrupt*, 6. (1.)
ANCE. See *Process, XV.* 9.
[illegible]ENT. See *Proof, V.*
[illegible] *Proof, VI.*

Magistrates of Mon-
ouses within the town
ing for a long period
fixed stipend, some-
the annuity; but the
ncreased to a large

e whole five per cent.
ld yield a reasonable
by the Court.
d to apply the sur-
e minister, No. 289.
e.

lived separate from
l to his stepmother,
brought a suspen-
his father, and be-
hat at all events he
f the case, and in
ary, No. 46. p. 78.

bjection to a sum-
that it is not also
7. Robertson &c.

outh of a parish,
st being directed
rally precented,)
ned by authority
rson had always,
chool master and
d to the interest
t, No. 27. p. 45.

in damages for
No. 400. p. 772.

Tutoris, 3.—

PALACE.
Held (by the Jury Court) incompetent to attach furniture alleged to belong to a subject situated within the palace of Holyrood, No. 463. p. 852. July 8. Earl of Strathmore v. Bruce's Trustees.

PARENT AND CHILD. See *Aliment*, 2.—*Lawburrows—Proof*, *IV.* 1.

PARISH CHURCH. See *Manse.*

PARTIES TO A CAUSE. See *Process*, *VII.*

PARTNERSHIP.
1. One of the two partners of a company not entitled in his own name, or that of the company, to pursue a summary process against the other for removing him from a house vested in the person of the party pursuing, but for behoof of the company, into possession of which he had been put as a partner and manager of the company, No. 4. p. 10. Nov. 13. Rutherford and Finlayson &c. v. Finlayson.
2. Circumstances under which a party who had subscribed proposals for the formation of a joint stock company, and taken shares, and paid part of the sum due by him as stock, was held not liable to pay any further part to the company, No. 206. p. 409. Feb. 13. Ward &c. (Portable Gas Company) v. Matheson.
3. Held, in the absence of evidence to fix the extent of shares of partners, that the presumption of law is for equality, and their rights must be regulated accordingly, No. 333. p. 650. May 26. Campbell's Trustees v. Thomson.
4. Where a company holds out an individual as a partner, the company is responsible to the public as if he were in fact a partner, No. 419. p. 793. June 25. Moyes v. Cooks.

PASSIVE TITLE.
1.—(1.) An action brought against an alleged heir, in which the day of compearance is within the annus deliberandi, cannot be sisted, but is liable to be dismissed.
(2.) Under a summons libelling on a passive title by a charge to enter heir, together with the general averment of style as to passive representation, it is not competent to found on alleged gestio pro hærede.
(3.) An heir's getting up titles does not of itself infer gestio pro hærede, so as to subject him in a passive title, No. 290. p. 580. March 11. Fergusson v. M'Gachen.
2. It is not sufficient to subject a party in a passive title, that in a closed record he has pleaded not only that he did not represent, but that the debt was not justly due, No. 418. p. 792. June 25. Smith (for Stirling Bank) v. Drummond &c.
3.—(1.) Summons against an heir proceeding on a general charge, may be raised and executed within the annus deliberandi.
(2.) The summons and charge may be executed simul ac semel, and the induciæ of both run on at the same time.
(3.) Irrelevant to allege that the days of charge have not elapsed before the day of compearance in the summons, provided the summons be not called in Court till their expiry, No. 469. p. 882. July 9. Mackintosh v. Macqueen &c.
See *Process*, *II.* 1.

PENALTY. See *Sequestration*, 13. (2.)

PERSONAL OBJECTION.
A party held barred by his own acts from objecting to the regularity of a warrant of sequestration, No. 449. p. 831. July 4. Cooper v. Earl of Eglintoun's Trustees.
See *Arrestment*, 5.—*Bankrupt*, 6. (3.)—*Bill of Exchange*, 1. 7. (3.)—*Commonty—Fraud*, 2.—*Homologation—Process*, *XVII.* 6.—*Sequestration.*, 5.

POINDING.

Held incompetent for the creditor of an individual to poind property alleged to belong to him jointly with another party, No. 54. p. 92. Dec. 2. Fleming v. Twaddle.

See *Husband and Wife*, 2.

POINDING OF THE GROUND.

It is not competent for the proprietor of the ground against which a poinding is led, to oppose decree passing in absence against the tenants, No. 134. p. 296. Jan. 20. Buchan v. Scott.

POOR.

1. King's property acquired from a subject, and occupied as a military fort, liable to be assessed for poor's rate at a rent equal to that of unoccupied ground in the vicinity for the time, and neither at the rent which it bore when acquired by the Crown on the one hand, nor an estimated rent, as if it had been feued out for building, on the other, No. 213. p. 416. Feb. 14. Officers of Ordnance v. Heritors and Kirk-Session of North Leith.
2. Held that an able-bodied woman in destitute circumstances, with two young children to support, having a claim against her father-in-law for the maintenance of the children, he being able to support them, was not entitled to be placed on the permanent roll of paupers, but was entitled to temporary aid pending an action at her instance against her father-in-law to have him ordained to maintain the children, No. 254. p. 495. Feb. 28. Watson or Richardson &c. v. Heritors and Kirk-Session of Ancrum.

POOR'S ROLL.

1. On the refusal of a kirk-session to grant the certificates required by the Act of Sederunt 16th June 1819, in order to obtain admission to the poor's roll, the Court remitted to the Sheriff of the county to inquire and report, No. 138. p. 301. Jan. 21. Thomson, petitioner.
2. The Court refused to review the judgment of the lawyers and agents for the poor on the matter of probabilis causa; but the applicant not having been fully heard, they remitted to hear him further, No. 139. p. 302. Jan. 21. Currie, applicant.

POSSESSORY JUDGMENT.

Possession for fifteen years without a title not a sufficient ground for a possessory judgment, No. 83. p. 182. Dec. 10. Neilson v. Vallance.

POSSESSORY RIGHT. See *Property*, 2.

PRECENTOR. See *Mortification*.

PRELIMINARY DEFENCES. See *Process, VIII.*

PRESBYTERY. See *Jurisdiction*, 8.

PRESCRIPTION.—I. LONG.

1. An heir in possession of an entailed estate having, along with his eldest son, been attainted for accession to the rebellion 1745; and the estate having been forfeited and annexed to the Crown under the Vesting and Annexing Acts; and a claim for it, after his death, having been made by his second son, (who was called to the succession under the same substitution with his father,) but not for any heirs under any of the other substitutions; and this claim having been dismissed; and the estate having afterwards been restored to the eldest son, his heirs and assignees, in virtue of an Act of Parliament, which, as well as the charter following thereon, referred to the Vesting and Annexing Acts, and mentioned the lands conveyed in the charter as having been forfeited &c. according to these statutes; and the eldest son having been thereupon infeft, and having executed a new entail differing in some of the substitutions from that existing prior to the forfeiture; and having thereafter died, whereby the substitution in the original entail, under which his father held the estate, failed; and forty years unchallenged possession having followed from the date of infeftment on the charter of restoration, but not from the date of the failure

PRESCRIPTION.—I. LONG.

of the substitution, before a reduction of the new entail was brought by the substitute who would have succeeded under the original entail—Held,

(1.) That the rights of the substitute heirs were lost by no claim having been made for them within six months, in terms of the Vesting Act.

(2.) That the charter of restoration and sasine thereon formed a good title on which to prescribe an absolute right to the estate.

(3.) That prescriptive possession began to run from the sasine on that charter, and not from the failure of the substitution under the original entail, *No. 217.* p. 423. Feb. 17. Glassford v. Mackenzies.

2. *A proprietor* of heritable subjects having granted an ex facie absolute disposition, on which infeftment was taken, qualified by a back bond containing a power of redemption within eleven years; and having assigned this bond to a third party, and disponed the property to him; and the assignee having, within the eleven years, raised an action of redemption, which fell asleep; and the heir of the original disponee having acquired right to the assignation and relative action, which he afterwards wakened; and more than forty years having elapsed from the date of the above deeds—Held that a prescriptive title had not been obtained, so as to exclude the heir of the original proprietor, No. 243. p. 467. Feb. 26. Duncan v. Hume and Watson.

3.—(1.) A party holding a fee-simple assignation of a lease in his own favour, and being also institute under an entailed assignation granted by the same party of the same lease, and having enjoyed possession of the subjects for forty years, and done certain acts referring his possession to the fee-simple assignation—Held that he had acquired a prescriptive fee-simple right, and that the entailed assignation was extinguished.

(2.) The same party having right in fee-simple, as heir of his father, to the lease of another subject, and also as institute under an entailed assignation made by his father; and having possessed for more than forty years—Held that his possession must be imputed to the entailed assignation, and therefore he had not acquired a prescriptive right under the fee-simple title.

(3.) A remote heir-substitute is not entitled to have his minority deducted during that part of the prescriptive period to which he had no immediate right to the estate, No. 260. p. 527. March 4. Maule v. Maule.

PRESCRIPTION.—II. TRIENNIAL.

1. An entry in a state of affairs of a sequestrated estate, made up by an accountant, under the authority of the creditors, bearing that a debt was due by the estate, and an allocation having been made on the creditors accordingly, and there being no entry or allegation of payment—Held sufficient to elide the plea of triennial prescription, although the entry was within three years from the last article in the account, No. 21. p. 35. Nov. 20. Buchanan &c. v. Magistrates of Dunfermline &c.

2. Circumstances held not sufficient to elide the plea of triennial prescription, No. 147. p. 307. Jan 28. Nisbet's Trustees v. Morrison's Trustees.

3.—(1.) A writer's accounts fall under the triennial prescription, both as to constitution and payment.

(2.) Letter from a country agent, authorizing the business to be done, but without evidence of authoriy, general or special, from the client to the country agent, not sufficient to elide prescription, No. 262. p. 542. March 4. Wallace v. M'Kissock.

4.—(1.) That the triennial prescription of an account of furnishings to a vessel was not barred by a marking on it, without date, by the master; nor,

(2.) By the raising and executing within the three years, a summons for payment before an incompetent Court, No. 250. p. 483. Feb. 27. M'Laren v. Buik.

5.— That the triennial prescription is not pleadable against an action for

PRESCRIPTION.—II. TRIENNIAL.
advances in money, No. 398. p. 771. June 1
Trustee.)
6. In a general accounting, the triennial prescriptio
parts of the accounts on one side, No. 436. p. 8
v. Hamilton or Gray.
7.—(1.) A party having brought an action agains
for furnishings made to it on the employment o
also a joint-owner, and who was called pro forı
ance; and the other owners having pleaded
stated that they were ignorant as to the furnis
payment—Held that they were not bound to
ence of the debt, and that resting owing could
oath of the owners.
(2.) Question raised, Whether a reference to
be competent to elide the triennial prescripti
owners, No. 441. p. 821. July 2. Duncan &c. v
See *Agent and Client*, 4.
PRESCRIPTION.—III. SEXENNIAL.
1. Prescription of a bill of exchange not interrupte
tered, No. 89. p. 192. Dec. 12. Scott v. Brown
2. Held, that in a question with a co-acceptor who
commodation of the acceptor, he was entitled to
notwithstanding the lapse of six years, No. 34
M'Neill.
PRESCRIPTION.—IV. SEPTENNIAL.
Held that a British consul who ordered gooc
a merchant there for a British flotilla, was
septennial prescription on the footing of being a
June 19. Smith v. Bell (Mitchell's Trustee.)
PRESUMED PAYMENT. See *Landlord and Tenant*,
PRESUMPTION. See *Landlord and Tenant*, 9.
PRESUMPTION OF DEATH. See *Factor loco Absenti*
PRINCIPAL AND AGENT.
1. Circumstances under which the proprietors of a
the expenses of an action for the value of repai
their father, who was their factor, but who app
No. 106. p. 218. Dec. 20. Dunns v. Livingstone.
2. A merchant to whom goods were consigned by
merchant not entitled to set off against these good
consignees, a debt due to him by the foreign m
Feb. 26. Anderson and Co. v. Collier.
3. Observed, that an agent ordering furnishings for a
self personally liable for the price, No. 443. p. 824.
and Co.
See *Process—Retention.*
PRISONER. See *Process, XVI.* 1.
PRIVILEGED SLANDER.—See *Slander.*
PROCESS.—I. ADVOCATION.
1. A bill of advocation to the Court of Session of
founding on the statutes prohibiting the profaning
for penalties against a party sailing a steam-boat
and for interdict, held incompetent, No. 50. p. 83.
bert.
2.—(1.) An advocation under the 40th section of
view of having a proof taken before the Jury Cour

PROCESS.——I. ADVOCATION.

possessory right, held competent, although the action did not set forth that it was of the value of £40.

(2.) The case remitted to the Jury Court, No. 126. p. 276. Jan. 17. Learmonth v. Morton.

3. A party having applied to a Sheriff for admission as a procurator of Court, and this having been opposed by the procurators of Court, and a proof allowed of their objections—Held,

(1.) That an advocation under the 40th section of the Judicature Act was competent.

(2.) Observed that, under such an advocation, it is not imperative to remit the case to the Jury Court, No. 132. p. 290. Jan. 20. Sands v. Mefan &c.

4. An action of damages in an Inferior Court having been conjoined with an action of relief at the instance of the defender against a third party, and a judgment of absolvitor having been pronounced in the former; and the pursuer, without delaying till a similar judgment had been pronounced in the question of relief, having brought an advocation—Held that the judgment was not final, and that the advocation therefore was incompetent, No. 136. p. 300. Jan. 20. Seymour v. Thomson.

5. A landlord having presented a petition to the Sheriff, praying to have it found that his tenant was bound not to carry off the straw &c. grown on his farm, and to have a poinding creditor interdicted from selling; and the Sheriff having at first granted interim interdict, and thereafter recalled it, remitting the process at the same time to a process of sequestration depending before him at the instance of the landlord against the tenant and a trustee for his creditors—Held that the judgment recalling the interim interdict was, in so far as regarded the creditor, a final judgment, of which it was competent for him to bring an advocation without leave, No. 238. p. 461. Feb. 25. Gammell's Trustees v. Miller.

6. A landlord having raised an action in the Sheriff Court against his tenant for payment of two years rent, greatly exceeding £40; and the tenant having pleaded as a total defence that his farm had been rendered absolutely unproductive by the devastation committed by rabbits encouraged by the landlord; and the Sheriff having allowed a proof of the tenant's allegations—Held competent for him to advocate with a view to a Jury trial, under the 40th section of the Judicature Act, as being a matter of greater value than £40, without leave, or any declaration as to the value of the claim, No. 338. p. 664. May 27. Richmond v. Earl of Kinnoull.

7. *An advocation dismissed as incompetent, in respect of the conclusions of the libel not being exhausted, No. 339. p. 665. May 27. M'Kechnie v. Griffin.*

8. *Not sufficient to warrant an advocation from an interlocutory judgment under the* 50th Geo. III. c. 112. as for defect of jurisdiction, that the citation has been irregular, no objection to it having been taken in the Inferior Court; and premature to allow advocation on proper defect of jurisdiction, while a proof has been allowed by the Inferior Court, with a view to give a judgment on an objection to the jurisdiction, No. 410. p. 781. June 20. Moffat v. Denham.

See No. 137. p. 301. Jan. 20. Mackenzie v. Taylor.

See No. 146. p. 306. Jan. 23. M'Donald v. Murray.

See No. 188. p. 378. Feb. 6. Cowan &c. v. Hamilton &c.

See No. 210. p. 415. Feb. 13. Weston v. Craigie.

See No. 271. p. 553. March 6. M'Intosh v. Shillinglaw.

——— II. EXPENSES.

1. Where the representative of a deceased defender is called as a party to

PROCESS.—II. EXPENSES.
an action, and thereupon renounces and allo
to pass against him, he is entitled to expen
necessary expense to the pursuer, No. 47.
v. Phillips &c.
2. A general finding of expenses in a suspension
does not carry the expenses incurred in the
p. 224. Dec. 20. Graham &c. v. Cuthberston.
3. Held, that although expenses be found due by
a preliminary defence, on notice being given of
an adherence by the Court does not carry the ex
and that they must be moved for and allowed,
Learmonth v. Morton.
4. In Bill-Chamber cases, a simple adherence to
cutor finding expenses due does not carry the ad
p. 558. March 7. Aitchison v. Aitchison.
5. Where a case has been decided on the meri
found expenses due, an adherence by the Inne
tional expenses, No. 279. p. 561. March 7. Har
6. Although expenses are not concluded for, the
a defender, No. 283. p. 566. March 10. Scott
of Hamilton.
7. Several of the parties interested in a deed of s
heritage and moveables, having intimated to t
reduction ex capite lecti, that they were willing
as to the heritage; but he having insisted on rais
in consequence of one of the parties interested b
curring in the renunciation; and having accordi
ties, and refused to pass from his conclusion for
those willing to renounce, or to allow decree
nounced—Held that these parties were entitle
was satisfied, to give in defences confined to the
that they were entitled to the expense of so
May 15. Glen v. Clark &c.
8. The Court will not interfere with the decision
expenses, except on strong grounds for doing so
p. 619. May 16. Bontine v. Graham's Trustees.
9. A party subjected in expenses for delay in pro
p. 619. May 16. Scott and Co. v. Boog.
10. Expenses found due, subject to modification, N
Smith v. Halls.
11. There being considerable doubt how far parties
security could grant a valid discharge, the debt
a declarator of redemption; and the creditors ha
with a view to the question whether they should
penses of their appearance, found liable in expense
p. 695. June 2. Herries &c. v. Morrison or Lamon
12. A party not having insisted, during a long litiga
his reasons of suspension, which, however, only
partial abatement of the sum charged for, and ha
unexpectedly brought it forward, found liable, altl
in all the previous expenses,—all his other plea
and refused the expenses of the debate at which it
ward, No. 403. p. 775. June 19. Adam v. Watson
13. Trustees having refused to show extrajudicially a

PROCESS.—II. EXPENSES.

session to a party having a certain interest therein; and he having, in ignorance of the tenor of it, raised a summons of exhibition ad deliberandum and delivery; but, on their producing the deed in process, (which they only did after certain preliminary defences were repelled,) having declined to insist further in the conclusions, found entitled to his expenses, No. 405. p. 777. June 19. Nicol v. Cameron &c.

14. Expenses refused to a party, in respect an objection to the competency, which was given effect to, was not taken by him, No. 480. p. 899. July 11. Mackenzie &c. v. Campbell.

15. After the Court have awarded the expenses of the discussion of one part of a case, it is incompetent to move for the previous expenses till the final issue of the cause, No. 195. p. 383. Feb. 10. Mackenzie &c. v. Magistrates of Dingwall &c.

16. Observed, that where parties litigate about a small sum, whichever is successful should always be allowed his expenses, subject, however, to modification in case of improper conduct of his cause, No. 232. p. 451. Feb. 21. M'Nair v. Murray.

See No. 8. p. 18. Nov. 14. Stark v. Watt &c.
See No. 19. p. 32. Nov. 18. Wallace &c. v. Horn.
See No. 48. p. 81. Nov. 28. Thomson v. Low.
See No. 70. p. 143. Dec. 5. Grant &c. v. Kennedy &c.
See No. 103. p. 215. Dec. 19. Hamilton v. Durie's Trustees.
See No. 160. p. 327. Jan. 27. Bank of Scotland v. Smith.
See No. 178. p. 361. Feb. 3. Philips's Trustee v. Bell &c.
See No. 181. p. 364. Feb. 4. Strachan v. Nicholl.
See No. 241. p. 466. Feb. 25. Glen v. Glen.
See No. 315. p. 622. May 19. Thomson v. Thomson.
See No. 387. p. 762. June 13. Clyne v. Swanson.
See No. 446. p. 828. July 3. Flowerdew v. Boyack or Foreman.
See *Agent and Client*, 3.—*Appeal, Execution pending*, 1. 2.—*Cautioner*, 3.—*Interdict*, 2.—*Process, V.* 3. *XIII.* 1. *XV.* 1. *XVII.* 14.—*Road*, 3. (2.)—*Sequestration*, 10.—*Submission*, 3.—*Trust*, 6.

PROCESS.—III. INSTANCE.

1. An individual being called as defender in a reduction under the designation of H. J. banker in Leith, allowed to give in a reclaiming note as H. J. manager, and for behoof of the Leith Bank, No. 22. p. 38. Nov. 20. Carruthers &c. v. Johnston.

2.—(1.) An action in the name generally of "the Commissioners of Police" of a burgh, held not to set forth a proper instance, the Act of Parliament under which they acted not authorizing them to sue by this designation.

(2.) The defenders not having taken the objection in due time, held competent to amend the instance by a supplementary summons, No. 300. p. 605. May 14. Tannoch v. Reid &c.

—— IV. JURY COURT.

1. A question relative to an agreement between merchants remitted to the Jury Court, without any findings as to the import and effect of it, No. 259. p. 526. March 8. Schuurmans v. Stephens.

2. A question having been raised whether a Lord Ordinary can competently find that a case must be remitted to the Jury Court in respect of certain rationes, without actually remitting it; and whether it be competent to reclaim against such an interlocutor; a remit made to his Lordship either to report the case, or remit it to the Jury Court, No. 76. p. 150. Dec. 9. Campbell's Trustees v. Thomson.

3. Incompetent to reclaim against a remit to the Jury Court relative to a conclusion for damages, although an interlocutor had been pronounced with

PROCESS.—IV. JURY COURT.
special findings in regard to another conclusion
Ralston v. Farquharson &c.
See *Process, I.* 2. 3.
——— V. INFERIOR COURTS.
1. Held,
(1.) That where separate actions are raised in
number of parties on the same grounds, it is not
and lodge a single defence, but that each class o
fence to the particular action to which they are
(2.) That where a decree in absence has be
parties applying to be reponed must consign the
(3.) That where this has not been done, and t
of suspension, they can only be reponed on payn
Bill-Chamber, and consignation of those in the I
Nov. 18. Cowie &c. v. Merry.
2. An objection having been made to an extracted
that the extract had been issued before the expira
date of the final judgment, held not necessary to
the Clerk of Court a party; but that the fact m
suspension of the decree, No. 253. p. 493. Feb.
(Amory's Trustee.
3. Bill of suspension of a charge for expenses awar
ed, on the allegation that the fees of extract, w
charger, were not sanctioned by the A. S. 16t
certain charges were higher than those allowe
though both the fees and these charges were wa
of the Sheriff Court; and held competent to obj
party charging, without calling the Sheriff Clerk,
Knox v. Craig and Co.
4. A Sheriff Substitute having closed a record on
respect that parties declined to hold them as the
of facts," the Court, under the special circumstan
request of both parties, and after obtaining an e
Depute, did not quash the proceedings, No. 449
v. Earl of Eglintoun's Trustees.
See *Process, II.* 2. *X.* 4. *XVII.* 1.
PROCESS.—VI. MULTIPLEPOINDING.
1.—(1.) An allegation of collusive arrestments in the
multiplepoinding, not sustained as a preliminary obj
of the process.
(2.) The Lord Ordinary having suspended the lett
the right to which remained for discussion in a conj
poinding, the Court recalled his Lordship's inte
Nov. 25. M'Gregor &c. v. Macandrew.
2. A party having suspended a charge given him
and having, on the letters being found orderly pr
to their agent, but immediately thereafter arreste
on the dependence of a reduction and declarator
thereafter raised a summons of multiplepoinding i
—the multiplepoinding dismissed as incompetent,
ters and the agent, No. 73. p. 145. Dec. 6. Misses
v. Stewart.
3. Held that a process of multiplepoinding raised
prescribe by the lapse of the period sufficient to p
No. 236. p. 459. Feb. 25. Boyes's Trustees v. Ha

-VI. MULTIPLEPOINDING.
:y sued by one executor-nominate for his share of the funds of the de-
, (which the defender was alleged to have intromitted with,) having
l that the executor had no title to pursue alone; and the executor
thereupon raised a process of multiplepoinding in name of the de-
calling himself and the other executor—Held,
That the objection to his title to pursue the ordinary action was not
unded.
That the multiplepoinding was competent, No. 292. p. 591. May 12.
get v. Monteith.
s of multiplepoinding held competent as to an heritable bond, to the
of determining whether the amount was heritable or moveable in a
n between the heir and executor of the party to whom it was taken,
1. p. 636. May 21. M'Intyre's Trustees v. Belch or Shaw &c.
ommon debtor in a multiplepoinding reponed against an order for con-
on alleged to have been pronounced in absence of him, No. 331. p. 649.
3. Lawrie v. Grant.
tor, Judicial, 1.—*Heritable Security,* 3.—*Process, VII.* 2.—*Real*
n.
-VII. PARTIES TO A CAUSE.
ourt refused to allow several purchasers in a ranking and sale to give
nt petition for getting up their respective bonds of caution for the
No. 102. p. 215. Dec. 19. Bonthorn &c. petitioners.
on raised, but not decided, whether it is a good objection to a sum-
f multiplepoinding brought in name of a minor, that it was not also in
of all the curators, No. 216. p. 421. Feb. 17. Robertson &c. v. Ni-
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ion having been brought against the treasurer of the proprietors of a
per for payment of an obligation undertaken by him as treasurer, and
rd Ordinary having sisted procedure till the proprietors should be
the defender reclaimed, and contended that the action should be dis-
as incompetent against him, reserving to the pursuer to bring a new
against the proprietors. This the Court refused, but reserved to him all
jections to the conjunction of the supplementary action to be brought
the proprietors with that depending against him, No. 328. p. 646.
2. Paterson v. Thomson.
action against a cautioner for two confirmed executors, one of whom
ed, it is necessary to call the representatives of the executor deceased,
there be no special allegation of intromission on his part, No. 246.
. Feb. 26. Monro &c. v. Lyon.
incompetent, without the consent of a defender, to sist a third party
rsuer along with the original pursuer, or to repeat an action at the in-
of that party against the defender, No. 353. p. 692. June 2. Reming-
rawford, and Co. v. Bruces &c.
rocess of reduction-improbation and declarator of non-entry at the in-
of a superior against singular successors in possession of the lands, not
ary to call the heirs of the last vassal entered, if such vassal have
d a disposition containing procuratory as well as precept, No. 428.
. June 26 Magistrates of Dundee v Kid.
tio Bonorum, 5.—*Entail,* 1.—*Process, V.* 2.—*Road,* 5.—*Trust,* 1.
-VIII. PRELIMINARY DEFENCES.
it is not a good preliminary defence that the estate of the pursuer
ubsequent to the existence of the cause of action, sequestrated, and that
not alleged that he had been retrocessed,—the subject-matter being
oveable nature, No. 140. p. 302. Jan. 22. Russell and Co. v. Stewart.
not to be preliminary defences that a claim was cut off by prescrip-

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tion, and that a widow had no claim for jus rel
free funds, No. 329. p. 648. May 22. Munro v.
3. Allegation that the subject-matter of an actic
submission, not a preliminary defence to the e
No. 393. p. 765. June 16. Hon. A. Macdonald
See No. 14 p. 21. Nov. 15. Caledonian Iron Con
——— IX. PRODUCTION OF WRITS.
1. After a record had been closed, the Court or
probationis, of a document which had all alon
agent of the party wishing to have it produced,
factorily to judge of the cause, No. 15. p. 21. N
See *Process, XI.* 1.—*Records, Public.*
——— X. RECORD.
1. Competent to open up a closed record, so as to p
judgment, No. 87. p. 186. Dec. 12. Lord Melvil
2. An explicit averment having been made, in answ
of a fact falling within the knowledge of the s
him, held to be admitted, No. 106. p. 218. Dec.
3. A record, insufficient in statement to enable the
ordered to be opened up, and a new one prepared
Lothian v. Tod and Husband.
4.—(1.) A circumstance once known to a party, bu
collection, not res noviter.
(2.) A. S. 11th July 1828 cannot apply to judg
came into operation.
(3.) Question remitted as to whether, under A.
statement of fact omitted in the Inferior Court r
ward in reasons of advocation in this Court, No. 1
v. M'Gauchie.
5. A party having raised an action against anothe
of money, and the defender having alleged tha
him in relation to a partnership with the pursu
produced an unstamped letter by the defender
had not been given, as alleged by the defender
after a record was closed, having ordered the l
not being stamped, the Court opened the recor
locutor, and remitted to prepare the case in ref
partnership, and as to the admissibility of the
allegation, No. 141. p. 303. Jan 22. Henderson
6. Although a record has been closed in the Inferior
pronounce judgment on the merits in an advocatic
record in this Court, No. 462. p. 852. July 8. Bair
See *Process, V.* 4. *XIII.* 2. (2.)
——— XI. REDUCTION.
1. In an ordinary action of reduction (not reduction-
defects in the writing of the original deed, the prod
fied by an extract; and the Court will only authoris
original from the records, when required, in the cou
dum probationis, No. 270. p. 552. March 5. Misses
2. Where decrees which have been extracted are c
and the precepts have been delivered up on recei
sufficient to produce the receipt to satisfy the proc
May 27. Elder v. Smith.
See *Minor*, 1.—*Process, XIII.* 1. *XV.* 3.

PROCESS.—XII. REMITS TO ACCOUNTANTS, &c.

1. Court refused to allow a remit to an accountant to examine and report on accounts and vouchers prior to the record being closed, but granted diligence with a view to enable the party to employ a professional man to examine them, preparatory to his making his averments in his condescendence, No. 61. p. 130. Dec. 3. Finlay &c. v. Bannatyne &c.

2. Held that a defence of prescription of a claim should be decided before remitting to an accountant to report on the state of accounts between the parties, No. 65. p. 140. Dec. 4. Rose v. M'Leod.

3. The Court refused to remit, pending the preparation of a cause, to valuators to inspect certain lands, and report on their value, No. 67. p. 141. Dec. 4. Fettes v. Buchanan.

PROCESS.—XIII. REPONING.

1. Circumstances in which decree of certification contra non producta recalled, and diligence granted, without payment of previous expenses, No. 22. p. 38. Nov. 20. Carruthers &c. v. Johnston.

2.—(1.) A party acquiescing in an interlocutor for several years not entitled to have it opened up under 48th Geo. III. c. 151, on an allegation that it had originally become final by mistake.

(2.) A judgment of a Court of Law, finding that under a deed a party had not a right which he supposed he had, is not res noviter, so as to entitle the party to have a final interlocutor opened up, finding him bound to warrant that supposed right, No. 170. p. 349. Jan. 31. Ferrier (Lyell's Trustee) v. Mudie.

3.—(1.) An interlocutor having become final in consequence of a reclaiming note being refused as incompetent, (the summons, owing to accidental causes, not having been appended,) held to be an interlocutor become final by mistake or inadvertency, against which the party was entitled to be reponed under the 48th Geo. III. c. 151.

(2.) A petition for this purpose, without leave of the Lord Ordinary, refused as incompetent, No. 368. p. 716. June 6. Mills v. Hamilton.

See *Cessio Bonorum*, 6.—*Process*, *V.* 1. *VI.* 6.

——— XIV. RES JUDICATA.

1. *Question raised, but not decided*, whether a bill of advocation of a judgment of an *Inferior Judge*, sustaining his jurisdiction in a pending cause, having been refused by a Lord Ordinary, whose judgment is by the Judicature Act declared to be final, forms a res judicata on that point when the whole cause is brought to this Court, after a final judgment by the Inferior Judge, No. 52. p. 88. Nov. 29. Bryson v. Weir.

2. *A multiplepoinding* having been raised in name of trustees, and a sum found to be in the hands of one of them who acted as their agent, and decree of *preference* pronounced against the trustees in favour of certain parties, reserving relief to the trustees inter se; and the one who acted as agent having brought an action at his own instance, concluding to have it found that his co-trustees were bound to relieve him of the decree to a certain extent, and that the parties in whose favour it had been pronounced should also free him of certain sums improperly awarded to them, and for which they were liable to him individually—Held that the decree was not res judicata in favour of these parties, so as to bar the action; and a remit made to ascertain whether any of the parties were personally bound to relieve the one who had acted as agent, No. 336. p. 659. May 27. Mackenzie v. Mackenzie's Trustees &c.

3.—(1.) An extracted decree in a process between the authors of two competing parties proceeding in a circumduction, and failure to produce a title, held res judicata so long as not set aside.

(2.) An unextracted decree (but which was final) in mutual actions between

PROCESS.—XIV. RES JUDICATA.
the authors of the two competing parties, anc
ing of the actions being conjoined and being a
there appeared no interlocutor of conjunctio
cesses must have been at one time asleep, an
wakened,—more than twenty years having e
cree, No. 195. p. 383. Feb. 10. Mrs. Hay
Dingwall.
4. Circumstances in which it was held that the
presented by a purchaser, relative to anoth
judicata, No. 257. p. 503. March 3. Dickso
Medwyn.
5. A bankrupt under sequestration having rais
fenders; and the trustee having declined to
intimated that if the creditors adopted any
ferent shape; and the defenders having bee
rupt had failed to find caution for expense
trustee from afterwards bringing a multiplep
in relation to the same question, No. 346. p.
Trustee) v. Munro &c.
——— XV. SUMMONS.
1. A pursuer having unnecessarily libelled in
onerous, held entitled to proceed with his
but found liable in the expenses occasioned
No. 66. p. 140. Dec. 4. Hamilton v. M'Ghi
2. Held that it is not a sufficient objection
founding on a letter of guarantee for the p
that it was not specifically set forth that th
yarns, No. 140. p. 302. Jan. 22. Russell an
3. Held competent for a pursuer in a supple
state the facts more fully than in the original
not inconsistent with the former,—the co
No. 166. p. 338. Jan. 29. Scott v. Napier
4. The Court sustained a supplementary sum
ting forth the slander founded on in the orig
instances prior thereto, and referred to gen
proof of malice, except as to a statement i
mons, No. 237. p. 460. Feb. 25. M'Doug
5. It being set forth in a summons for recov
it had been indorsed to the pursuers by
their condescendence, having stated that
fender to a bank, and thereafter retired b
dismissed the summons, as not supported
to the pursuers to bring a new action, N
Trustees &c. v. Farquharson.
6. Held that an erasure in the date of a su
No. 266. p. 547. March 5. Taylor v. Malc
7. Held competent for a landlord, on suing
conclude for the rent of a subsequent term
gone, No. 282. p. 566. March 10. Woodw
8. Held competent to transfer an executed s
in Court, No. 332. p. 649. May 26. M'In
9. Held that an action resting on an allegati
a nuisance, and concluding for interdict, w
to relevancy reserved till a condescende
June 24. Alison &c. v. Watt &c.

PROCESS.—XV. SUMMONS.

10. Incompetent to amend a libel by a minute, No. 464. p. 854. July 8. Gifford &c. v. Trail &c.

11. —(1.) An action brought against an alleged heir, in which the day of compearance is within the annus deliberandi, cannot be sisted, but is liable to be dismissed.

(2.) Under a summons libelling on a passive title by a charge to enter heir, together with the general averment of style as to passive representation, it is not competent to found on alleged gestio pro hærede, No. 290. p. 580. March 11. Fergusson v. M'Gachen.

12. —(1.) Summons against an heir proceeding on a general charge may be raised and executed within the annus deliberandi.

(2.) The summons and charge may be executed simul ac semel, and the induciæ of both run on at the same time.

(3.) Irrelevant to allege that the days of charge have not elapsed before the day of compearance in the summons, provided the summons be not called in Court till their expiry, No. 469. p. 882. July 9. Macintosh v Macqueen &c.

13. Question raised, Whether it is competent to amend a libel to the effect of introducing new pursuers, No. 187. p. 374. Feb. 6. Trinity House of Leith v. Magistrates of Edinburgh and Leith Dock Commissioners.

See No. 297. p. 601. May 14. M'Gougan v. Earl of Strathmore.

See No. 298. p. 601. May 14. Mills v. Hamilton.

See *Agent and Client*, 1.—*Process, III.* 2. *XVII.* 17.—*Road* 4.

——— XVI. SUSPENSION.

1. A party imprisoned for debt not entitled to be liberated by suspension, on an allegation that his health was in danger; but reserving to him to apply under the A. S. 14th June 1671, No. 171. p. 351. Jan. 31. Goodsir v. Fleming.

2. The cautioner in a suspension, who has advanced part of the expenses of process, entitled, on decree suspending the letters with expenses having been obtained, to appear and obtain decree in his own name for the amount of expenses advanced by him, No. 69. p. 142. Dec. 5. Henderson v. Young.

3. Bill of suspension of a charge for expenses found due by a pursuer to a defender, who had been assoilzied, passed, the pursuer being also in the course of raising a reduction of the decree of absolvitor, No. 306. p. 617. May 16. Miller v. Miller.

4. Suspension of an interim interdict pronounced by the Judge Admiral held competent, No. 231. p. 449. Feb. 21. Matheson v. M'Douall.

See No. 24. p. 40. Nov. 21. Scot v. Johnston (for Leith Bank.)

See No. 30. p. 52. Nov. 22. Lady Torphichen v. Bell.

See No. 64. p. 139. Dec. 4. Elliott v. Ballantyne.

See No. 68. p. 142. Dec. 5. Spalding v. Skene.

See No. 71. p. 143. Dec. 5. Ferguson &c. v. King &c.

See No. 128. p. 278. Jan. 17. Watmore &c. v. Burns.

See No. 142. p. 305. Jan. 22. Christie &c. v. Goodsir.

See No. 189. p. 379. Feb. 7. Jones v. Gourlay.

See No. 190. p. 379. Feb. 7. Hunter v. Overend &c.

See No. 227. p. 448. Feb. 21. Munro v. Creighton.

See No. 229. p. 448. Feb. 21. Hagart v. Stirton.

See No. 230. p. 448. Feb. 21. Jesslman v. Cheyne &c.

See No. 277. p. 559. March 7. Laings v. Cheyne.

See No. 351. p. 686. May 30. Scot v. Irving.

See *Cautioner*, 4.—*Diligence, Legal*, 5.—*Decree in Foro*, 2.

PROCESS.—XVII. VARIOUS.

1. A trustee on a sequestrated estate having raised an action before an Inferior Court against a party, alleging that, subsequent to the first deliverance, or at least sixty days prior to it, he had received part of the estate in payment of

PROCESS.—XVII. VARIOUS.
a previous debt; and the Inferior Court havi
the Court remitted to order a condescenden
the goods having been got subsequent to the
Nov. 14. Jaffray v. Horne (Hughes and Willi
2. A party having allowed a cause to go t
Ordinary, on a plan produced in process rel
not allowed in the Inner House to ask for
Dec. 10. Neilson v. Vallance.
3. A landlord who was liable in an unascertaine
a tenant about to quit his farm, and to whom,
was due, having presented a petition to the
reporters to estimate the indemnification, and
the amount to be deducted from the year's ren
after raised an action before this Court conclu
he libelled at four years rent, and having als
Sheriff's process—Held that the latter was no
in this Court; and Observed, that the questio
ed by the action in this Court having been l
the Sheriff Court, No. 95. p. 203. Dec. 16.
4. Intimation of a petition for recall of a judicia
the factor had applied for a sequestration of
Act, No. 96. p. 205. Dec. 18. Frazer, petiti
5. That it is irregular to produce affidavits in
No. 115. p. 234. Jan. 14. Johnston (for Leit
6. Circumstances under which a party was
a judicial report, and to the opinions of the c
taken, No. 162. p. 330. Jan. 28. Stewart &c
7. Held not a sufficient objection to the co
boxed on the last reclaiming day, (being a S
delivered to the agent of the opposite part
March 3. Lothian v. Tod.
8. Question raised, but not decided,
(1.) Whether it be competent, under th
charge into a libel.
(2.) Whether, if it be so, the record mus
suspension or an ordinary action, No. 265.
v. Campbell.
9. Held that when cases are ordered by th
reporting to the Court, they must be lodge
fore avizandum can be made with them to
boxed, No. 359. p. 699. June 4. Carruther
10. Question raised, whether it be competent
sent of both parties) to grant a commission,
of witnesses residing abroad, and not alleg
retentis, No. 367. p. 715. June 6. Malcoln
11. A party having neglected to lead a pr
notwithstanding repeated renewals; and
Court, in a suspension, refused to allow l
previous expenses, No. 369. p. 717. June
12. A party having allowed an interlocutor
pay a sum of money on getting a receipt i
wards to insist on an alteration being mad
Hamilton v. Cuthill's Trustees.
13. Competent to grant a prorogation where
the currency of the time for that purpose,
fore the motion is made, No. 397. p. 771.

PROCESS.—XVII. VARIOUS.

14.— A party having brought an action concluding for removal of an encroachment on his property, and for a random sum of damages; and after some procedure, in which there was no discussion as to damages, (in regard to which the defences were silent,) having obtained decree in terms of the libel, and thereupon extracted the decree as for the amount of damages concluded for—Held, in a suspension of a charge of this decree, that there was no warrant for extracting a decerniture for a particular sum of damages, and (altering the Lord Ordinary's interlocutor) that the charger was liable in expenses, No. 404. p. 775. June 19. Swan &c. v. Allan.

15.—(1.) An action of declarator to have a fact declared without any consequent right, is incompetent.

(2.) The Court of Session cannot declare, primâ instantiâ, that parties have right to vote as freeholders, or be elected members of Parliament; nor that all the steps taken by Commissioners of Supply in relation to a valuation are per aversionem inept, nor that a valuation to be made up by the freeholders of one part of a shire, or any other to be produced in process, shall be good as to that part; nor to ordain that the election of members of Parliament shall take place alternately at different places, No. 464. p. 854. July 8. Gifford &c. v. Trail &c.

16. One of several pursuers having withdrawn after defences had been lodged—Found that the defenders were entitled to lodge additional defences arising out of this circumstance, No. 434. p. 813. June 30. Bontine &c. v. Dixon &c.

17. No ground of complaint against the agent for the pursuer in a cause that he has not furnished the opposite agent with a number of copies of the summons requisite for appending to a reclaiming note for the defender, No. 450. p. 834. July 4. Hamilton v. Turnbull.

18.—(1.) A petition under a private Act of Parliament for a warrant on a purchaser at a judicial sale having, with answers, been remitted to the Lord Ordinary to prepare the cause; and having depended before him for more than twelve months without any step being taken—Held that the process did not fall asleep.

(2.) Where authority is granted by a private Act of Parliament to sell an estate for payment of debts, and, on a sufficient sum being realized for payment of the debts, to grant warrant on a purchaser, the Court will not grant it, unless there be clear evidence that there is a sufficient fund to pay all the debts, No. 453. p. 839. July 7. Gillies &c. v. Scott.

19.—(1.) Petition and complaint held an incompetent mode of procedure against a private party alleged to have taken irregular steps in order to obtain an extract given out of Chancery, as of a retour therein existing and recorded, of what was in truth a copy of an entry in an unauthenticated fragment of a book lying in the Register-House, he not having yet made use of it by claiming to be enrolled in a Court of Freeholders.

(2.) Circumstances in which a complaint as to this matter held not relevantly laid against the office-bearers in Chancery, No. 474. p. 890. July 10. Campbell v. Murray.

20. A Lord Ordinary on the Bills having refused a first bill of suspension by an interlocutor containing special findings as to the facts appearing from a proof in the Inferior Court, and a second bill having been thereafter competently presented—Held that the findings of fact in the interlocutor of the Lord Ordinary refusing the first bill were not final and conclusive in the cause, but were brought under review by the second bill, No. 232. p. 451. Feb. 21. M'Nair v. Murray.

21. That a reclaiming note against an interlocutor by a Lord Ordinary in the

PROCESS.—XVII. VARIOUS.
Outer House, pronounced, by direction of t
is competent, No 132. p. 290. Jan 29 San
See No. 75. p. 150. Dec. 9. Magistrates of Ki
See *Cessio Bonorum*, 5. 6. 7.
PRODUCTION OF WRITS. See *Process, IX.*
PROOF.—I. ADMISSION.
In a competition between a poinding credit
sequestration, the admission of the tenant, a
to be taken per se as evidence of the amount
Scott (Cashier of the Paisley Bank) v. Ersk
——— II. PAROLE.
1. A party having agreed, by written missive,
tain size and price, payable on delivery, but
tity—Held incompetent to prove the quar
Dec. 12. Pollock &c. v. M'Andrew.
2. Parole proof of usage allowed to explain
statute as to levying harbour dues, No. 45
Co. v. Campbell.
3. Competent to support by parole the exec
move within burgh, in which execution th
form, was delete, and another term inse
Scott v. Boyd and Latta
See *Master and Servant*, 1.—*Removing*, 1.—
——— III WRITINGS.
Circumstances in which the Court refused,
preparation of a cause, to compel productio
tial between agent and client; and Observe
gland, which protects from disclosure all
agent in his professional capacity, whethe
except only where the agent has been empl
ought to be followed in Scotland, No. 3. p
four.
See *Process, IX. and XI.* 1.
——— IV. WITNESS.
1. It is competent, in an action of debt, to ex
party as witnesses against him, No. 74. p.
2. A party having agreed, by written missive
tain size and price, payable on delivery, bu
tity—Held incompetent to prove the qu
Dec. 12. Pollock &c. v. M'Andrew.
3. That burgesses and proprietors in a
admissible as witnesses in support of the
Magistrates of Earlsferry v. Malcolm &c
——— V. OATH IN SUPPLEMENT.
Circumstances held sufficient to constit
allow the oath in supplement of the mo
p. 434. Feb. 19. Bertram v. Steel.
See *Proof, VI.* 8.
——— VI. REFERENCE TO OATH.
1. Circumstances in which a landlord not
tion to refer to the oath of a party all
lease for a term of years, at a higher re
years from the person in possession of t
missives defective as to the term of ent
Observed, that it was incompetent for c

PROOF.—VI. REFERENCE TO OATH.

oath of the other whether they had been engaged in a contrivance to defraud the revenue, No. 20. p. 32. Nov. 18. Thomson v. Young.

2. A party having referred to the oath of a defender, who deferred back to the pursuer; and the defender having died, and his heir having attempted to extract the reference—Found that he was not entitled to do so, No. 38. p. 63. Nov. 26. Galbraith v. M'Neill.

3. Question raised, but not expressly decided, whether it is competent to make a reference to oath involving a matter of law, No. 193. p. 380. Feb. 10. Lawsons v. Murray.

4. Held that a reference to the oath of a party, as to whether he is liable for a debt, is incompetent,—this being a question of law, No. 281. p. 565. March 10. Taylor and Sons v. Hall &c.

5.—(1.) No relevant objection to a reference to oath that the party is alleged to be in an advanced state of life, and his faculties impaired as to the recollection and apprehension of facts, it not being averred that he is non compos mentis.

(2.) The Court refused to instruct the Commissioner who was to take the oath to report as to the party's state of mind, No. 380. p. 743. June 11. Nicholson v. M'Alister and Trustees.

6.—(1.) Reference to oath of certain facts previously found by the Court not relevant to infer an obligation, refused to be allowed.

(2.) Proper form of reference as to the subsistence of a debt is, whether it be 'resting owing,' not whether it be '*still* resting owing,' No. 409. p. 780. June 20. M'Laren v. Buik.

7. The Court refused to allow an oath on reference to be taken, to lie in retentis, pending a discussion on the competency of the reference, No. 477. p. 893. July 10. Bell v. Syme's Trustees.

8. Reference to the oath of a sequestrated bankrupt by his niece, refused to be allowed in a question with the other creditors, No. 483. p. 902. July 11. Mein (Neilson's Trustee) v. Towers.

9. A reference to oath having been made in an Inferior Court process, after a defence of prescription had been sustained in circumstances to which this defence did not apply, and the oath not proving the debt sued for—Held that the party referring was bound by the reference; and as the oath did not prove resting-owing, the defender assoilzied, No. 145. p. 306. Jan. 23. M'Donalds v. Burden.

See No. 376. p. 733. June 10. Clyne v. Campbell.

——— VII. JUDICIAL EXAMINATION.

The judicial examination of a defender, his wife, and a party who had been his agent, as to the constitution and subsistence of a debt alleged to arise from a loan of money, held irregular, No. 165. p. 337. Jan. 28. M'Master v. Brown.

——— VIII. TO LIE IN RETENTIS. See *Process, XVII.* 8. 10.—*Proof, VI.* 7.

PROPERTY.

1. Question raised, but not decided, whether a proprietor can be barred by implied acquiescence from vindicating property in which he is feudally vested, but on which other parties have erected buildings, on the supposition that it belonged to them, No. 87. p. 186. Dec. 12. Lord Melville v. Douglas's Trustees &c.

2. A party having been long in use to deposit dung in a space at the side of a common close, over which an outside stair to a building formerly existing on his property had projected; and having at a subsequent period surrounded this space, with a parapet wall to keep in the dung—Held, in an application to have this wall removed within seven years of the erection of the wall, that he was entitled to erect it, No. 151. p. 316. Jan. 24. Wilson v. Pattie.

PROPERTY.
3. A party having got into possession of a feu b
title but by the sufferance of the superior, a
many years, and expended money in amelior
(1.) That his having done so afforded no d
perty by the true owner.
(2.) That it was jus tertii to him to found
contract, whereby, it was contended, the fe
No. 168. p. 342. Jan. 29. Sinclair v. Sinclai
4. Circumstances under which certain building
property found to be in emulationem vicin
another part of it, No. 179. p. 361. Feb. 3.
5.—(1.) The proprietor of the lower flat of a
thereto, but the proprietors of upper flats h
(2.) Question raised, but not decided, wh
floor of a house which has been taken do
to have a sunk storey, without the concurr
per flats.
(3.) That question held proper, in the fi
No. 180. p. 362. Feb. 3. Stewart v. Black
6. Two conterminous proprietors having ere
of ground between their respective gables,
by a wall which each claimed as his prope
to the Dean of Guild to have certain bea
were rested on it by his neighbour, and t
a nuisance; and this process having been
the prayer—Held,
(1.) That it was not a good objection t
dering the beams to be removed, had de
so gone ultra vires.
(2.) That the party complaining was en
up, No. 371. p. 726. June 9. Connal v.
See *Coal—Stat. 6th Geo. IV. c.* 68.
PROROGATION. See *Process*, 13.—*Submiss*
PROVISIONS TO CHILDREN. See *Entail*, 4.
PUBLIC BURDENS. See *Manse—Warrandi*
PUBLIC OFFICER.
Question raised, whether the Bill-Chambe
in a suspension, after a sist has been
taken, and the bill passed without any
Brown v. Wemyss and Walker &c.
PUBLIC RECORDS. See *Records, Public.*
PUPIL.
1. Court refused a petition in name of a m
ad litem appointed in an action about t
no action actually in dependence, No.
tioners.
2. Held that a decree against a pupil und
pil entitled to be restored against it i
Dick &c. v. M'Ilwham &c.
See *Factor loco Tutoris.*
RANKING AND SALE.
1. The Court refused to allow several pu
in a joint petition for getting up thei
price, No. 102. p. 215. Dec. 19. Bon
2. Creditors in possession by a trustee in

RANKING AND SALE.
be personally cited to a process of ranking and sale, and their consent to sist themselves will not cure the defect of their not having been so cited, No. 28[illegible]. p. 563. March 7. Mrs. Littlejohn v. Hamilton.
See No. [illegible]25. p. 447. Feb. 20. Smith (Trustee for Stirling Bank) v. Mackintesh.
See *Process, VII.* 1.

REAL BURDEN.
(1.) Lands cannot be declared to be disencumbered of a real burden in a process of multiplepoinding as to the price brought by a purchaser, except on full payment or a discharge.
(2.) A party holding a real lien not barred from insisting that the lands shall not be declared disencumbered, by having claimed in the multiplepoinding for the price, and allowed a judgment, finding the sale valid, to be pronounced, No. 113. p. 224. Jan. 13. Little &c. v. Wightman.

RECLAIMING NOTE.
See No. 322. p. 687. May 21. M'Intyre's Trustees v. Belshes &c.
See *Process, XVII.* 7.

RECORD. See *Process, X.*

RECORDS, PUBLIC.
1. A warrant to transmit an extracted process from the public records refused, in respect it is competent to get certified excerpts of any part of it, No. 31. p. 52. Nov. 25. Munro, petitioner.
2. Held that the warrant of a Lord Ordinary is not a sufficient authority to the Lord Clerk Register to transmit to the Court the grounds and warrants of an extracted decree, No. 186. p. 374. Feb. 6. Simpson &c. petitioners.
See *Process, XI.* 1. *XVII.* 19.

REDUCTION. See *Process, XI.*

REFERENCE TO OATH. See *Proof, VI.*

REGISTRY ACTS. See *Insurance—Shipowner.*

RELIEF.
1. Held that although a cautioner in a bond, who has not paid the debt, has a right to insist for relief from the principal obligants, yet he has no title to insist to that effect against a co-cautioner, No. 57. p. 112. Dec. 2. Alston v. Denniston &c.
2. A widow in whose favour provisions have been made by a deed of settlement of her husband's challenged ex capite lecti, is not entitled to relief against the heir or representatives of her husband, No. 361. p. 704. June 4. Boyack or Foreman v. Foreman's Trustees &c.
See *Lease*, 4.—*Warrandice.*

REMOVING. See *Landlord and Tenant—Jurisdiction*, 9.

REPARATION.
1. In an action of damages for apprehension for examination alleged to have been on a grossly illegal and irregular warrant, against the Judge who granted it, it is not necessary to aver malice and want of probable cause, No. 2. p. 4. Nov. 13. Strachan v. Stoddart.
2. Held,
(1.) That it is not necessary to reduce decrees awarding sequestration of a tenant's effects, in order to enable him to raise an action of damages against his landlord for having obtained and executed them oppressively.
(2.) That such an action ought to be remitted to the Jury Court, without abiding the result of a process of count and reckoning by the landlord against the tenant, No. 200. p. 396. Feb. 11. M'Leod v. M'Leod.
3. One of two neighbouring tenants under the same landlord having cut down part of a thorn hedge between the same farms, but not in a way

REPARATION.
which was alleged to be prejudical, or unne
provement of the hedge; and having offered
at mutual expense, and the other tenant ha
the latter was not entitled to reparation f
quence of the want of a fence, No. 37
v. Purves.
4. Circumstances in which an action for dama
judicial procedure was dismissed as irrelev
loss consequent on execution pending appea
versed, No. 468. p. 876. July 9. Graham v.
See *Agent and Client*, 1. 5. 6. 7.—*Public*
RES JUDICATA. *See Process, XIV.*
RES NOVITER VENIENS. See *Process*, X. 4. a
RETENTION.
A consignee having deposited for custody wit
certain goods consigned to him, but witho
his own property, and the owners of the war
advances to him, but not specially on the fa
to them, and the consignee having become
tors of the warehouse were not entitled to r
till satisfied of their advances to the con
Stuarts and Fletcher v. M'Gregor and Co.
See *Right in Security*, 2.
RIGHT IN SECURITY.
1. A party having granted two promissory n
owner of a ship, who executed a vendition
by discounting the notes with a banker; a
become bankrupt, and settled with his cre
after assigned the vendition to the banke
as in a question with the granter of the no
on their amount, yet, in a question with t
ditors, he was entitled, by virtue of his as
out of the ship, No. 318. p. 628. Ma
v. Finlayson (Weir's Assignee.)
2. A party having obtained an assignation
back bond to be in security merely of
question with other creditors, that he w
debts subsequently contracted, No. 396.
Trustee) v. Earl of Breadalbane.
ROAD.
1. Held,
(1.) That a party having a property in
entitled to form crossings over the foot-
(2.) That he is not compellable to do
of others originally made by the truste
No. 23. p. 39. Nov. 21. Leith Walk T
2.—(1.) A party having purchased some
enable him to pass from a turnpike roa
parish road, without passing through a
be an evasion of that toll, not protected
Act in favour of the proprietors passin
(2.) Judgment of Sheriff, on the co
cluded, final and conclusive, without r
p. 90. Nov. 29. Merry v. Dallas &c.
3.—(1.) Trustees having shut up part of

RIGHT IN SECURITY.

bringing persons travelling along it into their turnpike road, in order to make them pay toll, a suspension and interdict at their instance against parties removing the obstructions put up by them refused; but,

(2.) These parties not allowed their expenses, in respect of having removed the obstructions brevi manu, instead of applying for redress by law, No. 58. p. 115. Dec. 2. Trustees of Glasgow and Carlisle Road v. White &c.

4.—(1.) Under a verdict finding a public foot-path in virtue of immemorial usage, held competent to decern in terms of a summons libelling a right acquired by the inhabitants of certain towns and places in the neighbourhood.

(2.) A foot-path having been unduly shut up, the Court refused to delay ordering the obstructions to be removed until the precise line of the path should be marked out, No. 131. p. 287. Jan. 17. Rodgers &c. v. Harvie.

5. A party having taken a toll-bar advertised to be let by the general road trustees of a county, but of which the lease was granted by those of the district in which the toll-bar was placed; and the tolls having been evicted by the erection of check-bars let to a tacksman in another district—Held competent to insist in an action against the general trustees and the district trustees, by whom the lease was granted, for reparation of the loss suffered by the eviction, No. 323. p. 637. May 22. Fairlie v. Sir A. M. Gibson &c.

6. A public road having been used for upwards of forty years for the purpose of conveying burdens &c. on horseback according to the usage of the district, and for carts and carriages since their introduction, which was not, however, forty years—Held that it was subject to be used as a cart and carriage road, No. 223. p. 441. Feb. 20. Forbes v. Forbes &c.

See *Implied Liability—Trustee*, 2.

RUNRIG.

Held that a field exceeding four acres is not liable to division under Stat. 1695, c. 23, although intersected by a road, and the parts on each side of the road do not extend to four acres each, No. 211. p. 415. Feb. 14. Burns v. Bogle.

SABBATH, PROFANATION OF. See *Jurisdiction*, 2.

SALE.

1. The landlord of a distillery, who was also proprietor of the distillery utensils, having granted a missive assigning and disponing the utensils to the tenant, and stipulating for eight per cent. on the purchase-money while he had possessed them; and further bearing, "It is hereby declared and understood that you are to be obliged to take the said utensils, betwixt and the term of Martinmas 1824, at the amount of what I paid for the same, at which period the payment of eight per cent. will cease upon said amount;" held to be a conditional sale, dependent on the tenant paying the price at Martinmas 1824; and he having been sequestrated, subsequent to that time, without payment of the price, held, in a question with his creditors, that the utensils were still the property of the landlord, No. 81. p. 175. Dec. 10. Wight v. Forman.

2. A party having bought lands with reference to a rental, among the deductions from which was erroneously stated a sum of converted multures payable by the tenants in addition to the rental exhibited; and having stipulated that he was to have relief at the rate of twenty years purchase for any excess, beyond a certain amount, of public burdens forming a deduction from the rental—Held that, in estimating these burdens, the sum of converted multures payable by the tenants in addition to their rents was not to be taken into account, No. 157. p. 323. Jan. 27. Gordon v. Douglas's Trustees.

3. A party having sold grain to another by sample; and the buyer having ordered the grain to be delivered at a particular place, which was done; and having then objected to the grain, as not conform to sample; but having afterwards intimated that he would keep the wheat, and claim de-

SALE.
duction from the price—Held that he wa
p. 372. Feb. 6. Watt v. Glen.
4. A party having purchased a piece of grou
stipulation that the seller was to give
Whitsunday thereafter; but a dispute h
purchaser was not entitled to get free of t
subject of a submission, wherein decree (i
pronounced till April 1826—Held that th
repudiate the bargain, though a title was
after, No. 379. p. 788. June 10. Ross (C
Districts Market Company.
See *Servitude*, 1.
SALE, JUDICIAL. See *Judicial Sale.*
SALMON-FISHING.
Circumstances in which stake-nets were in
the mouth of a river, No. 130. p. 284. J
Trustees.
See *Title to Pursue*, 3.
SASINE.
1. Held,
(1.) That a sasine for £5000, and thr
curity of advances by a banker on a cas
cumulo sum, is a sufficient compliance wi
(2.) That the omission of the christi
is not a nullity, and that parole evidence
(3.) That it is no objection to a sa
witnesses is written on an erasure in the
duly signed by him, and there being no a
No. 80. p. 172. Dec. 10. Morton (Brown
2. A sasine written on nine pages, but state
held valid, No. 257. p. 504. March 3. D
Medwyn.
See *Bankrupt*, 6.—*Heritable Security*, 4.
SCHOOLMASTER. See *Mortification.*
SCHOOLMASTERS' WIDOWS' FUND. See *Ali*
SEMIPLENA PROBATIO. See *Proof*, V.
SEPTENNIAL PRESCRIPTION. See *Prescrip*
SEQUESTRATION UNDER BANKRUPT STATU
1. When a party had entered an appeal ag
and the election of an interim factor un
superseded consideration of a petition
the factor to apply during vacation to
No. 478. p. 893. July 11. Ker &c. (for
2. Payment of a dividend under a sequest
months from the date of the sequestrat
two creditors claiming after the lapse o
seen whether certain additional funds w
a dividend equal to that of the other
Porteous &c. v. Wilson (Aitken's Trust
3. Held,
(2.) That a charge on letters of h
loosed within the proper time, against

SEQUESTRATION UNDER BANKRUPT STATUTE.
a creditor is entitled to oppose sequestration being awarded, although no opposition is made by the debtor, No. 37. p. 60. Nov. 26. Cheyne and Mackersy v. Walker.

4. Sequestration awarded under the Bankrupt Act, of the estates of a writer, broker, and commission-agent, No. 105. p. 217. Dec. 20. Fraser, petitioner.

5. Held that the trustee of a sequestrated bankrupt, applying for sequestration of a third party, was barred from founding on diligence done against that party upon a bill, of which the bankrupt was bound to have relieved him, No. 109. p. 221. Dec. 20. Cormack v. Lawrie.

6.—(1.) Question raised, but not decided, whether a stipulation made openly by one creditor in a sequestration for an advantage over the others, as the price of his acceding to the composition, and agreed to by the creditors, is pactum illicitum.

(2.) Such a stipulation will not be presumed, if in ambiguous terms.

(3.) A discharge by an arresting creditor to an arrestee, on obtaining a decree for less than the actual debt, does not subject him in any responsibility to the common debtor, as the arrestee is only discharged qua such, No. 161. p. 327. Jan. 27. Levick &c. v. Cadell, Sons, and Co.

7. Held not sufficient to prevent a sequestration being awarded under the Bankrupt Act, that the debtor had appealed against a judgment of the Court sustaining the diligence on which he had been rendered bankrupt, No. 221. p. 438. Feb. 20. Ker and Johnston (for Leith Bank) v. Scot.

8. Circumstances sufficient to make a party liable to be sequestrated as a builder, No. 233. p. 452. Feb. 21. Cook v. Cuthill's Trustees.

9. A creditor who claimed in a sequestration on a joint acceptance by the bankrupt and another, having emitted an affidavit in an unsubscribed marginal note, stating that the bankrupt was the primary obligant—Held that the marginal note could not be regarded; and as it did not appear from the acceptance or the affidavit which of the parties was the primary obligant, and as no value was put on the other obligant, the vote of the creditor was objectionable, No. 275. p. 556. March 7. Mackersy v. Guthrie.

10.—(1.) A creditor on a sequestrated estate by several bills, having claimed a preference as to one of them, which was disputed by the trustee; and having succeeded in a litigation in obtaining a decree establishing his preference with expenses—Held that no part of the expenses on either side could be allocated on him as one of the body of creditors, in respect of his other claims.

(2.) Although a trustee who had litigated with a creditor averred he had no trust-funds, the Court refused to find him liable in expenses of process personally, but only qua trustee, No. 278. p. 559. March 7. Schuurmans v. Goldie (Tweedie's Trustee.)

11. Held (in passing a bill of suspension) that the Sheriff has power, under the Bankrupt Act, to imprison the bankrupt for giving unsatisfactory answers while under examination; but liberation granted under the circumstances, No. 303. p. 612. May 15. Paterson v. Samuel (Pattison's Trustee.)

12. A bankrupt having made up titles erroneously to lands to which he had right, subject to a trust, and on which he had borrowed money; and the trustee on his sequestrated estate having proceeded to make up titles in correct form, and applied for a special adjudication; the Court adjudged all right the bankrupt might have, without prejudice of that of other parties, No. 312. p. 621. May 19. Paul (Boyd's Trustee) v. Boyd &c.

13. Creditors of a sequestrated bankrupt, holding an heritable bond, having claimed on the general estate, and drawn a dividend, without deducting

SEQUESTRATION UNDER BANKRUPT STATUTE.
the value of the security, the lands over wh
with other securities sufficient to exhaust
time were considered preferable; and havi
holder of one of these securities, succeede
but without obtaining the expenses of the l
(1.) That in valuing the security, with r
sum which had been ranked for, and to a
portion of the dividends drawn by the cred
petition fell to be deducted from the amo
bond.
(2.) That, under the penalty, the credit
rank on the price of the lands for these exp
Mein v. M'Nair &c.
14. Special circumstances under which the (
sequestrated estate, a person residing at a
place where the bankrupts had carried on
Kerr, petitioner.
See No. 350. p. 686. May 30. Grant v. Gibs
See *Bankrupt—Cautioner*, 2.—*Heritable Jurisdiction*, 13.—*Lease*, 2.—*Process*, *Hypothec Writer's*, 2.

SEQUESTRATION OF LAND ESTATE.
1. An heir who had been in possession of an
40 years, having acquired right to an adj
obtained by him through the intervention
succession,) and made up titles under it;
be ostensibly under the entail; having e
mained latent till his death; and a comp
next substitute under the original entai
new entail, and no actual possession hav
the Court, on the application of the
No. 198. p. 392. Feb. 11. Cathcart v. C
2. Adjudging creditors of an estate conve
inter alia, of paying debts, having broug
and obtained decree of mails and duties,
trated, No. 208. p. 412. Feb. 13. Bank
tees.

SERVICE.
1. A proprietor having executed an ente
eldest son—whom failing, a series of sul
and power to alter, sell, and burden th
predeceased him, and no infeftment tak
having been exercised—Held that a serv
entailer, was inept, No. 94. p. 200. De
2. In an advocation by a younger brot
elder brother as heir of conquest of his
son had survived him for some time, t
the Court refused to decide the questi
been acquired by the brother deceas
found, that as there was no competitic
quest, the younger brother was not enti
p. 558. March 7. Aitchison v. Aitchis

SERVITUDE.
1. A negative servitude expressed in a n

quent titles, held to have been departed from, No. 99. p. 210. Dec. 19. Sivright v. Wilson &c.

2. Two parties having personal rights to adjoining tenements, flowing by singular titles from the same author, and the prior right conveying a servitude over the property carried by the posterior right—The servitude held to be effectual, without possession, against the party having the posterior right, No. 125. p. 274. Jan. 16. Gunn or Greig &c. v. Brown &c.

3.—(1.) A property in a town being burdened with the servitude of receiving and carrying off in a sewer the ordinary waste water from a neighbouring tenement—Held that the proprietor of the dominant tenement was not entitled, in erecting a distillery on his premises, to discharge on the servient a large quantity of additional water introduced artificially for the supply of his distillery.

(2.) The proprietor of the dominant tenement having, at his own hand, turned this additional water in a new direction, whereby it flooded an adjoining house and injured it, held not entitled to recover from the owner of the servient tenement the consequential damages thus arising, nor the expenses incurred in disputing it.

(3.) The proprietor having passed from all other claims of damages in the Inferior Court, not entitled to revert to them in the Court of Session in an advocation by the other party, No. 169. p. 344. Jan. 29. Scouller and Brownlee v. Robertson.

4. A public road having been used for upwards of forty years for the purpose of conveying burdens &c. on horseback according to the usage of the district, and for carts and carriages since their introduction, which was not, however, forty years—Held that it was subject to be used as a cart and carriage road, No. 223. p. 441. Feb. 20. Forbes v. Forbes &c.

5. The proprietor of a moss having granted a feu of certain lands belonging to him, with the privilege to the vassal of casting peats in the moss "for fuel to himself, and for sale"—Held that while the vassal exercised the full privilege himself, he could not communicate the right of casting peats, either for fuel or sale, to tenants or subfeuars of the lands to which the privilege attached, No. 301. p. 607. May 14. Carstairs v. Brown &c.

6. The proprietors of a piece of ground having granted permission to a neighbouring proprietor to make a drain through their ground, without any specification as to depth, for the purpose of draining his property, but with a prohibition against allowing the water from conterminous land to be carried off by it; and a drain having accordingly been made, and continued in the same state for about fifty years—Held that the proprietor of the dominant tenement was not entitled to have the drain deepened, on the allegation that it did not effectually drain his property, No. 342. p. 672. May 28. Magistrates of Dunbar v. Sawers.

7. A proof allowed, before answer, as to a claim of servitude of light, No. 374. p. 732. June 10. Johnstone and Buchanan v. Aitken.

8. The proprietor of a house having access to it through a court belonging to another party, held entitled to load and unload carts in the court, No. 394. p. 766. June 17. Baird v. Ross.

9. A servitude enjoyed by feuars in a town of taking stones from a quarry for their own purposes, does not warrant Parliamentary Commissioners of the harbour of the town to take stones for building and improving the harbour, No. 205. p. 405. Feb. 12. Sir A. Keith v. Stonehaven Harbour Commissioners.

See *Burgh Royal*, 2.—*Property*, 2.—*Title to Pursue or Defend*, 9.

SETTLED ACCOUNT.
1. Circumstances under which accounts bet
held to be settled, and not liable to be ope
the client to enter into a count and reck
Elder v. Smith.
2. Circumstances under which an account re
and for which the client granted and paid
and not liable to be opened up, No. 4
v. Mackenzie.
SEXENNIAL PRESCRIPTION. See *Prescriptio*
SHERIFF-CLERK FEES. See *Process, V.* 3.
SHERIFF COURT. See *Process, V.—Jurisd*
SHIPOWNER.
1. Circumstances under which the owners
the account of a law agent, although th
not on the register, No. 207. p. 412. Fe
2. Held,
(1.) That a party holding an ex facie
being the sole owner appearing on the reg
to reconvey on receiving payment of a lo
to the vessel.
(2.) That he was not liable for insuran
ner, but by inserting the vessel in the
insurance, whereby the owners of the ves
shares of loss, No. 350. p. 483. Feb. 27.
3. Held, in a question as to a title to purs
value of a vessel lost at sea on an impli
registry was not, per se, conclusive evi
sel, No. 33. p. 56. Nov. 25. Scott and
See *Insurance, 2.—Prescription, II.* 6.
SLANDER.
Circumstances affording a relevant defe
for slander, No. 235. p. 458. Feb. 24.
See *Process, XV.* 4.
SLANDER, PRIVILEGED.
1.—(1.) A Justice of the Peace is not pro
for slander, false and malicious, delivere
trial before him.
(2.) The falsehood of a libel to be ass
falsehood, if no proof in justification be
(3.) Observed, that the case of Ha
establish such a distinction between S
the former enjoy an absolute protection
p. 601. May 14. Robertson v. Allardy
SOCIETY. See *Title to Pursue or Defe*
STAMP. See *Process, X.* 5.—*Submissio*
STATUTE.
A statute empowering harbour commis
mons or wastes, or within high wate
without consideration therefor, does
already existing, and beneficially wo
stones from it without paying for the
Keith v. Stonehaven Harbour Commi
See *Minister's Sti[illegible] Proof IX.* 8
STAT. 1695, c. 23.

STAT. 1695, c. 24. See *Passive Title.*
STAT. 1696, c. 5.
The Court passed, without caution or consignation, a bill of suspension of a charge for part of the amount contained in a bond, the whole of which was admitted not to have been advanced, No. 247. p. 479. Feb. 26. Hamilton v. Paul.
See *Bankrupt.*
STAT. 17TH GEO. III. c. 56. See *Jurisdiction*, 10.
STAT. 48TH GEO. III. c. 151 See *Process, II.*
STAT. 6TH GEO. IV. c. 68.
Question raised, and a remit made to a Jury under the above statute, to ascertain whether a party who held a lease of premises which had been destroyed by fire, had such an interest as to entitle him to the value of the lease from commissioners authorized to appropriate the ground for public purposes, No. 127. p. 278. Jan. 17. Budge v. Trustees of Scottish Courts of Justice.
STAT. 7TH GEO. IV. c. 67. See *Title to Pursue or Defend*, 1. 2.
STIPEND. See *Minister.*
SUBMISSION.
1. Under a reference forming part of an agreement, and not being a regular submission, held competent to require from an overman an explanation of his award, No. 49. p. 82. Nov. 28. Kid v. Walker.
2. A submission having been prorogated, on the 5th of February 1823, 'to the day of next,' and the next prorogation not having been executed till the 6th of February 1824, the Court refused to sustain a reduction of the decreet-arbitral subsequently pronounced, which was brought on the ground that the prorogation ought to have been executed within a year, instead of a year and day, No. 295. p. 595. May 13. Earl of Dunmore v. M'Inturner.
3.—(1.) The circumstance of prorogations by parties to a submission containing no power to prorogate, not being on a separate stamp, but merely indorsed on the submission, is not a valid ground of reduction of the decreet-arbitral following thereon.
(2.) No ground of reduction that an award as to expenses is for a proportion of the expenses generally, without the amount being ascertained.
(3.) Special case as to whether a party had been sufficiently heard, No. 305. p. 616. May 15. Paterson v. Sanderson &c.
4. Held competent to proceed by summary diligence for execution of a decree-arbitral, where there had been no consent in the submission that the decree should be recorded, but where the parties afterwards subscribed a minute, consenting that it should be registered for execution in common form. Question raised, whether an arbiter is entitled to stipulate for remuneration, No. 311. p. 619. May 19. Baillie &c. v. Pollock.
5. Observed, that where a decree-arbitral has been issued for a certain sum, under deduction of counter claims, interest on these ought also to be deducted, No. 481. p. 900. July 11. Maxwell v. Cumming.
See *Arbiter—Property*, 6.
SUMMARY COMPLAINT. See *Law Agent*, 1.—*Process, XVII.* 19.
SUMMARY DILIGENCE. See *Husband and Wife*, 4.—*Submission*, 4.
SUMMONS. See *Process, XV.*
SUPERIOR AND VASSAL.
1. A piece of ground being feued to partners of a company for the purpose of carrying on an iron manufactory, under a prohibition to sell, and a stipulation for payment to the superior of a duplicand of the feu-duty every

.IOR AND VASSAL.
5 years, "in lieu and place of the composition for entry of heirs, or the ntry of singular successors, in the share or shares of any of the said parties ı the said feu, while it remains with the company as such," and for pay- ıent of £500 in case any of the parties or their heirs should, notwith- tanding the prohibition, sell the ground feued; and the original company aving sold the feu to another company, who continued to carry on the ame manufacture—Held that this was to be considered a sale not pro- ected by the stipulation for a duplicand of the feu-duty merely every :5 years; that the lands were in non-entry, and that the purchasers were ıly entitled to an entry on payment of £500, No. 327. p. 642. May 22. Earl of Mansfield v. Gray &c.
Held,
(1.) That parties holding lands by the tenure of booking from the Magistrates of Paisley are entitled to entries by that form in terms of heir investitures, and on payment of the casualties paid from time imme- morial.
(2.) That the Magistrates cannot convert the title by booking into one by charter and sasine, without consent of the vassals.
(3.) That in regard to lands held from the Magistrates on charter and sasine, they are entitled, on the vassals demanding an entry, to exact such casualties as may be fixed by them, provided they do not exceed the usual feudal casualties, No. 370. p. 718. June 9. Chalmers &c. v. Magistrates of Paisley.
In a process of reduction-improbation and declarator of non-entry at the instance of a superior against singular successors in possession of the lands, not necessary to call the heirs of the last vassal entered, if such vassal have granted a disposition containing procuratory as well as precept, No. 428. p. 801. June 26. Magistrates of Dundee v. Kid &c.
'LEMENTARY SUMMONS. See *Process, XV.* 3.
ENSION.
competent for a defender to suspend a decree in foro on an allegation that expenses decerned for to the pursuer had been incurred to a person not authorized to act as an agent, No. 308. p. 618. May 16. Ewing v. Wight. e *Process, XVI.*
ATION OF ACCOUNT. See *Account.*
'DS. See No. 313. p. 622. May 19. Commissary of Dunkeld v. Duke of Atholl.
'AMENT.
A testator having, in his trust-deed of settlement, appointed to his trustees to pay ne half of the free proceeds of his moveable estate to his wife; and having in a odicil, as an additional provision, directed to be paid to her, during her life, the interest of all such free money as he might leave behind him at his death, declaring that she should have no right to the principal in virtue of this bequest—Held,
(1.) That the codicil did not revoke the gift in the settlement of one half of the moveable estate, but that the widow was entitled to the fee of one half, and to interest of the other half.
(2.) That under the term 'free money' were to be included all the testator's moveable funds, and not merely cash in bank, subject to the deduction of debts, but not of legacies, No. 377. p. 734. June 10. Smith &c. v. Donaldson.
A party having executed an entail, and a relative trust-deed for payment of his debts, declaring that his heirs and executors should be liable to relieve the heir of entail of debts; and having, in a supplementary trust, excepted his funds and estate in England from the operation of the trust, and declared an intention that the debts should be paid out of the rents of the entailed estate and funds falling under the trust; and having thereafter, by an English will, among certain special legacies, left to an individual "all my books, and whatever other property and effects I may die possessed of in England"—Held that this individual was entitled

TESTAMENT.
to take the effects falling under this bequest, without relieving the heir of entail, No. 459. p. 845. July 7. Eliott v. Earl of Minto.
See *Legacy*.
THIRLAGE.
Question raised, but not decided, whether an action for abstracted multures, when there is no dispute as to the right to levy them, be competent before the Judge of the defender's domicile, he not being the Judge Ordinary of the bounds within which the thirl lies, No. 52. p. 88. Nov. 29. Bryson v. Weir.
TITLE TO APPEAR.
Held that a party who alleged that he had right to a document of debt, on which another had raised an action against the debtor, was not entitled to appear and prevent decree passing against the debtor; but his rights reserved entire, No. 222. p. 440. Feb. 20. Stewarts v. Stewart.
See *Process, VII.*
TITLE TO EXCLUDE. See *Prescription, I.* 1.
TITLE TO PURSUE OR DEFEND.
1. The cashier of a Bank which had ceased to carry on business, except to the effect of winding up, entitled, under the 7th Geo. IV. c. 67, to raise and prosecute diligence, No. 37. p. 60. Nov. 26. Cheyne and Mackersy v. Walker.
2.—(1.) Action sustained at the instance of a cashier for behoof of an incorporated bank.
(2.) Question raised, but not decided, whether an entry at the Stamp-office by a bank, under the 7th Geo. IV. c. 67, made after the period therein mentioned, entitled them to the benefit of it, No. 56. p. 110. Dec. 2. Cheyne and Mackersy (for Fife Bank) v. Little &c.
3. Held,
(1.) That a proprietor and tacksman of salmon-fishings in a frith or river is not entitled to object to an heritor fishing in a lawful way opposite to his lands, although he has no right of salmon-fishing,—the former not alleging that he had any such right.
(2.) (By the Lord Ordinary, and acquiesced in,) That the proprietor and tacksman has a title to object to such a party fishing in an unlawful manner, No. 135. p. 297. Jan. 20. Mackenzie v. Gilchrist.
4.—(1.) Held that the Trinity-House of Leith, and other private and trading bodies at that port, by whom the Parliamentary Commissioners for superintending the improvements of the harbour under statutes are partly elected, have no title to insist in an action against these Commissioners, or the Magistrates of Edinburgh as proprietors of the harbour, and as having contracted with the Commissioners of the Navy, to compel them to proceed with the execution of improvements, or to pay damages; and,
(2.) Question raised, Whether it is competent to amend a libel to the effect of introducing new pursuers, No. 187. p. 374. Feb. 6. Trinity-House of Leith &c. v. Magistrates of Edinburgh and Leith Dock Commissioners.
5. A party sued by one executor-nominate for his share of the funds of the deceased, (which the defender was alleged to have intromitted with,) having pleaded that the executor had no title to pursue alone; and the executor having thereupon raised a process of multiplepoinding in name of the defender, calling himself and the other executor—Held,
(1.) That the objection to his title to pursue the ordinary action was not well founded.
(2.) That the multiplepoinding was competent, No. 292. p. 591. May 12. M'Target v. Monteith.
6. An action in the name generally of "the Commissioners of Police" of a burgh held not to set forth a proper instance, the Act of Parliament under which they acted not authorizing them to sue by this designation, No. 300. p. 605. May 14. Tannoch v. Reid &c.
7. Held competent for an heir-substitute of entail to insist in a declarator to ascertain the power of the heir of entail in possession; but the question superseded as to whether he could insist on its being found, that on the supposition the heir did certain acts, his right to the estate would be forfeited, No. 326. p. 641. May 22. *Hon.* A. O. Murray &c. v. Lord Elibank.
8. A party not having the title set forth by him, process at his instance dismissed,

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without deciding whether the title actually possesse
p. 675. May 28. Pollock v. Mather &c.
9. Question raised, but not decided, whether the cha
a burgh of barony was a sufficient title to pursu
right to carry off sand and gravel from the bed of
from, No. 345. p. 679. May 28. Sharp &c. v. Duk
10. An individual being called as defender in a re
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11. A party having raised a reduction of a decree se
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12. A mason lodge having sold a lease held by the
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ation, or of want of title in the treasurer to
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See *Entail*, 1.—*Fraud*, 2.—*Heir and Executor*, 1.—
(2.) *VI.* 4. *VIII.* 1. *XVI.* 2.—*Relief*, 1.—*Seques*
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2. A trust having fallen by the death of a trust
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been entitled to have retained the trust-estate
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3. A party having conveyed his estates, mortis c
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6. A party having, by a deed of factory, autho
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2. Statute Labour Trustees having bound themselves to repay an advance as soon after the lapse of five years as the funds would admit of it—Held that they were bound to pay the claim, although without trust-funds, if they might have been in funds, had they not incurred expenses which they were not obliged to do, and paid debts not preferable to this claim, No. 197. p. 390. Feb. 10. Aitken &c. v. Reid (for Glasgow Statute Labour Trustees.)
3. Circumstances under which trustees were found to be bound by a sale, of part of the trust-estate, made by their factor under general powers, No. 447. p. 828. July 4. Thomas v. Walker's Trustees.
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(2.) Charge to a Jury having been given with reference to usage proved on the trial, not liable to exception on the ground of its not being well founded as a point of abstract law, No. 28. p. 47. Nov. 21. Stein's Assignees v. Shirreff.

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A landlord who had granted a lease, reserving power to feu in whole or in part, having feued about half the farm, and required the tenant to cede possession to the feuar; and the tenant having refused, and the Sheriff and the Lord Ordinary having ordained him to remove, but found no expenses due; and the Court having altered and assoilzied, and thereafter unanimously adhered; and the House of Lords having reversed that judgment, and affirmed that of the Sheriff and Lord Ordinary; and in the mean while the lease having expired, whereby the tenant

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had remained in possession during the whole
was obliged to pay the feuar interest on the
exceeded the yearly rent—Held that the tena
fides, and was therefore not liable for the di
rent as violent profits, No. 40. p. 65. Nov. 26
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1. A party having compelled the cautioner of a
by a bill, on which there were indorsers, in r
execute diligence raised upon it; and having
cautioner, with an obligation of warrandice f
and it having been afterwards discovered tha
gence irregular—Held that the cautioner
p. 401. Feb. 12. Sinclair v. Wilson and Macl
2. The Governors of Heriot's Hospital having
of St. Cuthberts, and beyond the royalty o
relieve the feuars "a solutione omnium stip
riorum ludi magistris, et omnium censuum al
aut imponendorum dict. acris;" and the lanc
been brought, by a subsequent statute, withi
parish of St. Cuthberts, and annexed to tha
of stipends and parochial burdens; and hous
which the inhabitants became liable to the M
of annuity to the Ministers of Edinburgh, p
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348. p. 682. May 29. Sprot &c. v. Governor
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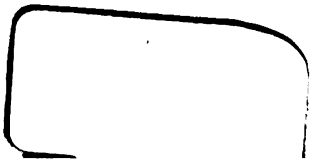
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